

Crim.
280¹

Woolrych

THE
CRIMINAL LAW,

AS AMENDED BY

THE STATUTES OF 1861,

WITH

PLEADING, EVIDENCE, FORMS OF INDICTMENT, CASES,
AND INDEX.

BY

HUMPHRY WILLIAM WOOLRYCH,
SERJEANT-AT-LAW.

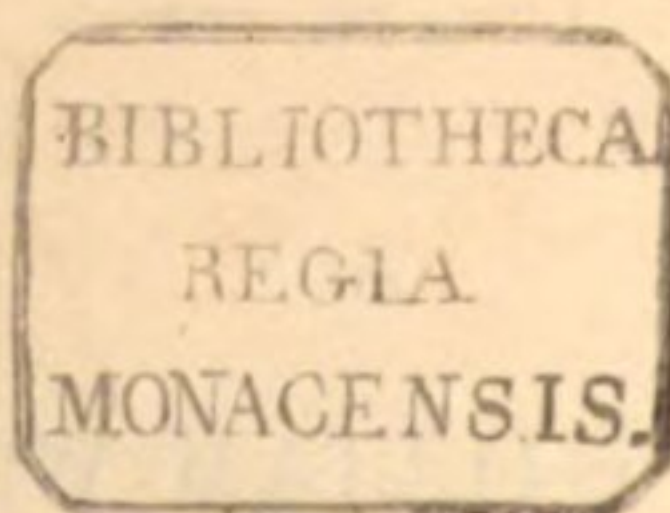
LONDON:
SHAW AND SONS, FETTER LANE,
Law Printers and Publishers.

1862.

CRIMINAL LAW.

THE STATUTE OF 1861.

LONDON: PRINTED BY SHAW AND SONS, FETTER LANE.



PREFACE.

It has long been the aim of the Author to produce a comprehensive and systematic work on the Criminal Law, embracing not only the steps of the procedure, but also the principles governing the subject, whether these are defined by the Common Law, or by Statute, or, as is usual, partly by both. The materials for such a treatise are necessarily copious, and the labour of reducing them within a reasonable compass proportionally great. The Author has accordingly spared no pains to make the present work complete; and now submits it to the judgment of the profession and the public.

The passing of the Criminal Consolidation Acts of 1861 formed an epoch in criminal legislation, and furnished a convenient opportunity for such a publication. The Author, having for several years previously accumulated his materials, has thus been able at a comparatively early period to incorporate all the details of this important instalment of our penal code, and to distribute them in their proper places, but without materially disturbing the arrangement observed by the legislature. However carefully the law may be consolidated in the

form of statutes, it is well known to every lawyer, that many decisions as to the meaning of enactments which formerly existed in another shape, are still necessary to illustrate them in their new and improved arrangement. A treatise would be very defective which omitted to collect those decisions, and even though several old enactments may have been wholly repealed, the settled construction given to them by courts of law may often be of the greatest value in illustrating kindred enactments, or throwing light on similar phraseology employed in the statutes which still exist. Certain expressions are found frequently to recur in statutes or families of statutes treating of the same subject, and it is no small part of an Author's task to collect and utilize the decisions relating to extinct enactments by applying them to the existing law, so far as can safely be done.

The Author has made it a conspicuous feature of this work to give in considerable detail the various steps of the procedure in a criminal trial, and these constitute the first part of the work. In this department the natural order of the proceedings has been followed as nearly as possible, and as it is common to all criminal prosecutions, it is hoped that it will be found useful. Thus the Author commences with the issuing of process, or the apprehension, and follows the prosecution through all its subsequent stages, whether before the grand jury or justices of the peace, with the pleadings and evidence, until it arrives at its natural termination of verdict, judgment, and execution.

The incidental or occasional proceedings are also treated of, such as Bail, Certiorari, Criminal Information, Challenge of the Jury, Rewards of Officers, and Error, at those stages of the prosecution where they

naturally diverge. The importance of this part of the subject fully warranted its being treated at considerable length; and, it is believed, the reader will require no apology for being furnished with a compendium of the present practice.

The second part of the subject consists of the various defined crimes recognized by the Law of England, from Treason down to miscellaneous Misdemeanors, not omitting a reference also to those Summary Convictions included in the recent Acts. It was considered better to give a complete list of Criminal Offences, for though Treason is a crime which now happily is of rare occurrence, its incidents are more or less blended with those of the minor crimes, and the criminal lawyer can never hope that this branch of the law will become entirely obsolete.

The Offences have, for the sake of convenience, been collected into various groups, after the manner adopted by the Criminal Consolidation Acts. First in order are the Offences against the Queen and her Government, then the Offence of Larceny and its cognate Offences. Next follow Malicious Injuries to Property, Forgery, Coinage, Offences against the Person, against the Game Laws, against Public Justice, Perjury and Conspiracy, Offences against the Public Peace, against Religion and Morals, against Public Trade, against the Public Revenue, Nuisances, other Indictable Offences, and lastly, Offences punishable by Court Martial. Each of those subdivisions treats of the offence so far as it exists at Common Law, then the statutory description and its ingredients, next, the decisions of the courts bearing on each phrase and expression so used, and lastly, any peculiarities of procedure which exist. With regard to those Offences embraced in the recent Consolidation Acts, the order of

the Statutes has been followed as nearly as practicable. Occasional subjects have been introduced under their proper heads: thus the practice of Coroners' Inquisitions, and Surety of the Peace, have been included among the chapters relating to Offences against the Person.

The cases have been collected at the foot of the page, so as not to interrupt the progress of the reader as he peruses the text. The Table of Cases cited will show the extent and variety of the references. A Table of Contents, and also of the Statutes, together with a copious Index of subjects, compiled with great care, will bear testimony to the solicitude with which the whole has been completed.

In a work of such magnitude the Author can only confidently hope that any errors which have occurred will be viewed with indulgence, as he has spared neither time nor labour to render the work complete.

H. W. W.

Hare Court, Temple,
1862.

TABLE OF CONTENTS.

PART I.

Procedure in Criminal Trials.

CHAP. 1. Process, 1.

2. Depositions, 17.
3. Bail and *habeas corpus*, 20.
4. The grand jury, 42.
5. Proceedings before trial, 50.
6. The indictment and its incidents, 53.
7. *Certiorari*, 99.
8. Of an arraignment and its incidents, 117.
9. Pleas, 125.
10. Of criminal and other informations, 134.
11. Juries and challenges, 152.
12. Of counsel, 166.
13. Election, 173.
14. Of evidence, 177.
15. Of the examination, cross-examination, &c., of witnesses, 222.
16. Of the nature of the evidence for the crown and for the prisoner or defendant, 233.
17. Of the attendance of witnesses and other incidents before verdict, 254.
18. The verdict, 259.
19. Of rewards and other matters, 264.
20. Of proceedings to stay judgment, 267.
21. Of acquittal, 276.
22. Of judgment, 281.
23. Of error, 290.
24. Of attainder and its consequences, 299.
25. Of execution, 302.

PART II.

Indictable Offences against the Queen and her Government.

- CHAP. 1. Of high treason, and its incidents, 307.
 2. Of treasonable libels and slander, 339.
 3. Of treasons relating to the succession and regency, 340.
 4. Of misprision of treason, 341.
 5. Of offences in the nature of treason with reference to persons of the Roman Catholic religion, 343.
 6. Of felonies and misdemeanors against Her Majesty the Queen, 344.
 7. Of sedition and offences of that nature, 347.
 8. Of tumultuous petitioning, 352.
 9. Of unlawful training, 353.
 10. Of aiding foreign powers without licence from the crown, 356.
 11. Of aiding prisoners of war to escape, 359.

PART III.

Larceny and other similar Offences. "The Larceny Act, 1861."

- CHAP. 1. Of simple larceny and of bailees, 361.
 2. Of taking and advertising rewards for the recovery of stolen property, 405.
 3. Larceny of cattle and other animals, 407.
 4. Of deer and fish; creatures *feræ naturæ*; and of dog stealing, 411.
 5. Larceny of valuable securities, 419.
 6. Larceny of deeds relating to real estate; wills and records, &c., 422.
 7. Of larceny of things attached to or growing on land, 425.
 8. Of larceny from mines, 430.
 9. Of simple robbery; stealing from the person; assault with intent to rob, 431.
 10. Of aggravated robberies, 439.
 11. Of demands with menaces, 442.
 12. Of burglary, 450.

13. Breaking and entry into buildings within the curtilage, but not being part of the dwelling house, with intent to commit felony, 468.
14. Of breaking into dwelling houses, shops, &c. 470.
15. Stealing in a dwelling house to the amount of 5*l.* 474.
16. Of stealing goods in the process of manufacture, 479.
17. Of stealing from ships, docks, &c., and from wrecks, 480.
18. Of larceny by clerks and servants, 482.
19. Embezzlement, 485.
20. Of larceny and embezzlement by persons in the Queen's service, or by the police, 502.
21. Embezzlement by officers of the Bank of England and Ireland, 504.
22. Embezzlement, Mutiny Acts, and public revenue, 506.
23. Of larceny by tenants and lodgers, 508.
24. Of frauds and embezzlements by bankers, &c., factors, and agents, 509.
25. Of frauds by trustees and directors, 514.
26. Obtaining money, &c., by false pretences, 516.
27. Of felonies relating to the receipt of stolen goods, 537.
28. Of piracy, 548.

PART IV.

Malicious Injuries to Property. "The Malicious Injuries Act, 1861."

- CHAP. 1. Of arson and malicious burning, 555.
2. Of injuries by explosive substances to buildings or goods therein, 569.
 3. Of riot and destruction of property, 570.
 4. Of injuries to buildings by tenants, 574.
 5. Of injuries to manufactures and machinery, 574.
 6. Of injuries to corn, hopbinds, trees, vegetable productions, &c., 577.
 7. Of injuries to mines, 582.
 8. Of injuries to sea and river banks, and to works on rivers, canals, and fisheries, 585.
 9. Injuries to bridges, viaducts, and toll bars, 586.
 10. Injuries to railways, carriages, and telegraphs, 587.

- 11. Injuries to works of art, 589.
- 12. Malicious injuries to cattle and other animals, 590.
- 13. Malicious injuries to ships, 593.
- 14. Sending letters threatening to burn or destroy, 599.
- 15. Of injuries not otherwise provided for, 600.
- 16. Gunpowder, 601.
- 17. Of procedure, 602.

PART V.

Cheats, Frauds, and Forgery. "The Forgery Act, 1861."

- CHAP. 1. Of cheats and frauds, 607.
 - 2. Forgery at common law, 632.
 - 3. Forging or counterfeiting the seals, 637.
 - 4. Forgery and personation, transfer of stock, &c., 639.
 - 5. Forgery of East India bonds, 642.
 - 6. Forgery of exchequer bills, bonds, &c., 643.
 - 7. Forgery of bank or other notes, and other incidents relating to them, 645.
 - 8. Forgery of deeds, bonds, &c., 654.
 - 9. Forgery of wills, 656.
 - 10. Forgery of bills and notes, 659.
 - 11. Forgery of receipts, &c., 670.
 - 12. Forgery connected with records and process, 691.
 - 13. Forgery of court rolls, 693.
 - 14. Forgery—Registry Acts, 693.
 - 15. Forging orders of justices, recognizances, &c., 694.
 - 16. Forgery—accountant-general, judge of Irish Landed Estates Court, &c., 695.
 - 17. Forgery—Births, baptisms, marriages, burials, 696.
 - 18. Demanding money upon forged instruments, 698.
 - 19. Forgery (5 El. c. 14 [repealed]), 698.
 - 20. Forgery—Bankruptcy Court, 699.
 - 21. Forgery of other legal documents, 699.
 - 22. Procedure in forgery, 700.
 - 23. Forgery relating to the government and revenue, 703.
 - 24. Other forgeries affecting commercial persons or companies, 717.

PART VI.

Offences relating to the Coin. "The Coinage Offences Act, 1861."

- CHAP. 1. Counterfeiting coin, 719.
2. Illegal utterings and the illegal possession of coin, 725.
3. Illegal dealings with false coin, 732.
4. Offences respecting implements for making false coin, 734.
5. Procedure in coinage offences, 739.
-

PART VII.

Offences against the Person, and of Surety of the Peace. "The Offences against the Person Act, 1861."

- CHAP. 1. Homicide—Murder, 743.
2. Manslaughter, 761.
3. Homicide not felonious, 773.
4. Indictments and trial, murder, &c., 778.
5. Attempts to murder, 787.
6. Letters threatening to murder, 802.
7. Acts causing or tending to cause danger to life, or bodily harm, 803.
8. Assaults, 811.
9. Rape, abduction and defilement of women, 830.
10. Child stealing, 847.
11. Bigamy, 848.
12. Attempts to procure abortion, 867.
13. Concealment of birth, 868.
14. Unnatural crimes, 872.
15. Making gunpowder with intent to commit felony, 874.
16. Procedure under the Act relating to offences against the person, 875.
17. The coroner's inquisition, 877.
18. Surety of the peace, 893.

PART VIII.**Offences against the Game Laws, 903.**

PART IX.**Indictable Offences against Public Justice.**

- CHAP. 1. Compounding offences ; misprision of felony, 915.
2. Champerty, &c., 918.
3. Non-repair of gaols, &c., 927.
4. Libels, &c., 928.
5. Misconduct by legal officers, 931.
6. Justices administering unstatutory oaths, 933.
7. Disobedience to orders of justices, 934.
8. Misconduct by justices, &c., 943.
9. Illegal distress, 948.
10. Misdemeanors committed against legal officers, 949.
11. Returning from transportation, 951.
12. Rescues, 955.
-

PART X.**Perjury, Conspiracy, and Extortion.**

- CHAP. 1. Perjury and subornation, 965.
2. Conspiracy, 1047.
3. Extortion, 1073.
-

PART XI.**Indictable Offences against the Public Peace.**

- CHAP. 1. Unlawful assemblies, 1083.
2. Seditious libels and slander, 1088.
3. Riot, 1092.
4. Affrays, 1100.
5. Challenges, 1102.
6. Forcible entry and detainer, 1105.
7. Libel and slander, 1130.

PART XII.

Indictable Offences—Religion and Morals.

- CHAP. 1. Disturbing ministers and congregations, 1165.
2. *Congé d'elire*, 1168.
3. Clergy making canons without the consent of the crown, 1168.
4. False recitals in ecclesiastical leases, 1169.
5. Registers of births, &c., 1169.
6. Jesuits, 1170.
7. Blasphemy, &c., 1171.
8. Sabbath breaking, 1176.
9. Indictable offences concerning marriage not hitherto mentioned, 1179.
10. Offences against decency, 1182.
11. Gaming and gambling houses, 1187.
12. Slave dealing, 1191.
13. Attempts to commit felony, 1194.
14. Stealing dead bodies, 1195.
15. Purchase and sale of offices, 1197.
16. Other offences, 1200.
17. Bribes and receiving bribes, 1201.
-

PART XIII.

Indictable Offences against Public Trade.

- CHAP. 1. Forestalling, &c., abolished, 1205.
2. Monopolies, 1207.
3. Unlawful oaths, 1209.
4. Payment of wages otherwise than in coin, 1211.
5. Refusing freedom, 1212.
6. Search of China passenger ships, 1212.
-

PART XIV.

Indictable Offences against the Public Revenue.

- CHAP. 1. Smuggling, 1213.
2. Receivers of stolen goods on the Thames, 1225.
3. Post office, 1226.

PART XV.**Nuisance.**

- CHAP. 1. Offensive trades and occupations, 1237.
2. General annoyances, 1240.
3. Procedure in nuisance, 1243.
4. Nuisances—highways, 1246.
5. Nuisances—bridges, 1273.
6. Nuisances—navigation, 1293.
-

PART XVI.**Of other Indictable Offences, 1305.****PART XVII.****Offences punishable by Courts Martial, 1321.**

TABLE OF CASES.

A.		PAGE		PAGE
Abbott, Den. 273		521	Akenhead, 3 Meriv. 682	1172
A'Becket v. —, 7 Taunt. 776 ..		1003	Akers, 6 Esp. 125	949, 1217
Abdy, Cro. Car. 585		1311	Albert, 5 Q. B. 37	64
Abgood, 2 C. & P. 436		449	Alcock v. Alcock, 21 L. J. Ch. 856:	179
Abingdon (Lord), Peake, 171, 236;			Alcocke, 1 Keb. 231	324
1 Esp. 226		1139	Aldenharn, 2 Lev. 152	889
Abingdon, Borough, 12 Mod. 308..		135	Alderton, 5 B. & Ald. 596	930
Abraham, Holt's Ca. 361	135,	1015	Alderton, Say. 286	1133
Abraham, 1 Moo. & Rob. 7	151,	249	Aldridge, 4 Cox, 143	409
Abraham, 1 Cox, 208		795	Alexander, 3 Ch. Burr. 458	143
Abraham, Comb. 141		1092	Alexander, 3 Ch. Burr. 338	616
Abrahams, Leach, 96		660	Alexander, Leach, 63	977
Abrahams, q. t. v. Bunn, 4 Burr.			Alford, Leach, 150	976
2251		1028	Allan, 7 C. & P. 664	398
Abrahat, Leach, 824		483	Allan v. Ormond, 8 East, 4	1263
Absolan, 1 Fost. & F. 498		1053	Allanson, Car. & M. 295	959
Ackroyd, 1 Lev. 49		190	Allday, 1 C. & P. 136	705
Acton, Str. 851		33	Allen, 1 Moo. 159	235
Adams, Car. & M. 299	94, 123,	572	Allen, Russ. & Ry. 513	412
Adams, 6 C. & P. 324		24	Allen, Trem. 109	610
Adams, 3 C. & P. 600	368,	369	Allen, 7 C. & P. 156	770
Adams, Den. 38		373	Allen, 9 C. & P. 31	832
Adams, Russ. & Ry. 225		374	Allen, 2 Moo. 179	838
Adams, 2 Russ. C. M. 28		377	Allen, Den. 364	873
Adams, 1 Fost. & F. 86		541	Allen, 1 Car. & K. 495	874
Adams, 1 Russ. C. M. 728		793	Allen, Exp. 3 Nev. & M. 35	35
Adams, 6 M. & S. 52		1078	Alleyne, Dears. 32	133
Adams v. Flemming, Hob. 283 ..		978	Alleyne v. Reg. 24 L. J. Q. B. 282;	
Adams v. Moore, Selw. N. P. 910:		13	Dears. 505	297
Adamson, 2 Moo. C. C. 286		536	Allington, Str. 678	944
Addis, 6 C. & P. 388	15,	911	Allison, 1 Cox, 24	217, 558,
Adey, Leach, 169		5	Allison, 8 C. & P. 418	758
Adey, Leach, 206	72,	756	Allison, Russ. & Ry. 109	851,
Adey, 1 Moo. & Rob. 947		228	All Saints, Ca. T. Hardw. 105	1264
Adey, Den. 571		488	All Saints, Worcester, 6 M. & S. 194:	184
Adey, 3 Stark. 71		498	Allibone, Trem. 97	1053
Adlard, 4 B. & C. 772		1311	Alme, 3 Salk. 224	1133
Ady, 7 C. & P. 140		529	Alme, 3 Jur. 750	950
Agar, Mo. 627		978, 998	Almon, 5 Burr. 2686	1145
Aickles, Leach, 294	216,	379	Alsop, 1 Show. 339	908
Aickles, Leach, 390	218,	952	Altass, 1 Cox, 17	984
Aickles, Leach, 430		662	Amarro, Russ. & Ry. 286	799
Aillesbury, Earl of, 12 Mod. 117 ..	33,	34	Ambury, 6 Cox, 79	265
Airey, East, P. C. 231; 2 East, 30:			Ambury, 6 Cox, 263	954
	519,	530	Amey v. Long, 1 Campb. 14	1002
Akehurst, Leach, 150		678	Amery, 1 T. R. 363	65
Akenhead, Holt, N. P. C. 469		793	Amier, 6 C. & P. 344	475
			Amos, Den. & P. 65	561

	PAGE		PAGE
Amos, 3 B. & Ald. 533.....	940	Anon., 1 Lew. 58	772
Amphlitt, 4 B. & C. 35	1157	Anon., 1 Russ. C. M. 724	794
Anderdon v. Burrows, 2 C. & P. 410	824	Anon., 2 Moo. 40	800, 802
Anderson, Leach, 239	375	Anon., East, P. C. 305	814
Anderson, 3 Ch. Burn, 104....387,	1313	Anon., 2 Camp. 652....	818
Anderson, East, P. C. 772.....	397	Anon., 1 Lew. 17	821
Anderson, Leach, 673, n.	478	Anon., 2 Barnard. 27, 87, 138	826
Anderson, 2 Moo. & Rob. 469	671	Anon., Leach, 430.....	839
Anderson, 1 Russ. C. M. 531.....	744	Anon., 1 Russ. C. M. 695	839
Anderson, In the matter of, 30 L. J. Q. B. 139	31	Anon., 12 Mod. 112	889
Anderson v. Radcliffe, 28 L. J. Q. B. 32	920	Anon., 1 Ventr. 352.....	891
Andrews, 2 Dowl. & L. 10.....	35	Anon., Str. 533.....	892
Andrews, Car. & M. 121	471, 472	Anon., 2 Barnard. 60.....	928
Andrews, 2 Moo. & Rob. 37 ..906,	910	Anon., Lofft. 462	928
Andrews, Ex. p. 4 C. B. 226	32	Anon., Str. 384	933
Andrews v. Lord Cromwell, Cro. Jac. 32	1123, 1174	Anon., 2 Barnard. 198	944
Anglesea, Coroner, East, P. C. 382:	881	Anon., Lofft. 253	946
Annet, 1 Sir Wm. Bl. 395	1173	Anon., Lofft. 199	948
Anon., 1 Lew. C. C. 20.....	28	Anon., 7 Mod. 10	949
Anon., 7 Mod. 27	28	Anon., 1 Ventr. 296	970
Anon., 1 Lew. C. C. 70.....	43	Anon., 1 Ventr. 369.....	982
Anon., East, P. C. 559.....	73	Anon., Str. 384.....	1003
Anon., Leach, 6, 7	81	Anon., 1 Ventr. 13	1005
Anon., Mo. 8	83	Anon., 1 Lew. 271.....	1010
Anon., 12 Mod. 502	94	Anon., Cro. El. 201	1017
Anon., 2 Jur. 14	94	Anon., 2 Russ. C. M. 652	1026
Anon., 7 Mod. 40	134	Anon., 3 Mod. 116.....	1033
Anon., 12 Mod. 248	134	Anon., 2 Lew. 12.....	1038, 1039
Anon., 12 Mod. 495	134	Anon., Lat. 132.....	1039
Anon., 12 Mod. 434	134	Anon., 1 Lew. 9.....	1040
Anon., Latch. 198.....	135	Anon., 1 Salk. 330	1075
Anon., Skin. 114	135	Anon., 6 Mod. 43	1094
Anon., In re, 16 Jur. 995	137	Anon., 12 Mod. 648	1094
Anon., Skin. 110	138	Anon., 3 Salk. 317	1095
Anon., 2 Salk. 514	144	Anon., 13 Vin. Ab. 64.....	1114
Anon., 1 Ventr. 28.....	145	Anon., 11 Mod. 252	1116
Anon., Sty. 417.....	146	Anon., 1 Ventr. 18	1142
Anon., 1 Salk. 153	153	Anon., 11 Mod. 99.....	1153
Anon., 1 And. 299.....	154	Anon., 11 Mod. 40	1187
Anon., 1 Ventr. 309.....	154	Anon., 2 Russ. 556	1200
Anon., 1 Lew. 276.....	173	Anon., East, P. C. 765	1223
Anon., 1 Lew. 324.....	181	Anon., Dearsl. 304	1256
Anon., 1 Lew. 323.....	186	Anon., 2 Barnard. 54	1260
Anon., 1 Lew. 322.....	221	Anon., 1 Russ. C. M. 379	1295
Anon., 1 Lew. 138	237	Ansell, 8 Cox, 409.....	685
Anon., 1 Lew. 128	256	Anstruther, Leach, 43	229
Anon., Salisbury, M. S.....	257	Antrobus, 2 Ad. & El. 788	303
Anon., 1 Lew. 36	262	Apley, 1 Cox, 71.....	865
Anon., 1 Lew. 20	276	Apothecaries' Company v. Bentley, Ry. & M. 159.....	235
Anon., East, P. C. 664	364	Appleby, 3 Stark. 33.....	202
Anon., 2 C. & P. 459	368	Apprentices, Leach, 203	33
Anon., 8 Mod. 248	394	Apprentices, 1 Hale, 43	314
Anon., Leach, 1061	419	Archer, 1 Moo. 143	73
Anon., East, P. C. 662	432	Archer, 3 Cox, 218.....	181
Anon., 1 Lew. 300.....	433	Archer, 2 T. R. 203	286
Anon., 1 Lew. 37	453	Archer, Dearsl. 449	522
Anon., Matth. Cr. Dig. 48.....	453	Archer, Plowd. 475	751
Anon., Stark. Cr. Pl. 467, n.....	474	Archer, 1 Fost. & F. 351.....	769
Anon., 2 Lew. 256.....	487	Archer, 1 Car. & K. 174.....	802
Anon., Lofft. 271	529	Argent, 1 Moo. 159	235
Anon., 1 Lew. 8	560	Aris, 6 C. & P. 348	580
Anon., 2 Salk. 522	615	Arlett, 1 Car. & K. 596	116, 279
Anon., Lofft. 146	616	Arman, 1 Jur. 1115	490
Anon., 8 Mod. 164	750	Armes, Case of, Poph. 121....1085,	1100
Anon., East, P. C. 296	755	Armstrong, 1 Lew. 195.....	374
Anon., East, P. C. 261.....	761	Armstrong, 1 Ventr. 305.....	1052
		Arnall, 8 Cox, 439.....	835
		Arnold, 8 C. & P. 621	17, 198, 213

Table of Cases.

xvii

	PAGE		PAGE
Arnold, 1 <i>Russ. C. M.</i> 9.....	250	Attorney-General v. Austin, 1 <i>Ventr.</i>	
Arnold, 2 <i>Keb.</i> 526	951	183	1246
Arrigoni, <i>East, P. C.</i> 399	81	Attorney-General v. Bond, 9 <i>C. & P.</i>	
Arrowsmith, 2 <i>Dowl. N. S.</i> 704.....	136	189	253
Arrowsmith v. Le Mesurier, 2 <i>New</i>		Attorney-General v. Bovet, 15 <i>Mees.</i>	
<i>Rep.</i> 211	7	& <i>W.</i> 60	210
Arscott, 6 <i>C. & P.</i> 408, 410...660, 675, 682		Attorney-General v. Bowman, 2	
Arundel, 4 <i>Cox</i> , 260.....	129	<i>Bos. & P.</i> 532.....	248
Arundel, 1 <i>Lew.</i> 115.....	408	Attorney-General v. Briant, 15 <i>Mees.</i>	
Arundel, 13 <i>Vin. Ab.</i> 387	1125	& <i>W.</i> 169	223
Ash, 2 <i>Moo. & Rob.</i> 294	871	Attorney-General v. Brittain, 6 <i>B.</i>	
Ashburn, 8 <i>C. & P.</i> 50.....	976	& <i>C.</i> 579	1295
Ashburton, Lord, 4 <i>Q. B.</i> 585	61	Attorney-General v. Brooksbank, 1	
Ashburton, Lord, 8 <i>Jur.</i> 143.....	67	<i>Y. & Jer.</i> 439.....	143
Ashby v. White, 14 <i>How. St. Tr.</i>		Attorney-General v. Bulpit, 9 <i>Price,</i>	
806	39	4	231
Ashford v. Thornton, 1 <i>B. & Ald.</i>		Attorney-General v. Cleave, 2 <i>D. P.</i>	
423	125	<i>C.</i> 668	148
Ashley, 1 <i>Car. & K.</i> 198	475, 476	Attorney-General v. Eastern Coun-	
Ashley, 12 <i>Rep.</i> 90	1052	ties Railway Company.....	883
Ashley, 1 <i>Ro. Rep.</i> 109	1094	Attorney-General v. Green, 1 <i>Price,</i>	
Ashpernon, 2 <i>Leon.</i> 184	1122	180	258
Ashton, 1 <i>Lew.</i> 147	205	Attorney-General v. Hawkes, 1 <i>Tyr.</i>	
Ashton, 1 <i>Lew.</i> 276	572	3	89
Ashton, 2 <i>B. & Adol.</i> 750	576	Attorney-General v. Johnson, 2	
Ashton, 7 <i>Q. B.</i> 169	896	<i>Wils. Ch. Ca.</i> 87	1299
Askew, 3 <i>M. & S.</i> 9	270	Attorney-General v. Lambert, 5	
Ashman, 1 <i>Fost. & F.</i> 88.....	793	<i>Price</i> , 386.....	501
Aspinall, 3 <i>Stark. Ev.</i> 952.....	835	Attorney-General v. Laragoity, 3	
Aslett, <i>Leach</i> , 954	419, 504	<i>Price</i> , 221	5
Ast, <i>Car. Cr. L.</i> 66	186	Attorney-General v. Le Merchant,	
Asterley, 7 <i>C. & P.</i> 191	519	2 <i>T. R.</i> 201.....	216
Assisarum, 43 <i>Pl.</i> 37	1285	Attorney-General v. Moss, 13 <i>Price,</i>	
Assisarum, 37 <i>Pl.</i> 10	1296	258	50
Astley, <i>East, P. C.</i> 729	435	Attorney-General v. Parsons, 2 <i>Mees.</i>	
Aston, 2 <i>Cox</i> , 234; 2 <i>Car. & K.</i> 413:	491	& <i>W.</i> 23	145, 150, 195
Aston, 2 <i>Russ.</i> 407, 651		Attorney-General v. Pearson, 3	
Aston, 12 <i>Mees. & W.</i> 456.....	894, 899	<i>Meriv.</i> 682	1172
Athea, 1 <i>Moo. C. C.</i> 329	476	Attorney-General v. Phillips, 13	
Athea, 2 <i>Lew.</i> 191.....	906	<i>Price</i> , 592	50
Athos, <i>Str.</i> 553; 5 <i>Burr.</i> 2797 ..	303	Attorney-General v. Philpot, 2	
Athos, 1 <i>Russ. C. M.</i> 550	782	<i>Anstr.</i> 608	1299
Atkins and Atkinson, 4 <i>East</i> , 176..	103	Attorney-General v. Portsmouth	
Atkins and Atkinson, 1 <i>Lew.</i> 115..	241	Harbour, 6 <i>B. & C.</i> 573	1295
Atkins and Atkinson, 3 <i>Bro. P. C.</i>		Attorney-General v. Poppleton,	
517	289, 303	<i>Bunb.</i> 311	145
Atkins and Atkinson, 5 <i>C. & P.</i> 310:	320	Attorney-General v. Radloff, 10 <i>Ex.</i>	
Atkins and Atkinson, <i>East, P. C.</i>		84; 23 <i>L. J. Ex.</i> 240	180
673	373, 519	Attorney-General v. Ray, 9 <i>Mees.</i>	
Atkins and Atkinson, <i>Leach</i> , 302 ..	385	& <i>W.</i> 760; 11 <i>Mees. & W.</i> 464: 144, 145	
Atkins and Atkinson, 2 <i>Moo.</i> 278 ..	498	Attorney-General v. Read, 2 <i>Mod.</i>	
Atkins and Atkinson, 11 <i>Mod.</i> 79:		299	1311
612, 1076		Attorney-General v. Richards, 2	
Atkins and Atkinson, 2 <i>Mod.</i> 215..	686	<i>Anstr.</i> 603	1299
Atkins and Atkinson, 7 <i>C. & P.</i> 669:	667	Attorney-General v. Snow, <i>Bunb.</i>	
Atkins and Atkinson, 1 <i>Russ. & Ry.</i>		96	149
104	792	Attorney-General v. Thacker, 2	
Atkins and Atkinson, 1 <i>Russ. C. M.</i>		<i>Price</i> , 116	51
24	862	Attorney-General v. Woodward, 2	
Atkins and Atkinson, 2 <i>Russ. C. M.</i>		<i>Price</i> , 13.....	1003
542	969	Atwell, <i>East, P. C.</i> 768	539
Atkins and Atkinson, 7 <i>T. R.</i> 315..	980	Atwood, <i>Leach</i> , 464.....	180
Atkins and Atkinson, 1 <i>Salk.</i> 382: 1080		Atwood, 5 <i>Cox</i> , 197	197
Atkins and Atkinson, 3 <i>Burr.</i> 706: 1105		Atwood v. Jolliffe, 3 <i>New. S. C.</i> 116: 1109	
Atkins and Atkinson, <i>Id.</i> 1703	1121	Audley, Lord, 1 <i>St. Tr.</i> 393	185
Atkins and Atkinson, 3 <i>Salk.</i> 188: 1205		Austen and Austin, 4 <i>Cox</i> , 385 ..	45
Atkyns, Sir R., 2 <i>Show.</i> 236	1093	Austen and Austin, 7 <i>C. & P.</i> 796:	
Attorney-General v. —, <i>Hardr.</i>		120, 543	
201	146	Austen and Austin, 2 <i>Cox</i> , 59	128

	PAGE		PAGE
Austen and Austin, 25 <i>L. J. M. C.</i> 48:	209	Ball, <i>Russ. & Ry.</i> 132	272, 651
Austen and Austin, 1 <i>D. P. C.</i> 24 :	265	Ball, <i>Car. & M.</i> 249	521, 527
Austen and Austin, <i>East, P. C.</i> 664:	368	Ball, 1 <i>Moo.</i> 33.....	564, 565
Austen and Austin, <i>East, P. C.</i> 602:	420	Ball, 1 <i>Moo.</i> 470	679
Austen and Austin, <i>Russ. & Ry.</i> 492:	591	Ball, 6 <i>Cox</i> , 360	979
Austen and Austin, 1 <i>Car. & K.</i> 621:	904	Ball, 6 <i>C. & P.</i> 563	1210
Autey, 26 <i>L. J. M. C.</i> 190; <i>Dearsl.</i>		Ballard, 1 <i>Russ. C. M.</i> 814	462
& <i>B.</i> 294	672, 686	Balme, <i>Comp.</i> 648	936
Avery, 28 <i>L. J. M. C.</i> 188; <i>Bell,</i>		Balmerino, <i>Ld. Fost.</i> 9	319
150	389	Baltimore, <i>Ld. 4 Burr.</i> 2179.....	837
Avery, 8 <i>C. & P.</i> 596..233, 234, 657,	658	Bamber v. Reginam, 5 <i>Q. B.</i> 279..	1255
Ayes, <i>Russ. & Ry.</i> 166	764	Bambridge, <i>Str.</i> 1231	895
Aylett, 8 <i>C. & P.</i> 669	17, 167	Bamfield, 1 <i>Moo.</i> 416	671
Aylett, 4 <i>East</i> , 177	103	Bangor, <i>Bp. of</i> , 1 <i>Russ. C. M.</i> 274:	
Aylett, 1 <i>T. R.</i> 63 ..984, 990, 1007,	1020		1092, 1095
Aylett v. Reg. (in error), 3 <i>Bro. P.</i>		Bank of England v. Reid, 7 <i>D. P.</i>	
<i>C.</i> 529		<i>C.</i> 725	
Ayliffe, 1 <i>Show.</i> 15	292	Bank Prosecutions, <i>Russ. & Ry.</i> 578:	
Azire, <i>Str.</i> 633	185		652, 653
Azzopardi, 2 <i>Moo.</i> 288	785	Banks, 1 <i>Cox</i> , 238	73
		Banks, 6 <i>Mod.</i> 205	115, 163
B.		Banks, <i>Russ. & Ry.</i> 441.....	374
Backhouse, <i>Lofft.</i> 61	950	Banks, 8 <i>C. & P.</i> 574	841
Bacon, 1 <i>Lew.</i> 146	802	Banks, 1 <i>Sess. Ca.</i> 357	1121
Bacon, 2 <i>Ro. Ab.</i> 697	1027	Banks, 1 <i>Esp.</i> 144.....	1223
Badcock, <i>Leach</i> , 996	638	Bannen, 2 <i>Moo.</i> 309.....	737
Badger, 4 <i>Q. B.</i> 468.....	36	Barbat v. Allen, 21 <i>L. J. Ex.</i> 155:	179
Badger, 25 <i>L. J. M. C.</i> 81	108	Barber, 1 <i>C. & P.</i> 434	169, 655
Badger, 6 <i>Jur.</i> 994	137	Barber, 1 <i>Car. & K.</i> 442.....	658
Bagg, 1 <i>Ro. Rep.</i> 79	928, 930	Barclay, 2 <i>Sid.</i> 101	885, 892
Bailey, <i>Comb.</i> 10..	23	Bardell, 5 <i>Ad. & El.</i> 619	1268
Bailey, 2 <i>Stark. Ev.</i> 23	192	Barfoot, 13 <i>East</i> , 506	1217
Bailey, 7 <i>C. & P.</i> 264	237, 1009	Barford, <i>Ex p.</i> , 8 <i>Cox</i> ,	846
Bailey, <i>Russ. & Ry.</i> 1	247, 796	Barham, 1 <i>Moo.</i> 151	908, 910
Bailey, <i>Russ. & Ry.</i> 341.....	456	Barker v. Dixie, 2 <i>Russ. C. M.</i> 982:	184
Bailey, 1 <i>Moo.</i> 23.....	462	Barker, 2 <i>Moo. & Rob.</i> 53.....	206
Bailey, 4 <i>Cox</i> , 390.....	1190	Barker, 1 <i>Fost. & F.</i> 236	216
Bailey, <i>Dearsl.</i> 244; 470.....	1194	Barker, 1 <i>Car. & K.</i> 434	219, 230
Baillie, 2 <i>Cox</i> , 238	845	Barker, 3 <i>C. & P.</i> 589.....	226, 835
Baillie, <i>Holt, Libel.</i> 173	1034	Barker, 1 <i>Cox</i> , 434.....	240
Bain, <i>Leigh & Cave</i> , 129; 471		Barker, 1 <i>Dowl. & Ry. N. P. C.</i>	
Baines, 2 <i>Ld. R.</i> 1265	1076	19	489
Bainham, 1 <i>Salk.</i> 370	615	Barley, 2 <i>Cox</i> , 191	230
Bainton, <i>Str.</i> 1088.....	99	Barling v. Waters, 6 <i>Bing.</i> 423....	1003
Baker, 28 <i>L. J. M. C.</i> 377	1038	Barlow, <i>Ca. Sett.</i> 214	947
Baker, 7 <i>Ad. & El.</i> 502	305	Barlow, 2 <i>Salk.</i> 609.....	1313
Baker, <i>Leach</i> , 287	433	Barnard, 7 <i>C. & P.</i> 784	529
Baker, 3 <i>Cox</i> , 581.....	451	Barnard Castle, 5 <i>Jur.</i> 799....	109, 1272
Baker, 1 <i>Moo.</i> 231	671	Barnes, 4 <i>Cox</i> , 269	201
Baker, <i>Leach</i> , 112	752	Barnes, 7 <i>C. & P.</i> 166.....	264
Baker, 1 <i>Car. & K.</i> 254.....	799, 802	Barnes, 1 <i>Stark.</i> 243	217, 629
Baker, 1 <i>Mod.</i> 35	928, 1154	Barnes, 5 <i>Cox</i> , 112	373
Baker, 11 <i>Mod.</i> 235	1121	Barnes, 8 <i>Cox</i> , 129	487
Baker v. Greenhill, 3 <i>Q. B.</i> 148 ..	1280	Barnes, <i>Den. & P.</i> 59	520
Baker v. Townsend, 7 <i>Taunt.</i> 442:	915	Barnett, 3 <i>C. & P.</i> 600.....	26
Bakewell, <i>Russ. & Ry.</i> 35	504	Barnett, 2 <i>Russ. C. M.</i> 175.....	173
Bakewell, <i>Leach</i> , 943		Barnett, 2 <i>Russ. C. M.</i> 118	397
Baldry, <i>Den. & P.</i> 430	188	Barnett, 2 <i>Car. & K.</i> 594	441
Baldwin, 3 <i>Camp.</i> 265	95, 548	Barney, 5 <i>Mod.</i> 323	33, 34
Baldwin, <i>Russ. & Ry.</i> 241	252	Barnoldswick, 4 <i>Q. B.</i> 499.....	1254
Baldwin, 8 <i>Ad. & El.</i> 168	139	Barnsley Rioters, 1 <i>Lew.</i> 5.....	182
Baldwin, 1 <i>Russ. C. M.</i> 683	832	Baron and Boys, 13 <i>Rep.</i> 18	1206
Baldwin, 3 <i>Nev. & P.</i> 342	1150	Barr, 4 <i>Camp.</i> 16.....	1250
Ball, 1 <i>Moo.</i> 330	14	Barratt, 9 <i>C. & P.</i> 387: 214, 801,	
Ball, 8 <i>C. & P.</i> 745.....	221, 222, 251		843, 844
		Barratt, 3 <i>Camp.</i> 444	217
		Barre, <i>Mo.</i> 55	160
		Barrett, 6 <i>Cox</i> , 78	265
		Barrett, 2 <i>Car. & K.</i> 343	767, 782

Table of Cases.

xix

	PAGE		PAGE
Barrett, <i>Dougl.</i> 465	947	Beardsall, 1 <i>Fost. & F.</i> 629	679
Barrington v. Regem, 3 <i>T. R.</i> 499 :	292	Beauclerk, 7 <i>Jur.</i> 373	135
Barronnet, <i>Dearsl.</i> 51	35	Beaumont, <i>Dearsl.</i> 270 ; 23 <i>L. J.</i>	
Barstow, 1 <i>Lew.</i> 107	203	<i>M. C.</i> 54	492
Barthelemy, <i>Dearsl.</i> 60	33, 35	Beaumont, <i>Say.</i> 278	998
Bartholomew, 1 <i>Car. & K.</i> 366	1013	Beavan, <i>Ry. & M.</i> 242	187, 1125
Bartlett, 2 <i>Car. & K.</i> 321	169	Beavers, <i>East, P. C.</i> 383	888
Bartlett, 7 <i>C. & P.</i> 671	184	Beavis, 7 <i>T. R.</i> 80	141
Bartlett, 7 <i>C. & P.</i> 832	200	Beck, <i>Str.</i> 1160	975
Bartlett, <i>Deac. Cr. L.</i> 168	576	Beckett, 1 <i>Moo. & Rob.</i> 526	787
Bartlett, 2 <i>Moo. & Rob.</i> 362	665	Beckwith v. Philby, 6 <i>B. & C.</i> 35 ..	8
Bartlett v. Pickersgill, 4 <i>East</i> , 577 :		Bedford, <i>Str.</i> 789	1088
968, 1004, 1028		Bedford, <i>Lofft.</i> 29	1187
Barton, 4 <i>Cox</i> , 353	137	Beech, <i>Leach</i> , 133	237
Barton, 4 <i>Jur.</i> 431	267	Beecham, 5 <i>Cox</i> , 181	371
Barton, <i>Cr. C. C.</i> 103	457	Beechcroft, 12 <i>Mod.</i> 255	121
Barton, 1 <i>Moo.</i> 141	684, 687	Beechey, <i>Russ. & Ry.</i> 319	489
Bartrum, 8 <i>East</i> , 269	52	Beechey v. Sides, 9 <i>B. & C.</i> 806 ..	13
Barvisse, 5 <i>Cox</i> , 55	534	Beechey v. Sides, 4 <i>B. & C.</i> 136 ..	38
Barwell and others v. Hundred of		Beeching, <i>Exp. p.</i> , 4 <i>B. & C.</i> 136 ..	916
Winterstoke, 19 <i>L. J. Q. B.</i> 206 :	584	Beeley v. Wingfield, 11 <i>East</i> , 46 ..	164
Barwick, 7 <i>T. R.</i> 33	1313	Beere, 2 <i>Moo. & Rob.</i> 472	213
Baskerville v. Gulliam, <i>Mo.</i> 657 ..	1001	Beeston, 24 <i>L. J. M. C.</i> 5	174
Baspoole, 2 <i>Show.</i> 486	1033	Beeton, <i>Den.</i> 414	229
Bass, 2 <i>Car. & K.</i> 822	26	Beezley, 4 <i>C. & P.</i> 220	1149
Bass, <i>East, P. C.</i> 566 ; <i>Leach</i> , 251 :	385	Beharrel, <i>Str.</i> 498	33, 34
Bass, <i>Leach</i> , 870	482	Bell and ux., <i>Andr.</i> 69	171
Bassett, 1 <i>Cox</i> , 51	531	Bell, <i>Moo. & Malk.</i> 440	198
Batcheldor, 1 <i>Per. & D.</i> 516 ..32, 33, 38		Bell, 5 <i>C. & P.</i> 162	738
Bate, 8 <i>C. & P.</i> 875	678	Bell, <i>Fost. Cr. L.</i> 430	871
Bateman, 1 <i>Cox</i> , 186	667	Bell, 1 <i>Moo. & Rob.</i> 294	1012, 1020
Bateman v. Burge, 6 <i>C. & P.</i> 391 ..	1248	Bell, 3 <i>Bulstr.</i> 322	218, 1030
Bates, 2 <i>Fost. & F.</i> 217	211	Bellamy, <i>Ry. & M.</i> 175	250
Bates, 3 <i>Cox</i> , 201	522	Bellingham, 1 <i>Russ. C. M.</i> 9	967
Bath, <i>Leach</i> , 441	284	Bellingham, <i>Sty.</i> 126	
Bathews v. Galindo, 3 <i>C. & P.</i> 238 :	186	Belson, <i>In re</i> , 14 <i>Jur.</i> 631 ; 7 <i>E. F.</i>	
Bathurst, <i>Say. Rep.</i> 225	1106, 1119, 1121	<i>Moore</i> , 114	31, 33
Bathwick, 2 <i>B. & Adol.</i> 639	184, 863	Belstead, <i>Russ. & Ry.</i> 411	392, 508
Batt, 6 <i>C. & P.</i> 329	573	Belton, 1 <i>Salk.</i> 372	121
Batty, 2 <i>Moo. C. C.</i> 257	491	Belton, 5 <i>Jur.</i> 276	169
Baude, <i>Cro. Jac.</i> 41	1115, 1120, 1123	Belton, 11 <i>Mod.</i> 79	947
Baxter, 3 <i>Cox</i> , 502	492	Belwood, 11 <i>Mod.</i> 79	611
Baxter, 1 <i>Leach</i> , 578	545	Bembridge, 6 <i>East</i> , 136	1313
Baxter, 3 <i>Mod.</i> 69	1153	Bembridge, 1 <i>Salk.</i> 380	968
Bawn, 1 <i>Cox</i> , 33	851	Benesech, <i>Peake, Add. Ca.</i> 93	
Bayley, 1 <i>Jur.</i> 192	107	Benfield, 2 <i>Burr.</i> 980 ..98, 135, 139,	1136, 1148
Bayley, <i>Dearsl. & B.</i> 121	492	Bengough, 3 <i>Salk.</i> 170	1124
Bayley, <i>Car. Cr. L.</i> 143	884	Bennett and ux. v. Watson, 3 <i>M.</i>	
Bayley, 5 <i>B. & Ald.</i> 647	1034	<i>& S.</i> 1	22
Baylis, 4 <i>Cox</i> , 23	839	Bennett, <i>Leach</i> , 553	198, 1024
Baylis, 3 <i>Burr.</i> 1318	944, 945	Bennett, <i>Russ. & Ry.</i> 289	458
Baynes, <i>Leach</i> , 7	77	Bennett, 28 <i>L. J. M. C.</i> 27	771
Bazeley, <i>Leach</i> , 835	493	Bennett, 6 <i>C. & P.</i> 179	888
Beacall, 1 <i>Moo.</i> 15	93, 488, 497	Benson, 2 <i>Camp.</i> 509	1021, 1033
Beach, <i>Leach</i> , 133	1018	Benson, 1 <i>Sid.</i> 420	1076
Beade v. Orme, <i>Noy.</i> 136	1109	Benson, 1 <i>Keb.</i> 901	1121
Beal, 3 <i>Mod.</i> 124	303	Benson v. Offley, 2 <i>Show.</i> 510	754
Beale, 1 <i>East</i> , 183	1203	Bensted, <i>Cro. Car.</i> 583	314, 957
Beaman, <i>Car. & M.</i> 595	385	Bent, 2 <i>Car. & K.</i> 179	1321
Beany, <i>Russ. & Ry.</i> 416	261	Bent, <i>Den.</i> 157	1322
Bear, <i>East, P. C.</i> 413	80	Bentley, 2 <i>C. & P.</i> 148	198
Bear, <i>Carth.</i> 407	1141	Berchet, 2 <i>Salk.</i> 594	1097
Bear, 2 <i>Salk.</i> 417	1152	Bernard, 1 <i>Fost. & F.</i> 240 ..41, 83,	
Beard, 8 <i>C. & P.</i> 143 ..93, 169, 650,		117, 172, 272, 751, 781	
667, 668		Bernard, 1 <i>Ld. R.</i> 94	1310
Beardmore, 7 <i>C. & P.</i> 497	50	Berriman, 5 <i>C. & P.</i> 601	89
Beardmore, 8 <i>C. & P.</i> 260	211	Berry, 1 <i>Moo. & Rob.</i> 463 ..217, 260, 780	
Beardmore, 2 <i>Burr.</i> 792	304, 935	Berry, <i>Bell</i> , 95 ; 28 <i>L. J. M. C.</i>	
		70	389
		Berry, <i>Bell</i> , 467	981

Table of Cases.

	PAGE		PAGE
Berry, 4 <i>T. R.</i> 217	1152	Bitton, 6 <i>C. & P.</i> 92.....	118
Berry v. Adamson, 6 <i>B. & C.</i> 528..	7	Blackburn, 6 <i>Cox</i> , 333	158
Berwick, <i>Fost.</i> 10	322	Blackburn, 9 <i>Car. & K.</i> 330	170
Besant, 7 <i>D. P. C.</i> 680	105	Blacket and another, 7 <i>Mod.</i> 39....	1181
Best, 2 <i>Moo.</i> 124	915	Blackham, <i>East</i> , 711	433
Best, 1 <i>Salk.</i> 174	1052, 1057, 1061	Blackham, <i>Trem. P. C.</i> 101	934
Best, 2 <i>Ld. R.</i> 1167.....	1056, 1062	Blackman, 1 <i>Esp.</i> 95.....	1222, 1223
Bethel, 6 <i>Mod.</i> 33	112	Blackson, 8 <i>C. & P.</i> 43	97
Bethel, 5 <i>Mod.</i> 19.....	285	Blackwell, 7 <i>Cox</i> , 353	119
Betterton, 5 <i>Mod.</i> 142	1241	Blades v. Higgs, 30 <i>L. J. C. P.</i> 47 :	822
Betts, <i>Bell</i> , 99	484	Blake, 7 <i>C. & P.</i> 166.....	264, 467
Betts, 4 <i>Cox</i> , 211	1295	Blake, 6 <i>Q. B.</i> 126	1060, 1069
Bettsworth, 2 <i>Show.</i> 757.....	1309	Blake, 3 <i>Burr.</i> 1731....	1106, 1119, 1121
Beverley, <i>Latch</i> , 224	1113	Blake v. Barnard, 9 <i>C. & P.</i> 626: 795, 819	
Bevis, 1 <i>Cox</i> , 29	85	Blake v. Leigh, 1 <i>Hawk. c.</i> 37, s. 4 :	548
Bew, <i>Russ. & Ry.</i> 480.....	508	Blakeman, 3 <i>Car. & K.</i> 97	155
Bewdley Corporation, <i>Holt's Ca.</i>		Blakeman, 14 <i>Q. B.</i> 544	1299
453	135	Bland, 1 <i>Lew.</i> 236	89, 237
Bibithe, 4 <i>Rep.</i> 43, 161	76	Bland, <i>Leach</i> , 598.....	1220
Bickerstaff, 2 <i>Car. & K.</i> 261	1231	Blatch v. Archer, <i>Comp.</i> 64.....	7
Bickerton, <i>Str.</i> 498.....	1148, 1149	Blea, 8 <i>C. & P.</i> 735	94
Bidwell, <i>Den.</i> 222.....	943	Blenkinsop, <i>Den.</i> 276	663
Biers, 1 <i>Ad. & El.</i> 327	85, 1052	Bliek, 4 <i>C. & P.</i> 377	203, 425
Biers, 3 <i>Nev. & M.</i> 475.....	1059	Bliss, <i>Cro. Car.</i> 184	1248
Bigg, <i>East</i> , 882.....	647	Blisset, 1 <i>Mod.</i> 13	1097
Bignold, 4 <i>Dowl. & Ry.</i> 70.....	171	Bloomfield, <i>Car. & M.</i> 537	521
Bignold, 2 <i>Russ. C. M.</i> 639	1013	Bloomfield, <i>East, P. C.</i> 416	631
Bill, 2 <i>Burr.</i> 805.....	935	Bloomfield v. Blake, 6 <i>C. & P.</i> 75 :	1057
Billingham, 2 <i>C. & P.</i> 234	1100	Blower, <i>Say. Rep.</i> 119	1263
Billingshurst, 3 <i>M. & S.</i> 250	851	Bloxham, <i>Inhabitants</i> , 1 <i>New. S. C.</i>	
Bingham, 1 <i>Ch. Burn</i> , 100	944	370 ; 2 <i>Dowl. & L.</i> 168 ; 6 <i>Q. B.</i>	
Bingley, <i>Russ. & Ry.</i> 446	76	528	106
Bingley, 5 <i>C. & P.</i> 602	432	Blurton, 2 <i>Jur.</i> 33	137
Bingley, 1 <i>Sess. Ca.</i> 84	1242	Blyton, <i>Den.</i> 191	384
Binglose, <i>East</i> , 488	455	Boardman, 2 <i>Moo. & Rob.</i> 147	684
Bint v. Lavender, 1 <i>C. & P.</i> 659 ..	7	Bodell, 6 <i>C. & P.</i> 186	230
Birch, <i>Den.</i> 185	441	Boden, 1 <i>Car. & K.</i> 395 .. 437, 441,	801
Birch, <i>Leach</i> , 79	657	Bodle, 6 <i>C. & P.</i> 186	252
Birch, 2 <i>Car. & K.</i> 193	801	Bolam, 2 <i>Moo. & Rob.</i> 192	50
Birchenough, 1 <i>Moo. C. C.</i> 477....	130	Bolland, <i>Leach</i> , 83	660
Bird, <i>Den. & P.</i> 90	130	Bolton, 1 <i>Q. B.</i> 66	108
Bird, 9 <i>C. & P.</i> 44	454, 461, 473	Boltz, 6 <i>Dowl. & Ry.</i> 65.....	270
Bird, 2 <i>Car. & K.</i> 81	870	Boltz, 5 <i>B. & C.</i> 334.....	1164
Birdseye, 4 <i>C. & P.</i> 386	241	Bomaster, 2 <i>Burr.</i> 1039	896
Birkett, 8 <i>C. & P.</i> 732.....	181	Bond, 19 <i>L. J. M. C.</i> 138 ; <i>Den.</i>	
Birkett, <i>Russ. & Ry.</i> 251	237, 650	517	18, 391, 500
Birkett, 4 <i>C. & P.</i> 216	408	Bones v. Booth, <i>Str.</i> 22	878, 891
Birkett, <i>Russ. & Ry.</i> 86	665	Bones v. Booth, <i>Sir Wm. Bl.</i> 1226 :	1189
Birmingham, 9 <i>C. & P.</i> 469	934	Bonner, 2 <i>Russ. C. M.</i> 759.....	205
Birmingham, 8 <i>B. & C.</i> 29.....	859	Bonner, 7 <i>Cox</i> , 13	392
Birmingham and Gloucester Rail-		Bonny, <i>Carth.</i> 272	893
way Company, 1 <i>Gale & D.</i> 457..	121	Bontien, <i>Russ. & Ry.</i> 260.....	660, 662
Birmingham and Gloucester Rail-		Boober et ux., 4 <i>Cox</i> , 272	73
way Company, 6 <i>Jur.</i> 804 .. 123, 1283		Booker, 2 <i>D. P. C.</i> 446	28
Birnie, 1 <i>Moo. & R.</i> 160 24, 825,	944	Booth v. Hanley, 1 <i>C. & P.</i> 288....	12
Birt, 5 <i>C. & P.</i> 154	571	Booth, 1 <i>Ld. Ken.</i> 170.....	36
Bishop, 6 <i>Dowl. & L.</i> 499	110	Booth, <i>Russ. & Ry.</i> 29.....	727
Bishop, <i>Andr.</i> 220	121	Booth, <i>Russ. & Ry.</i> 47.....	1195
Bishop, <i>Car. & M.</i> 302	984	Bootie, <i>Burr.</i> 865	947
Bishop v. Curtis, 18 <i>Q. B.</i> 878 ; 21		Booty, 2 <i>Ld. Ken.</i> 575.....	958
<i>L. J. Q. B.</i> 391.....	300	Bootyman, 5 <i>C. & P.</i> 300	133, 499
Bishop Auckland, 1 <i>Ad. & El.</i> 744 :		Boulter, <i>Den. & P.</i> 396	1026
1254, 1266, 1290		Boulter v. Clark, <i>Bull. N. P.</i> 16 ..	823
Bispham, 4 <i>C. & P.</i> 392	251	Boreham, 2 <i>Cox</i> , 189	665
Biss, 2 <i>Moo. C. C.</i> 93	87	Boroski, 3 <i>St. Tr.</i> 474.....	202
Bisset, <i>In re</i> , 14 <i>L. J. M. C.</i> 17 ;		Borrett, 6 <i>C. & P.</i> 124	497, 1232
1 <i>New. S. C.</i> 357	33	Borthwick, 1 <i>Dougl.</i> 207.... 81, 750,	757
Bissett, 1 <i>Cox</i> , 148	718	Boss v. Litton, 5 <i>C. & P.</i> 407	768
Biswell, 2 <i>Cox</i> , 279	846	Boston, 4 <i>East</i> , 572	1029

Table of Cases.

xxi

	PAGE		PAGE
Boswell, <i>Car. & M.</i> 534	192	Brampton, 10 <i>East</i> , 282	859
Botfield, <i>Car. & M.</i> 151	1261	Brandreth, 32 <i>How. St. Tr.</i> 857 ..	325
Bothe, <i>Mo.</i> 666	82, 636	Brangan, <i>Leach</i> , 27	277
Botright, <i>Say.</i> 147	614	Brannan, 6 <i>C. & P.</i> 326	680
Bott v. Ackroyd, 23 <i>L. J. M. C.</i> 207	2	Branton, <i>East</i> , 485	454
Boucher, 8 <i>C. & P.</i> 141	169	Brawn, 1 <i>Car. & K.</i> 144	851
Boucher, 1 <i>Fost. & F.</i> 486	217	Bray, <i>Sty.</i> 147	1120
Boucher, 4 <i>C. & P.</i> 562	448	Braynell, 4 <i>Cox</i> , 402	213, 444, 445
Boucher, 5 <i>Jur.</i> 709	581	Brazier, <i>Leach</i> , 199	177
Boult, 2 <i>Car. & K.</i> 604	634	Brazier, <i>East</i> , <i>P. C.</i> 444	233
Boultbee, 6 <i>Nev. & M.</i> 26	360	Brazier, <i>Russ. & Ry.</i> 337	381
Boulton, <i>Den.</i> 508; 5 <i>C. & P.</i> 537 ..	390, 394	Brecon, 18 <i>L. J. M. C.</i> 127	1286
Bourdon, 2 <i>Car. & K.</i> 366	281	Bredon, q. t. v. Harman, <i>Str.</i> 701 ..	149
Bourne, 7 <i>Ad. & El.</i> 58	290	Breeme, <i>Leach</i> , 320; <i>East</i> , <i>P. C.</i> 1026	564
Bourne, 5 <i>C. & P.</i> 120	750	Breerton, <i>Noy.</i> 103	1053
Bourne v. The King, 5 <i>C. & P.</i> 120 :	750	Brenan, 10 <i>Q. B.</i> 492; 16 <i>L. J.</i> <i>Q. C.</i> 289	32, 33
Bowden, 2 <i>Moo.</i> 285	475	Brereton, 8 <i>Mod.</i> 330	1150
Bowden, 1 <i>Lew.</i> 9	1041	Brett, 2 <i>Russ. C. M.</i> 220	1226
Bowdich, 2 <i>Ch. Rep.</i> 278	269	Brewer, 6 <i>C. & P.</i> 363	234, 676
Bowditch v. Balchin, 19 <i>L. J. Ex.</i> 327; 5 <i>Ex.</i> 378	11	Brice, 2 <i>B. & Ald.</i> 606	169
Bowditch v. Fosberry, 19 <i>L. J. Ex.</i> 339	12	Brice, <i>Russ. & Ry.</i> 450	454
Bowen, 9 <i>C. & P.</i> 509	30	Bridge, <i>Cro. Jac.</i> 639	1123
Bowen, 19 <i>L. J. Q. B.</i> 63; 7 <i>Dowl.</i> & <i>L.</i> 312	111, 531	Bridgeman, <i>Car. & M.</i> 271	21, 1289
Bowen, 1 <i>Car. & K.</i> 501	123, 698	Bridger, 1 <i>Meca. & W.</i> 144	
Bowen, <i>Car. & M.</i> 149	796, 800	Bridges, <i>Godb.</i> 346	1289
Bowen, 2 <i>Car. & K.</i> 227	864	Bridges, 8 <i>East</i> , 53	1219, 1220
Bowen, 3 <i>C. & P.</i> 602	887	Bridgewater and Taunton Canal Company, 7 <i>B. & C.</i> 514	46, 1287
Bower, <i>Comp.</i> 343	614	Bridekirk, 11 <i>East</i> , 304	1266
Bower, 5 <i>Exp.</i> 127	1068	Brier, 18 <i>L. J. M. C.</i> 121	1183
Bowes, 1 <i>T. R.</i> 696	898	Briggs, 1 <i>Fost. & F.</i> 106	170
Bowes, 4 <i>East</i> , 171	1070	Briggs, 2 <i>Moo. & Rob.</i> 199	251
Bowler, 1 <i>Russ. C. M.</i> 10	250	Briggs, 1 <i>Moo.</i> 318	792, 798
Bowler, 6 <i>Jur.</i> 287	1319	Briggs, <i>Dearsl. & B.</i> 98	860
Bowles, <i>Cro. El.</i> 428	1013	Bright, 4 <i>C. & P.</i> 387	10
Bowman, 6 <i>C. & P.</i> 101	132	Bright, 2 <i>Ld. Keny.</i> 274	946
Bowray, 10 <i>Jur.</i> 211; In re, 5 <i>B. & Adol.</i> 1113	810	Brigstock, 6 <i>C. & P.</i> 184	1158
Bowser, 8 <i>D. P. C.</i> 128	1118	Brimilow, 2 <i>Moo.</i> 122	831, 839
Bowyer, 4 <i>C. & P.</i> 559	596	Bringloe, 13 <i>East</i> , 174	897
Box, 9 <i>C. & P.</i> 126	373	Brinklett, 3 <i>C. & P.</i> 416	90
Box, <i>Russ. & Ry.</i> 300	686	Brisac, 4 <i>East</i> , 164	1048, 1070
Boxall, 4 <i>Ad. & El.</i> 513	104	Brisby, <i>Den.</i> 406	936
Boyce, 1 <i>Moo.</i> 29	796	Briscoe, 1 <i>Dowl. N. P. C.</i> 520	209
Boycott, 1 <i>Ld. K.</i> 318	1309, 1310	Bristow, <i>Say. Rep.</i> 138	121
Boyes, 2 <i>Fost. & F.</i> 157	223	Bristow, 6 <i>T. R.</i> 168	935
Boynes, 1 <i>Car. & K.</i> 651	976, 998	Brittain, 3 <i>Cox</i> , 76	1066
Boys, 2 <i>Burr.</i> 802	935	Britton, 1 <i>Moo. & Rob.</i> 297	174, 626
Brackett, 4 <i>Cox</i> , 274	385	Britton, 1 <i>Fost. & F.</i> 354	242
Bradbury, 1 <i>Lew.</i> 639	198	Britton, 5 <i>Cox</i> , 180	906
Bradford, 8 <i>Cox</i> , 309	588, 810	Broadfoot, <i>Fost.</i> 154	771
Bradford, 1 <i>Salk.</i> 189	1302	Broadribb, 6 <i>C. & P.</i> 571	1200, 1210
Bradford, <i>Comb.</i> 304	1241	Brogan, 3 <i>Russ. C. M.</i> 88	211
Bradley, 2 <i>Man. & Ry.</i> 152	1163	Bromhead, 2 <i>Dowl. N. S.</i> 713	
Bradshaw, 7 <i>C. & P.</i> 233	950	Bromley, 2 <i>Russ. C. M.</i> 298	373
Bradshaw v. Vaughton, 30 <i>L. J.</i> <i>C. P.</i> 93	829	Bromwich, 1 <i>Lew.</i> 186	748
Brady, <i>Leach</i> , 274	505	Brooke, 2 <i>T. R.</i> 190	142, 945
Brady, <i>Leach</i> , 327	711	Brooke, 2 <i>Lew.</i> 267	832
Brain, 6 <i>C. & P.</i> 349	757	Brooke, 7 <i>Cox</i> , 251	1154
Braithwaite, 8 <i>Cox</i> , 254	1027	Brooks, <i>Dearsl.</i> 184	73
Braithwaite, 3 <i>B. & Adol.</i> 614	1311	Brooks, 1 <i>Cox</i> , 7	171
Bramah v. — Insurance, 3 <i>Chetw.</i> <i>Burn.</i> 532	983	Brooks, 1 <i>Cox</i> , 67	204
Bramley, 8 <i>Cox</i> , 468	380	Brooks, 8 <i>C. & P.</i> 295	375
Bramley, <i>Russ. & Ry.</i> 478	388	Brooks, 4 <i>C. & P.</i> 131	414
		Brooks, <i>Car. & M.</i> 544	466
		Brooks, 1 <i>Fost. & F.</i> 502	523
		Brooks, <i>Den.</i> 217	904
		Brooks, <i>Trem.</i> 151	980
		Brooks, <i>Trem.</i> 195	1238

	PAGE		PAGE
Brooks, <i>Say. Rep.</i> 167	1264	Buckeridge, 4 <i>Mod.</i> 48	1255
Brooks v. Hall, 2 <i>Ro. Rep.</i> 76	1038	Buckhurst, Lord, 2 <i>Keb.</i> 180	892
Brooks v. Warwick, 3 <i>Stark.</i> 289 ..	649	Buckingham, Marq. of, 4 <i>Campb.</i>	
Broome, 5 <i>Dowl. & L.</i> 607	297	189	1288
Broome v. Reg. 17 <i>L. J. M. C.</i> 52;		Buckle, 1 <i>Russ. C. M.</i> 409 ..	1051, 1059
11 <i>Q. B.</i> 834	70, 85	Buckler, 5 <i>C. & P.</i> 118	661
Brotherton, <i>Str.</i> 702	94, 1176	Buckler, <i>Dy.</i> 69	779, 890
Broughton, 6 <i>East</i> , 587	123	Bucklugh, Duke of, 1 <i>Salk.</i> 358 ..	
Broughton, 13 <i>Rep.</i> 127	1076	1279, 1291	
Broughton, <i>Trem.</i> 111	1079	Bucknall, Lord <i>Raym.</i> 792	1279
Broughton v. Prince, 3 <i>Leon.</i> 237 ..	147	Buckner, <i>Str.</i> 467	763, 772
Brown, <i>Car. & M.</i> 314	11	Bucks, JJ. 8 <i>B. & C.</i> 375	1290
Brown, 8 <i>T. R.</i> 26	25	Bucks, 12 <i>East</i> , 192	1276
Brown, 9 <i>C. & P.</i> 509	50	Buckworth, 1 <i>Sid.</i> 377	1032
Brown, 6 <i>Jur.</i> 168	65	Budd, 5 <i>Esp.</i> 230 ..	218
Brown, <i>Moo. & Malk.</i> 163: 85, 464, 1214		Bull, 9 <i>C. & P.</i> 32	228
Brown, 1 <i>Salk.</i> 376	120	Bull, <i>Leach</i> , 841, 1033	493
Brown, 17 <i>L. J. M. C.</i> 145; <i>Den.</i>		Bull, 1 <i>Cox</i> , 281	669
291	125	Bull, 2 <i>Fost. & F.</i> 201	766
Brown, 1 <i>Ventr.</i> 243	186, 843	Bull, 9 <i>C. & P.</i> 22	774
Brown, <i>East, P. C.</i> 731	434	Bullen v. Bullen, <i>Mo.</i> 656	1001
Brown, <i>Leach</i> , 199	446	Bulling v. Ferris, 1 <i>Mees. & W.</i> 628:	13
Brown, <i>East, P. C.</i> 487	454	Bullock, 25 <i>L. J. M. C.</i> 92	532, 533
Brown, <i>East, P. C.</i> 497	458	Bullock, 1 <i>Moo. C. C.</i> 324	62
Brown, 2 <i>Cox</i> , 348	531	Bullock, <i>Leach</i> , 996	630
Brown, <i>East, P. C.</i> 1007	711	Bullock v. Dodds, 2 <i>B. & Ald.</i> 258:	
Brown, <i>Leach</i> , 148	763	Bulwer, 7 <i>Rep.</i> 1; <i>East, P. C.</i> 771 ..	397
Brown, 1 <i>Lew.</i> 165	779	Bunce, 1 <i>Fost. & F.</i> 523	370
Brown, <i>Car. & M.</i> 814	948	Bunce, <i>Andr.</i> 163	1301
Brown, <i>Den.</i> 291	993	Bunting, <i>Leach</i> , 991	678
Brown, <i>Moo. & M.</i> 315: 1011, 1025, 1030		Bunts, 2 <i>T. R.</i> 683	286
Brown, 12 <i>Mod.</i> 516	1116	Bunyan, 1 <i>Cox</i> , 74	1185
Brown, 11 <i>Mod.</i> 86	1148	Burbage, 3 <i>Burr.</i> 1440	255
Brown, 1 <i>Freem.</i> 524	1151	Burder, 4 <i>T. R.</i> 778	1310
Brown, <i>Den.</i> 291	1169	Burdett v. Abbott, 14 <i>East</i> , 35	
Brown, <i>Russ. & Ry.</i> 232	1227	Burdett v. Colman, 14 <i>East</i> , 164 ..	1086
Brown, 11 <i>Mod.</i> 73	1267	Burdett, 1 <i>Ld. Raym.</i> 48; <i>Salk.</i> 645:	50
Brown, 1 <i>Keb.</i> 49	1313	Burdett, 24 <i>L. J. M. C.</i> 63	228
Brown v. Giles, 1 <i>C. & P.</i> 120	258	Burdett, 12 <i>Mod.</i> 111	269
Brown v. Gillies, 1 <i>Ch. Rep.</i> 372 ..	1003	Burdett, 1 <i>Ld. R.</i> 149	1075, 1078
Brown v. Michel, <i>Cro. El.</i> 500	986	Burdett, 4 <i>B. & Ald.</i> 95	
Browne v. Cumming, 10 <i>B. & C.</i> 70:	278	1143, 1148, 1154, 1161, 1162	
Brownlow, 8 <i>D. P. C.</i> 157	883, 887	Burdett, 4 <i>B. & Ald.</i> 314	1151
Brownlow, 11 <i>Ad. & El.</i> 119	891	Burgen, 1 <i>Ventr.</i> 13	610
Broxham, 1 <i>Hawk. c.</i> 21, s. 13	929	Burgess, 6 <i>Cox</i> , 293	364
Bruce, <i>Leach</i> , 1095	54, 783	Burgess, <i>Kel.</i> 27	461
Bruce, <i>Leach</i> , 243	552	Burgess, 1 <i>Russ. C. M.</i> 687	837
Bruce, <i>Al.</i> 50	1169	Burgess, 1 <i>Keb.</i> 38	1124
Brumby, 3 <i>Car. & K.</i> 315	429	Burgess, <i>Say. Rep.</i> 169	1263
Brumby v. Rollitt, 16 <i>Mees. & W.</i>		Burgess v. Coney, <i>Trem. P. C.</i>	
645	1303	402	
Brummitt, 8 <i>Cox</i> , 413; <i>Leigh &</i>		Burgiss, 6 <i>C. & P.</i> 488	27
<i>Cave</i> , 9	426	Burgiss, 7 <i>C. & P.</i> 1490	650, 676, 677
Brumrig v. Hanger, <i>Hardr.</i> 151 ..	978	Burgon, 25 <i>L. J. M. C.</i> 105; <i>Dears.</i>	
Branswick, 1 <i>Moo.</i> 26	392	& <i>B.</i> 11	522
Brunt	320	Burke, 2 <i>Stark.</i> 472	228
Brunton, <i>Russ. & Ry.</i> 454	183	Burke, <i>Russ. & Ry.</i> 496	643
Bryan, <i>Dears. & B.</i> 265	527	Burkett, <i>Andr.</i> 226	120
Bryan, <i>Str.</i> 866	614	Burks, 7 <i>T. R.</i> 4	1151
Bubb, 4 <i>Cox</i> , 455	745, 760, 763	Burley, 2 <i>Russ. C. M.</i> 958	192
Bubb, 1 <i>Wils.</i> 93	946	Burn, 1 <i>Jur.</i> 657	143
Buchanan, 1 <i>Cr. & M.</i> 195	292	Burn, 7 <i>Ad. & El.</i> 190	1144
Buchanan, 15 <i>L. J. Q. B.</i> 227	942	Burnard, 1 <i>C. & P.</i> 87	182
Buck v. Buck, 1 <i>Campb.</i> 547	1209	Burnby, 13 <i>L. J. M. C.</i> 28	120
Buck, 6 <i>Mod.</i> 306	1313	Burnett, 4 <i>M. & S.</i> 272	1302
Buck, 18 <i>L. J. M. C.</i> 113	936	Burnside, <i>Bell</i> , 282	522
Buck, <i>Str.</i> 679	946	Burr, 3 <i>Burn. Just. by D'Oyley</i> ,	
Buckbridge, 7 <i>Mod.</i> 52	1179	93	457
Buckeridge, 2 <i>Show.</i> 297 ..	270, 281, 285	Burraston, <i>Gow.</i> 216	628

Table of Cases.

xxiii

	PAGE		PAGE
Burraston, 4 <i>Jur.</i> 697.....	1019	Caley, 5 <i>Jur.</i> 709.....	90
Burnell, <i>Leach</i> , 588.....	508	Caley, 3 <i>Inst.</i> 109.....	465
Burridge, <i>Str.</i> 593.....	157	Callahan, 8 <i>C. & P.</i> 154.....	488
Burridge, 2 <i>Moo. & Rob.</i> 296.....	445	Callan, <i>Russ. & Ry.</i> 157.....	455
Burridge, 3 <i>P. Wms.</i> 483.....	958, 959	Callanan, 6 <i>B. & C.</i> 102.....	1019, 1022
Burrow, 1 <i>Moo. C. C.</i> 138.....	277	Calliand v. Vaughan, 1 <i>B. & P.</i> 210:	978
Burrow, 1 <i>Lew.</i> 138.....	119, 277	Calveley v. Rishley, <i>Moo.</i> 657.....	
Burrows, 2 <i>Moo. & Rob.</i> 124.....	169	Calvert, 2 <i>Cox</i> , 491.....	211
Burrows, 2 <i>Moo. & Rob.</i> 134.....	261, 285	Calvert, 3 <i>Car. & K.</i> 201.....	799
Burrows, 1 <i>Moo. C. C.</i> 274.....		Cambridgeshire Fens, Commoners,	
	459, 559, 561	case of, 1 <i>Hawk. c.</i> 27.....	99
Burrows, <i>Russ. & Ry.</i> 519.....	832	Cambridge Tailors, 8 <i>Mod.</i> 11.....	1057
Burroughs, 11 <i>Mod.</i> 385.....	163	Camfield, 1 <i>Moo.</i> 42.....	461
Burslem v. Fern, 2 <i>Wils.</i> 47.....	753	Campbell, 1 <i>Moo. C. C.</i> 179.....	374, 377
Burt, 5 <i>Cox</i> , 284.....	252	Campbell, <i>Leach</i> , 564.....	379, 474, 1052
Burton, 1 <i>Moo.</i> 237.....	486	Campbell v. Reg., 2 <i>New. S. C.</i> 297;	
Burton, <i>Str.</i> 481.....	768	11 <i>Q. B.</i> 799.....	284, 291, 477
Burton, 3 <i>Keb.</i> 345.....	966, 981	Campbell v. Reg., 17 <i>L. J. M. C.</i>	
Burton, <i>Sty.</i> 153.....	1007	89.....	293
Burton-upon-Trent, 3 <i>M. & S.</i> 537:		Camplin, <i>Den.</i> 89.....	834
	660, 851	Canadian Prisoners, 1 <i>Per. & D.</i>	
Bury, <i>Leach</i> , 201.....	98	516.....	32, 33
Busbey, 2 <i>Barnard.</i> 89.....	1313	Canniff, 9 <i>C. & P.</i> 359.....	764
Bush, <i>Russ. & Ry.</i> 572.....	71, 544	Canning, 19 <i>How. St. Tr.</i> 671.....	165
Bushell, <i>Vaugh.</i> 152.....	999	Canning, <i>Dougl.</i> 794.....	1006
Bushby, 1 <i>Bott.</i> 335.....	1059	Cannon, 1 <i>Lew.</i> 227.....	79
Butler, <i>Moo. & Malk.</i> 54; 2 <i>C. & P.</i>		Cannon, <i>Russ. & Ry.</i> 146.....	446
585.....	13	Cant, 2 <i>Moo.</i> 271.....	936
Butler, 1 <i>Lew.</i> 86.....	175	Capewell, 5 <i>C. & P.</i> 549.....	910
Butler, 2 <i>Car. & K.</i> 221.....	195, 213	Cardigan, Earl of, 24 <i>L. J. M. C.</i>	
Butler, 2 <i>Car. & K.</i> 340.....	385	117.....	65, 90
Butler, <i>East, P. C.</i> 776.....	461	Cardigan, Earl of, <i>Dearsi.</i> 477.....	69
Butler, <i>Russ. & Ry.</i> 31.....	863	Careinion Castle, 8 <i>East</i> , 77.....	182
Butler, 6 <i>C. & P.</i> 368.....	1294	Careswell, 5 <i>Jur.</i> 251.....	383
Butler v. Turley, <i>Moo. & Malk.</i> 54:	13	Carew, 1 <i>Ro. Rep.</i> 457.....	45
Butcher, 9 <i>D. P. C.</i> 135.....	102	Carlile, 6 <i>C. & P.</i> 619.....	21
Butcher, 1 <i>Moo. & Rob.</i> 228.....	169	Carlile, 6 <i>C. & P.</i> 415.....	35, 36
Butcher, 28 <i>L. J. M. C.</i> 14; <i>Bell</i> , 6:	524	Carlile, 8 <i>C. & P.</i> 584.....	45
Butcher, <i>Leach</i> , 265.....	195	Carlile, 2 <i>B. & Adol.</i> 971.....	289, 290
Butcher, <i>Peake</i> , 170.....	950	Carlile, 2 <i>B. & Adol.</i> 362.....	290
Butterfield, 2 <i>Moo. & Rob.</i> 352.....		Carlile, <i>Dearsi.</i> 357.....	1057
Butteris, 6 <i>C. & P.</i> 147.....	546	Carlile, 3 <i>B. & Ald.</i> 167.....	1136
Butterwick, 2 <i>Moo. & Rob.</i> 196.....	664	Carlile, 1 <i>Ch. Rep.</i> 451.....	1152
Butterworth, <i>Russ. & Ry.</i> 520.....	1007	Carlile, 6 <i>C. & P.</i> 636.....	1241
Buttery, 4 <i>B. & Ald.</i> 479, 536;		Carlile, 23 <i>L. J. M. C.</i> 100.....	1054,
<i>Russ. & Ry.</i> 342.....	658		1136, 1193
Button, 8 <i>C. & P.</i> 660.....	817	Carlton, 7 <i>C. & P.</i> 151.....	22
Button, 12 <i>Jur.</i> 1017.....	1054	Carmarthen, Marq. of, <i>Fort.</i> 359 ..	895
Button, 18 <i>L. J. M. C.</i> 19.....	1059	Carmarthenshire, JJ., 16 <i>L. J. M.</i>	
Buxton v. Gouch, 3 <i>Salk.</i> 269..	975, 985	<i>C.</i> , 167,.....	886
Byce, 1 <i>Bott.</i> 324.....	935	Carney, 1 <i>Moo.</i> 351.....	689
Byford, <i>Russ. & Ry.</i> 521.....	79	Carpenter v. Mason, 12 <i>Ad. & El.</i>	
Bykerdike, 1 <i>Moo. & Rob.</i> 179: 1050, 1063		629.....	145, 936
Byrne, 2 <i>Nev. & P.</i> 152.....	126, 1150	Carpenter, 1 <i>Cox</i> , 72.....	170
Byron, Lord, 11 <i>St. Tr.</i> 1177.....	764	Carpenter, 2 <i>Cox</i> , 228.....	213
C.		Carr, <i>Russ. & Ry.</i> 298.....	487
Cabbage, <i>Russ. & Ry.</i> 92.....	384, 1227	Carr, 8 <i>C. & P.</i> 163.....	768
Cadman, 1 <i>Moo.</i> 114.....	790	Carr, <i>Russ. & Ry.</i> 377.....	795
Cadogan, 3 <i>B. & Ald.</i> 902.....	1290, 1296	Carr, 1 <i>Sid.</i> 418.....	1031,
Cain, 2 <i>Moo. C. C.</i> 204.....	395, 403		1032, 1033
Caistor, 7 <i>Ad. & El.</i> 593.....	286	Carr, 2 <i>Keb.</i> 336.....	1078
Caldecott, 1 <i>D. P. C.</i> 315.....	109	Carradice, <i>Russ. & Ry.</i> 205.....	417
Calder, 1 <i>Cox</i> , 348.....	867	Carratt v. Morly, 1 <i>Q. B.</i> 18.....	816
Cale, 1 <i>Moo.</i> 11.....	538	Carroll, 7 <i>C. & P.</i> 145.....	247
Calfield v. —, 1 <i>Ro. Rep.</i> 189.....	777	Carroll, 1 <i>Moo.</i> 89.....	475
		Carroll, 1 <i>Wils.</i> 75.....	927
		Carruthers, 1 <i>Cox</i> , 138.....	444
		Carruthers, 1 <i>Man. & Ry. M. C.</i> 138:	891

	PAGE		PAGE
Carson, <i>Russ. & Ry.</i> 303.....	498	Champneys, 2 <i>Moo. & Rob.</i> 26 ..	129, 623
Cart, <i>Taylor, Ec.</i> 727	190	Chandler, 1 <i>Ld. R.</i> 545.....	5
Carter, 7 <i>Mod.</i> 173	34	Chandler, 1 <i>Str.</i> 612; <i>Dears.</i> 453,	
Carter, 1 <i>Str.</i> 442	53	807.....	672
Carter, 7 <i>C. & P.</i> 134	90	Chanell v. Rowbotham, <i>Velv.</i> 68 ..	465
Carter, 9 <i>Jur.</i> 878.....	284	Channel, <i>Str.</i> 793	615
Carter, 1 <i>Car. & K.</i> 173	472	Channen, 1 <i>Moo. C. C.</i> 374.....	160
Carter, 7 <i>C. & P.</i> 134	687	Chapman, 8 <i>C. & P.</i> 556.....	34
Carter, <i>Den.</i> 65	650, 653, 672	Chapman, 8 <i>C. & P.</i> 538.....	50
Carter, <i>Holt</i> , 347	1010	Chapman, 6 <i>Mod.</i> 152	134
Carter, 6 <i>Mod.</i> 168	1030	Chapman, 8 <i>C. & P.</i> 588	221, 257
Cartworth, 3 <i>Gale & D.</i> 162	105, 107	Chapman, 1 <i>Car. & K.</i> 119	495
Cartwright, <i>Russ. & Ry.</i> 106....	526, 673	Chapman, 2 <i>Car. & K.</i> 846	981
Cartwright, 4 <i>T. R.</i> 490	812	Chapman, <i>Den.</i> 432	975
Cartwright v. Green, <i>Leach</i> , 952: 123,	368	Chapman, <i>Ex p.</i> , 4 <i>Ad. & El.</i> 773: 137,	929
Casano, 5 <i>Esp.</i> 231	1203	Chapple or Chappel, 9 <i>C. & P.</i> 355..	83
Case, <i>Leach</i> , 154	722	Chapple or Chappel, <i>Russ. & Ry.</i> 77:	591
Case, 19 <i>L. J. M. C.</i> 174; <i>Den.</i> 580:	833	Chapple or Chappel, <i>Comb.</i> 477....	135
Case, 1 <i>C. & P.</i> 117, on the Midland		Chapple or Chappel, 1 <i>Burr.</i> 402: 140,	1104
Circuit	73	Chapple or Chappel, 1 <i>Moo. & Rob.</i>	
Case, <i>Durham Sp. As.</i>	74	305.....	199
Case, <i>Russ. & Ry.</i> 173.....	279	Chapple or Chappel, 5 <i>T. R.</i> 371 ..	1220
Case, from the Recorder, 1814, <i>Russ.</i>		Chapple or Chappel, 3 <i>Campb.</i> 91..	1308
& <i>Ry.</i> 268	284	Charles, 31 <i>L. J. M. C.</i> 69; <i>Leigh &</i>	
Case, from the Oxford Circuit, <i>East,</i>		<i>Cave</i> , 90	1183
<i>P. C.</i> 617.....	391	Charlewood, <i>East</i> , 689	373
Case, <i>Den.</i> 580	821	Charlesworth, 2 <i>Fost. & F.</i> 326..	188, 224
Caspar, 2 <i>Moo.</i> 101	540	Charlesworth, 16 <i>Q. B.</i> 1012..	1249, 1250
Cassidy, 1 <i>Fost. & F.</i> 79.....	230	Charnock, <i>Holt's Ca.</i> 301.....	324, 329
Casey, <i>Kel.</i> 62.....	453	Charrettle, 18 <i>L. J. M. C.</i> 100	1198
Castle, 1 <i>Hale</i> , 558	458	Charter v. Græme, 18 <i>L. J. M. C.</i> 73:	581
Castle, <i>Dears.</i> & <i>B.</i> 363.....	932	Chatburn, 1 <i>Moo. C. C.</i> 403; <i>Chater</i>	
Castlehaven (Lord), 1 <i>Russ. C. M.</i>		& <i>Cox</i> , 1, 489	94, 217, 260
676	837	Chatley, <i>Say.</i> 152	946
Catapodi, <i>Russ. & Ry.</i> 65.....	649	Cheafor, <i>Den. & P.</i> 361	414
Caton, 1 <i>Russ. C. M.</i> 231.....	1172	Checkett, 6 <i>M. & G.</i> 188	70
Cator, 4 <i>Burr.</i> 20	505	Chedwicke, 1 <i>Keb.</i> 612	1020
Cator, 4 <i>Esp.</i> 117	1154	Chedworth, 9 <i>C. & P.</i> 285	1269
Cator, 2 <i>East</i> , 261.....	1164	Cheere, 9 <i>B. & C.</i> 402	1307
Cattell, app., Ireson, resp., 27 <i>L. J.</i>		Cheeseman, 7 <i>C. & P.</i> 455; <i>Leigh &</i>	
<i>M. C.</i> 167.....	179	<i>Cave</i> , 140; 380	746
Caudle v. Symmons, 1 <i>Q. B.</i> 889 ..	211	Cherry, <i>East, P. C.</i> 556	363
Caudle v. Symmons, 1 <i>Gale & D.</i>		Chester Mill case, 10 <i>Rep.</i> 168	1294
145	3	Chichester, 17 <i>Q. B.</i> 504; <i>Den. &</i>	
Caudwell, <i>Den. & P.</i> 272.....	268	<i>P.</i> 408	281
Caulkin, 3 <i>Ch. Burn</i> , 443	45	Chichester, <i>Al.</i> 12	769
Causey, 2 <i>Hawk. c.</i> 9, s. 23	878	Chigwell, 1 <i>B. & Ald.</i> 67	269, 1271
Cave v. Mountain, 1 <i>M. & Gr.</i> 257:	24	Child, 5 <i>Cox</i> , 197	69, 219
Cave, <i>East, P. C.</i> 438	831	Child, 4 <i>C. & P.</i> 442.....	1099
Cawdry v. Atton, <i>Poph.</i> 59.....	1175	Chipchase, <i>Leach</i> , 699	384
Cawthorn, <i>Ex p.</i> , 19 <i>Ves.</i> 260	1051	Chipping Sodbury, 3 <i>Nev. & M.</i> 104:	605
Chadwick, 6 <i>C. & P.</i> 181	216, 535	Chisholm, <i>Russ. & Ry.</i> 297.....	660
Chadwick, 2 <i>Moo. & R.</i> 545	667	Chisser, <i>Tho. Raym.</i> 275.....	376
Chadwick, <i>Greave's Cr. L.</i> 10.....	751	Cholsey, <i>Comp.</i> 726	305
Chadwick, 17 <i>L. J. M. C.</i> 33.....	851	Christance, 1 <i>Cox</i> , 143	392
Chalehman v. Wright, <i>Noy. Rep.</i> 118:	146	Christance, 1 <i>Cox</i> , 1	524
Chalking, <i>Russ. & Ry.</i> 343	458	Christian, <i>Car. & M.</i> 388....	67, 572, 981
Chalkley, <i>Russ. & Ry.</i> 258	593	Christie, 7 <i>Cox</i> , 506	171
Challicombe, 6 <i>Jur.</i> 481	269	Christie, 2 <i>Russ. C. M.</i> 754	205
Challicombe, 2 <i>Moo. & Rob.</i> 309 ..	1269	Christopher, <i>Den.</i> 536	224
Challoner, 12 <i>Mod.</i> 377.....	135	Christopher, <i>Bell</i> , 9	367
Challoner, <i>Dickinson</i> , <i>Q. S.</i> 245 ..	474	Chubb, <i>Deac. Cr. L.</i> 1687	576
Challoner, 1 <i>Keb.</i> 585	1130	Chute, 3 <i>Keb.</i> 418	1310
Chalmers, 1 <i>Moo. C. C.</i> 352.....	94	Cirwan, <i>East, P. C.</i> 182	726
Chamberlayne, 1 <i>T. R.</i> 206.....	111	City of London, 8 <i>Rep.</i> 121.....	39
Chamberlayne, 6 <i>C. & P.</i> 95....	118, 126	Clapp, 3 <i>T. R.</i> 107.....	1314
Chamberlayne, 1 <i>Moo.</i> 59	132, 218	Clark, 3 <i>Burr.</i> 1362.....	35
Chambers v. Robinson, <i>Bull. N. P.</i>		Clark, <i>Russ. & Ry.</i> 358.....	87
239.....	1033	Clark, 5 <i>B. & Ald.</i> 728	116

Table of Cases.

XXV

	PAGE		PAGE
Clark, 1 <i>Dowl. & Ry.</i> 45	121	Cobbett v. Sloman, 4 <i>Ex.</i> 747; 19	
Clark, 3 <i>Burr.</i> 1809	124	<i>L. J. Ex.</i> 270; 7 <i>Q. B.</i> 187; 9 <i>Ex.</i>	31
Clark, 1 <i>Br. & Bing.</i> 473	129	633; 23 <i>L. J. Ex.</i> 144	
Clark, 1 <i>Fost. & F.</i> 654	132	Cobbett, In re, 14 <i>M. & Wels.</i> 175;	38
Clark, 12 <i>Mod.</i> 615	135	3 <i>Dowl. & L.</i> 209	259
Clark, 7 <i>T. R.</i> 536	146	Cobbett, 2 <i>Ch. Burn</i> , 528	21
Clark, 2 <i>Stark.</i> 241	185, 836	Cobus, 1 <i>Cox</i> , 207	270
Clark, <i>Car. Cr. L.</i> 59	195	Cochrane, Lord, 3 <i>M. & S.</i> 10	1213
Clark, 2 <i>Fost. & F.</i> 2	211	Cock, 4 <i>M. & S.</i> 71	
Clark, 2 <i>Stark.</i> 242	232	Cockburn, 26 <i>L. J. M. C.</i> 136;	
Clark, <i>Dearsi.</i> 200	244	<i>Dearsi. & B.</i> 203	209
Clark, 2 <i>Stark.</i> 241	253	Cockburn, 3 <i>Cox</i> , 543	840
Clark, 1 <i>Moo.</i> 376	388	Cockeril v. Apthorp, 3 <i>Bulstr.</i> 147:	
Clark, <i>Russ. & Ry.</i> 181	420	1018, 1038	
Clark, 1 <i>Car. & K.</i> 420	465	Cockin, 2 <i>Lew.</i> 235	369
Clark, 2 <i>Russ. C. M.</i> 296	525	Cockwaine, <i>Leach</i> , 498	374, 518
Clark, 1 <i>Lew.</i> 229	503	Codrington, 1 <i>C. & P.</i> 661	522, 528
Clark, 3 <i>Cox</i> , 89	680	Coe, 6 <i>C. & P.</i> 403	867
Clark, <i>Comp.</i> 610	812	Coffin, 2 <i>Cox</i> , 44	365
Clark, 3 <i>Ad. & El.</i> 287	815	Cohen, 1 <i>Stark.</i> 516	269
Clark, 24 <i>L. J. M. C.</i> 25	838	Cohen, <i>Den. & P.</i> 249	380
Clark, 5 <i>B. & Ald.</i> 665	941	Cohen, 1 <i>Stark.</i> 511	983
Clark, <i>Str.</i> 1216	943	Cohen, 8 <i>Cox</i> , 41	1220
Clark, 1 <i>Barnard.</i> 304	1153	Colchester, 2 <i>Keb.</i> 53	1277
Clark, 1 <i>Burr.</i> 606	1181	Cole, 6 <i>T. R.</i> 640	143
Clark, 5 <i>Q. B.</i> 88	1269	Cole, 1 <i>Ph. Ev.</i> 195	236
Clark, 12 <i>Mod.</i> 615	1294	Cole, 3 <i>Campb.</i> 371	261, 869
Clark, 1 <i>T. R.</i> 679	1308	Cole, 2 <i>Cox</i> , 340	375
Clark, 1 <i>Fost. & F.</i> 654	1321	Cole, 5 <i>Jur.</i> 200	382
Clark v. Cawthorn, 7 <i>T. R.</i> 321 ..	143	Cole, 4 <i>Cox</i> , 280	395
Clark v. Newsam, 1 <i>Exch.</i> 131	682	Cole, <i>East</i> , <i>P. C.</i> 767	1219
Clark, In re, 2 <i>Q. B.</i> 619	32	Cole, 1 <i>Esp.</i> 169	1222
Clapham, 1 <i>Lew.</i> 200	468, 1032	Cole and ur. v. Eagle, 8 <i>B. & C.</i>	
Clapton, 3 <i>Cox</i> , 126	497	409	1108
Clarkson, 1 <i>Cox</i> , 110	673	Colebourne, 1 <i>Fost. & F.</i> 655	1321
Clay, <i>Russ. & Ry.</i> 387	408	Coleman, 6 <i>Cox</i> , 163	238
Clay, <i>East</i> , 580	1232	Coleman, <i>East</i> , <i>P. C.</i> 123	319
Clayburn, <i>Russ. & Ry.</i> 360	458	Coleman, <i>East</i> , <i>P. C.</i> 672	373, 519
Clayfield, 2 <i>Russ. C. M.</i> 943	229	Coleman, <i>Mo.</i> 466; <i>East</i> , <i>P. C.</i>	
Clayton, 1 <i>Car. & K.</i> 128	568	513	466
Cleggs, 3 <i>Cox</i> , 295	575	Coleman, 1 <i>Ld. Raym.</i> 443	628
Clement, 1 <i>Lew.</i> 113	410	Coleman, 1 <i>Russ. C. M.</i> 700	874
Clement v. Chivis, 9 <i>B. & C.</i> 172 ..	1132	Collett, <i>Russ. & Ry.</i> 498	465
Clement, 4 <i>B. & Ald.</i> 418	1137	Colley, <i>Moo. & M.</i> 319	230
Clements, 5 <i>Cox</i> , 191	46	Colley, 2 <i>Moo. & Rob.</i> 475	561
Clements, <i>Den. & P.</i> 251	209	Collicott, <i>Russ. & Ry.</i> 212	706
Clerke, 3 <i>Salk.</i> 2	37	Collier, 2 <i>D. C. P.</i> 581	151, 915
Clerke, 1 <i>Salk.</i> 377	889, 891	Collier, 3 <i>Cox</i> , 57	195
Clerke, 1 <i>Keb.</i> 933	1308	Collier, 4 <i>Jur.</i> 703	369
Clewes, 4 <i>C. & P.</i> 221	190, 202, 781	Collier, 5 <i>C. & P.</i> 180	635
Clifford, 1 <i>C. & P.</i> 521	220	Collier v. Hicks, 2 <i>B. & Adol.</i> 663:	826
Clifford, 2 <i>Car. & K.</i> 402	668	Collingwood, 3 <i>Salk.</i> 42	1194
Clifford, 2 <i>Campb.</i> 272	1047	Collins, 9 <i>C. & P.</i> 456	226, 1090
Clifford, 2 <i>Campb.</i> 227	1200	Collins, 5 <i>C. & P.</i> 305	320
Clifford v. Brandon, 2 <i>Campb.</i> 370:	1093	Collins, 2 <i>Moo. & Rob.</i> 461	655, 667
Clifton, 5 <i>T. R.</i> 498	1265, 1268	Collins, 9 <i>C. & P.</i> 456	1155
Closs, 27 <i>L. J. M. C.</i> 54; <i>Dearsi. &</i>		Collison, 4 <i>C. & P.</i> 465	10
<i>B.</i> 460	610, 633	Colson, 3 <i>Mod.</i> 72	1092, 1097
Clube, 3 <i>Jur.</i> 698	217	Collyer, 1 <i>Wils.</i> 332	929
Cluderay, <i>Den.</i> 514		Colvin, 8 <i>Mod.</i> 226	1076
Cluworth, 6 <i>Mod.</i> 163	1272	Combe, <i>Noy.</i> 101	634
Coalheavers, <i>Leach</i> , 64	80	Combrune, 1 <i>Wils.</i> 301	613
Coate, <i>Lofft.</i> 73	819	Comer, <i>Leach</i> , 36	261
Coate, 8 <i>C. & P.</i> 394	795	Commerell, 4 <i>M. & S.</i> 203	1270
Coates, 1 <i>Man. & Ry.</i> 526	109	Commerell v. Beauclerk, 21 <i>L. J.</i>	
Coates, 1 <i>Ch. Burn</i> , 941	892	<i>Q. B.</i> 137	49
Cobbett, <i>Holt on Libel</i> , 114	1090	Comings, 5 <i>Mod.</i> 179	611, 1313

	PAGE		PAGE
Compson, 2 <i>Russ. C. M.</i> 834	196	Cornwall, <i>Mo.</i> 502	924
Compton, 7 <i>C. & P.</i> 139	464	Corrott, <i>Noy.</i> 93	1267
Compton, 3 <i>C. & P.</i> 418	471	Corry, 5 <i>East</i> , 372	1313
Compton, <i>Cald.</i> 246	612, 1051	Cosans, <i>Leach</i> , 342, <i>n.</i>	439
Connell, 1 <i>Car. & K.</i> 290	728	Coslet, <i>Leach</i> , 236	362
Connell, 6 <i>Cox</i> , 178	1194	Coster v. Hetherington, 28 <i>L. J. M.</i>	
Conner, 1 <i>Cox</i> , 236	167	<i>C.</i> 175	
Conner, 7 <i>C. & P.</i> 458	752	Cotesworth, 6 <i>Mod.</i> 172	820
Connop, 4 <i>Ad. & El.</i> 942	61	Cotterill, 1 <i>B. & Ald.</i> 67	1249
Connor, 2 <i>Cox</i> , 65	568	Cottingham, 6 <i>T. R.</i> 20	1258
Connor, 2 <i>Car. & K.</i> 518	786	Cotton, <i>W. Kel.</i> 133	929
Conolly, 8 <i>C. & P.</i> 21	75	Cotton, 3 <i>Campb.</i> 444	1267
Constable, 7 <i>Dowl. & Ry.</i> 663	281	Coulson, <i>Den.</i> 592	526
Coogan, <i>Leach</i> , 448	130, 657	Coulthart, 1 <i>Lew.</i> 194	832
Coogan, <i>East, P. C.</i> 948	656	Countesthorpe, 2 <i>B. & Ald.</i> 489	63
Cook, or Cooke, 1 <i>Fost. & F.</i> 389 ..	52	County, 2 <i>Russ. C. M.</i> 56	376
Cook, or Cooke, 7 <i>C. & P.</i> 559	66	County, 2 <i>Russ. C. M.</i> 118	397
Cook, or Cooke, 2 <i>B. & C.</i> 871	67	Coupey v. Henley, 1 <i>Russ.</i> 373	11
Cook, or Cooke, <i>Russ. & Ry.</i> 176 ..	94	Course, <i>Fost.</i> 349	82
Cook, or Cooke, 5 <i>Jur.</i> 181	102	Court, 7 <i>C. & P.</i> 486	189
Cook, or Cooke, 2 <i>B. & C.</i> 618	126	Court, 6 <i>Cox</i> , 202	588, 810
Cook, or Cooke, 4 <i>St. Tr.</i> 748 ..	226, 335	Courtalli, 1 <i>Q. B.</i> 893	212
Cook, or Cooke, <i>Leach</i> , 1013	220	Courtenay, 5 <i>Cox</i> , 218	462
Cook, or Cooke, 1 <i>C. & P.</i> 321	247, 254, 256	Courvoisier, 9 <i>C. & P.</i> 362	166, 170
Cook, or Cooke, 4 <i>M. & S.</i> 17	288	Cousens, 2 <i>Russ.</i> 948	254
Cook, or Cooke, 2 <i>Salk.</i> 634	334	Coveney, 7 <i>C. & P.</i> 667	17, 213
Cook, or Cooke, 2 <i>Russ. C. M.</i> 12 ..	367	Cover, 1 <i>Sid.</i> 91	1078
Cook, or Cooke, <i>East, P. C.</i> 616;		Cow, 1 <i>Lew.</i> 131	256
<i>Leach</i> , 105	408, 409	Coward v. Baddeley, 28 <i>L. J. Ex.</i>	
Cook, or Cooke, 1 <i>Fost. & F.</i> 64 ..	522	269	820
Cook, or Cooke, 8 <i>C. & P.</i> 586		Cowell, <i>East, P. C.</i> 17	540
44, 651, 664, 668, 676, 680		Cowle, 2 <i>Burr.</i> 834	65
Cook, or Cooke, <i>Cro. Car.</i> 537	772	Cowley v. Dunbar, 2 <i>C. & P.</i> 565 :	813
Cook, or Cooke, 14 <i>L. J. M. C.</i> 188 :	893	Cowper, <i>Skin.</i> 637	136, 355
Cook, or Cooke, <i>Den. & P.</i> 462	983	Cox, 1 <i>Fost. & F.</i> 90	203
Cook, or Cooke, 7 <i>C. & P.</i> 159	1005	Cox, 4 <i>C. & P.</i> 538	286, 1096, 1097
Cook, or Cooke, 5 <i>B. & C.</i> 538	1072	Cox, 1 <i>Car. & K.</i> 489	392
Cook v. Field, 3 <i>Esp.</i> 233	46	Cox, 1 <i>Fost. & F.</i> 664	795, 800
Cook v. Nethercote, 6 <i>C. & P.</i> 741 ..	10	Cox, <i>Russ. & Ry.</i> 362	796
Coombes, <i>Cald.</i> 59	916	Cox, 3 <i>Cox</i> , 58	799
Conway and Lynch v. Reg. 1 <i>Cox</i> ,		Cox, 1 <i>Moo.</i> 337	832
210	259	Cox, <i>Leach</i> , 71	1017
Cooper, 5 <i>C. & P.</i> 535	81	Cox, 2 <i>Burr.</i> 785	1177
Cooper, 3 <i>Car. & K.</i> 318	192, 555	Cox v. Coleridge, 1 <i>B. & C.</i> 37	826
Cooper, 3 <i>Cox</i> , 547	369	Coxhead, 1 <i>Car. & K.</i> 623	870, 871
Cooper, <i>Cro. Car.</i> 544	447, 774	Coxon, 7 <i>C. & P.</i> 651	27
Cooper, 2 <i>Car. & K.</i> 586	682	Coyle, 7 <i>Cox</i> , 74	223
Cooper, 2 <i>Car. & K.</i> 876	794	Cozins, 6 <i>C. & P.</i> 351	832, 873
Cooper, 18 <i>L. J. M. C.</i> 16	947	Cozins, <i>Dougl.</i> 426	945
Cooper, 8 <i>Q. B.</i> 533	1159	Cozinc, <i>Leach</i> , 392	1216
Cooper, <i>Cro. Jac.</i> 382	1243	Craddock, 4 <i>Cox</i> , 409	543
Cope, 1 <i>Nev. & P.</i> 515; 7 <i>C. & P.</i>		Craddock, <i>Den. & P.</i> 31	547
720	26	Cramp, <i>Russ. & R.</i> 327	711
Cope, 6 <i>Ad. & El.</i> 226	940, 941	Cranage, 1 <i>Salk.</i> 345	89
Cope, 1 <i>Str.</i> 144	1055, 1067	Cranburn, <i>Fost. Cr. L.</i> 186	320
Copeland, <i>Car. & M.</i> 516	523	Crane, 3 <i>Cox</i> , 53	61
Copeland, <i>Comb.</i> 3	1207	Cranfield, 5 <i>Mod.</i> 203	928
Coppard, <i>Moo. & M.</i> 118	1009	Craven, 1 <i>Lew.</i> 77	205
Coppard, 3 <i>C. & P.</i> 59	1018	Craven, <i>East, P. C.</i> 601	421
Coppen, q. t. v. Carter, 1 <i>T. R.</i> 462 :	149	Crawford, <i>In re</i> , 13 <i>Q. B.</i> 613; 18	
Corah, 2 <i>Russ. C. M.</i> 392	678	<i>L. J. Q. B.</i> 215	31, 32
Corbet v. Hill, <i>Cro. El.</i> 609	974	Crawley, 7 <i>C. & P.</i> 28	492
Cordy, 2 <i>Russ. C. M.</i> 248	541	Crawley, <i>Cro. Car.</i> 567	1312
Cordy and another, 3 <i>C. & P.</i> 325 ..	123	Crawshaw, 2 <i>Nev. & M.</i> 378	141
Cornelius, 3 <i>Keb.</i> 525	1041	Crawshaw, 9 <i>W. R.</i> 38	260
Cornish, <i>Dearsl.</i> 425	382	Crawshaw, <i>Bell</i> , 303	1188, 1191
Cornforth, 11 <i>East</i> , 451	845	Crawshay, 8 <i>Cox</i> , 138	357
Cornwall, J., 1 <i>New. S. C.</i> 314 : 105, 107		Crean, 8 <i>Cox</i> , 509	24
Cornwall, <i>Str.</i> 881	459, 876	Creed, 1 <i>Car. & K.</i> 63	496
		Creevey, 1 <i>M. & M.</i> 273	1139

Table of Cases.

xxvii

	PAGE
Crepps v. Durden, <i>Comp.</i> 649	1177
Crespigny, 1 <i>Esp.</i> 280	968
Crespin, 17 <i>L. J. M. C.</i> 128; 11 <i>Q. B.</i> 913	95
Crichton, <i>Russ. & Ry.</i> 62	497
Crick, 1 <i>Fost. & F.</i> 519	766
Crick, 5 <i>C. & P.</i> 508	909
Cricklade, 14 <i>Q. B.</i> 735	1252
Cripland, 11 <i>Mod.</i> 357	1202
Cripplegate, 5 <i>T. R.</i> 500	1265
Crisham, <i>Car. & M.</i> 187	837
Crisp, 6 <i>Mod.</i> 175	615
Crisp, 1 <i>B. & Ald.</i> 282	915
Critchley, 4 <i>T. R.</i> 128	1131
Crockatt, 4 <i>C. & P.</i> 554	205
Crocker, <i>Russ. & Ry.</i> 97	678, 680
Croford v. Blisse, 2 <i>Bulst.</i> 150	972
Croft, 9 <i>C. & P.</i> 219	244
Crofton, 1 <i>Ventr.</i> 63	138
Crofts, 2 <i>Ld. R.</i> 926	1118
Crohagan, <i>Cro. Car.</i> 332	324
Cromwell, Lord, <i>Yelv.</i> 15	1123
Crook, 1 <i>Fost. & F.</i> 251	766
Crooke, <i>Leach</i> , 706	237
Crookes, 3 <i>Burr.</i> 1842	121
Cropper, 2 <i>Moo. C. C.</i> 18	158, 165
Crosby, 3 <i>Wils.</i> 188	31
Crosby, 1 <i>Cox</i> , 20	528
Cross, <i>Dearsl. & B.</i> 68	628
Cross, 1 <i>Fost. & F.</i> 510	860
Cross, <i>Trem. P. C.</i> 846	980
Cross, 2 <i>C. & P.</i> 483	1239
Cross, 3 <i>Camp.</i> 224	1247
Crosse, 1 <i>Sid.</i> 204	881
Crossfield, 26 <i>Howell, St. Tr.</i> 55	322
Crossfield, 6 <i>Mod.</i> 43	943
Crossley, <i>Den. & P.</i> 319	93
Crossley, 2 <i>Esp.</i> 522	217
Crossley, 2 <i>Moo. & Rob.</i> 17	518
Crossley, 10 <i>Ad. & El.</i> 132	942
Crossley, 7 <i>T. R.</i> 315	980, 1021, 1022, 1034
Crouch, 4 <i>Cox</i> , 163	239
Crouch, 1 <i>Cox</i> , 94	256
Crowe, 4 <i>C. & P.</i> 251	52, 111
Crowe, 1 <i>Lew.</i> 88	490
Crowe, <i>Re</i> , 3 <i>Cox</i> , 123	1086
Crowhurst, 1 <i>Car. & K.</i> 370	368
Crowhurst, 2 <i>Ld. Raym.</i> 363	942
Crowther, 5 <i>C. & P.</i> 516	677, 681
Crowther, <i>Cro. El.</i> 654	947
Croydon, 2 <i>Cox</i> , 67	192
Crump, 1 <i>C. & P.</i> 658	407
Crumpton, <i>Car. & M.</i> 597	762, 763, 781, 801
Crunden, 1 <i>Camp.</i> 89	1187
Cruse et ux. 2 <i>Mod.</i> 53	75, 798
Cruse et ux. 8 <i>C. & P.</i> 546, 547	748, 794, 802
Crutchley, 5 <i>C. & P.</i> 33	577
Crutchley, 7 <i>C. & P.</i> 814	757
Cruttenden, 6 <i>Jur.</i> 167	369
Cryer, <i>Dearsl. & B.</i> 314	547
Cuddy, 1 <i>Car. & K.</i> 210	748
Cuddy v. Barlow, 1 <i>Man. & R.</i> 275	277
Culkin, 5 <i>C. & P.</i> 121	779
Cullen, 1 <i>Moo.</i> 300	680, 690
Cullen, 9 <i>C. & P.</i> 681	859
Culley, <i>In re</i> , 5 <i>B. & Adol.</i> 230	889, 891
Culliford, 1 <i>Salk.</i> 382	129

	PAGE
Culpeper, <i>Skin.</i> 673	238
Cumberland, 6 <i>T. R.</i> 195	1283, 1290
Cumberland, County of, v. Regem, 3 <i>Bos. & P.</i> 354	1283
Cumherworth, 3 <i>B. & Adol.</i> 108; 4 <i>Adol. & El.</i> 731	1258
Cundick, 1 <i>D. P. C.</i> 13	1196
Cunningham, <i>Bell</i> , 72	55, 799
Cur, <i>Str.</i> 788	136, 1186
Curling, <i>Russ. & Ry.</i> 123	552
Curnock, 9 <i>C. & P.</i> 730	913
Curran, 3 <i>C. & P.</i> 297; 1 <i>Moo. C. C.</i> 132	7, 9, 13
Currib, <i>Lofft.</i> 156	1068
Curry, 2 <i>Moo.</i> 218	660
Cureton v. The Queen, 8 <i>Cox</i> , 481; 30 <i>L. J. M. C.</i> 149	913
Curtis, 2 <i>Car. & K.</i> 763	224
Curtis, <i>Fost. Cr. L.</i> 135	753
Curtis v. Smith, 1 <i>Ch. Rep.</i> 116	970
Curwood, 3 <i>Ad. & El.</i> 815	133, 1244
Custodes v. Howel Gwin, <i>Sty.</i> 336	989
Cuthell, <i>Moo. & M.</i> 435	1146
Cutis, 4 <i>Cox</i> , 435	1014

D.

Dacre, Lord, <i>Mo.</i> 86; <i>Palm.</i> 35	749
Dade, 1 <i>Lew.</i> 196	22
Dade, 1 <i>Moo. C. C.</i> 307	76
Dadson, 20 <i>L. J. M. C.</i> 57; <i>Den. & P.</i> 35	757
Dakin, 1 <i>Lew.</i> 166	774
Dalby, <i>Peake</i> , 16	1027
Dale, 5 <i>Cox</i> , 171	23
Dale, 7 <i>C. & P.</i> 352	528, 534
Dale, 1 <i>Moo.</i> 5	779
Dale, 6 <i>Cox</i> , 14	790
Dale, <i>Dearsl.</i> 37	935
Dalloway, 2 <i>Cox</i> , 273	768
Dalman, 1 <i>Cox</i> , 95	187
Dalrymple v. Dalrymple, 2 <i>Hagg. Consist. Rep.</i> 54	856
Dalton, <i>Str.</i> 911	34
Daly, 9 <i>C. & P.</i> 342	916
Damaree and Purchase, <i>Fost. Cr. L.</i> 213	315
Dane, 1 <i>Fost. & F.</i> 323	862
Daniel, 1 <i>Salk.</i> 380	1194
Daniel, 6 <i>Mod.</i> 99	1212
Danger, <i>Dearsl. & B.</i> 307	529
Dann, 1 <i>Moo. C. C.</i> 424	131
Dann, <i>Russ. & Ry.</i> 310	77, 363
Dannelly, <i>Russ. & Ry.</i> 319	453
Dannelly, <i>Russ. & Ry.</i> 310	529
Dansey, <i>Str.</i> 920	1308
Darbishire, 2 <i>Burr.</i> 1182	1309
Darby, <i>Carth.</i> 14	135
Darby, 2 <i>Cox</i> , 315	200
Darby, 3 <i>Mod.</i> 139	928
Darby, 7 <i>Mod.</i> 101	972, 1022
Darby, 1 <i>Salk.</i> 78	1042
Darcey, 1 <i>Sid.</i> 186	1102
Darcey, Lord, v. Markham, <i>Hob.</i> 120	1103
Dark, <i>Den.</i> 276	521
Darley, 4 <i>East</i> , 174	103
Darley, 1 <i>Stark.</i> 359	1189
Darrel, 10 <i>Mod.</i> 322	312
Daubney v. Cooper, 10 <i>B. & C.</i> 237	826

d

	PAGE		PAGE
Davenport, 1 <i>Arch. Peel's Acts</i> , 5...	377	Deakin, <i>Hetl.</i> 73	1038
Davidson v. Elliott, 26 <i>L. J. Q. B.</i> 104; 7 <i>El. & B.</i> 229	1196	Dealtry, <i>Den.</i> 287	625, 627
Davies, 30 <i>L. J. M. C.</i> 159; 8 <i>Cox</i> , 486	16	Dean, 2 <i>Q. B.</i> 731	99
Davies, <i>East</i> , <i>P. C.</i> 707	433	Dean, <i>Leach</i> , 476	131
Davies, 2 <i>Moo.</i> 77	655	Dean, 6 <i>Cox</i> , 23	836
Davies, <i>East</i> , <i>P. C.</i> 956	666	Deane, 5 <i>Cox</i> , 501; 4 <i>Jur.</i> 364..164,	1064
Davies, 1 <i>Russ. C. M.</i> 491	745	Dearing, <i>Cro. El.</i> 193	890
Davies v. Reg. (in error), 10 <i>B. & C.</i> 89	911	De Beauvoir, 7 <i>C. & P.</i> 17	1032
Davis, 7 <i>C. & P.</i> 783	14, 771	De Berenger, 3 <i>M. & S.</i> 67....221,	1061
Davis, 1 <i>C. & P.</i> 470	46	De Berenger, 3 <i>M. & S.</i> 67...1048,	1056
Davis, <i>Den. & P.</i> 231; 26 <i>L. J.</i> <i>M. C.</i> 207	70	Deeley, 1 <i>Moo.</i> 303	90, 865
Davis, <i>Russ. & Ry.</i> 113	80	Deer v. ———, 12 <i>Mod.</i> 325.....	134
Davis, 3 <i>Car. & K.</i> 328; 6 <i>Cox</i> , 326	119	Deering, 5 <i>C. & P.</i> 165.....	166, 277
Davis, 7 <i>C. & P.</i> 183	166	D'Eon, 3 <i>Burr.</i> 1513	50
Davis, 12 <i>Mod.</i> 9	268	D'Eon, 1 <i>Sir Wm. Bl.</i> 310.....	1091
Davis, <i>Str.</i> 104	269	D'Eon, 1 <i>Sir Wm. Bl.</i> 510	1140
Davis, 6 <i>C. & P.</i> 177..... 197, 202,	241	D'Faria, <i>Peake</i> , 164.....	1028
Davis, 25 <i>L. J. M. C.</i> 91	371	Delaber v. Lyster, 1 <i>Hawk. c.</i> 64, s. 23	1112
Davis, <i>Russ. & Ry.</i> 499	456	Delamere, Lord, 4 <i>St. Tr.</i> 232	164
Davis, 6 <i>Cox</i> , 369	457	Delamotte, <i>East</i> , <i>P. C.</i> 124.....	215
Davis, <i>Leach</i> , 876; <i>East</i> , <i>P. C.</i> 499:	457	Delamotte, <i>East</i> , <i>P. C.</i> 53	308
Davis, <i>Russ. & Ry.</i> 322	458	Delamotte, <i>Str.</i> 698.....	1312
Davis, <i>East</i> , <i>P. C.</i> 499.....	474	Delany v. Jones, 4 <i>Esp.</i> 191.....	1133
Davis, <i>Leach</i> , 971	505	Delavel, 3 <i>Burr.</i> 1434	134, 1180
Davis, 6 <i>C. & P.</i> 177.....	541	Delpike, 2 <i>B. & Adol.</i> 226	859
Davis, 1 <i>Fost. & F.</i> 69.....	556	Deman, 2 <i>Lord R.</i> 1221.....1007,	1042
Davis, 4 <i>Camp.</i> 48.....	612	De Matto, 7 <i>C. & P.</i> 458.....	784
Davis, 1 <i>C. & P.</i> 306.....	796	De Mierre, 5 <i>Burr.</i> 2788.....	1310
Davis, <i>Leach</i> , 493.....	798	Denby, <i>Leach</i> , 514	43
Davis, 8 <i>Cox</i> , 486; <i>Leigh & C.</i> 64..	816	Denmour et ux. 8 <i>Cox</i> , 440.....	404
Davis, 5 <i>Cox</i> , 328	827	Dennie, <i>Godb.</i> 88	1038
Davis, 1 <i>Russ. C. M.</i> 574	869	Dennison, <i>Lefft.</i> 148	1150
Davis, 8 <i>C. & P.</i> 759.....	905	Dennison, 2 <i>Lord K.</i> 259	1311
Davis, <i>Say. Rep.</i> 163	935	Denslow, 2 <i>Cox</i> , 230.....	184
Davis, 3 <i>Burr.</i> 1317.....	944	Dent, 1 <i>Car. & K.</i> 249	93, 94, 531
Davis, <i>Lefft.</i> 62.....	945	Dent, 1 <i>Cox</i> , 15.....	535
Davis, <i>Holt</i> , 501.....	1045	Dent, 1 <i>Car. & K.</i> 97	864
Davis v. Capper, 10 <i>B. & C.</i> 28....	24	Depardo, 1 <i>Taunt.</i> 26; <i>Russ. & Ry.</i> 134	784
Davis v. Russell, 3 <i>Bing.</i> 354.....	9	Depuke, 11 <i>Mod.</i> 273	1116, 1121
Davison, 6 <i>C. & P.</i> 177.....	537	Deputy steward and coroner of Lon- don, <i>Jer. Archb.</i> 408	889
Davy, 6 <i>Jur.</i> 949	1127	Derbshire, 1 <i>Moo. & Rob.</i> 307	162
Dawber, 3 <i>Stark.</i> 34.....	180	Derbyshire, 2 <i>Q. B.</i> 745.....	1275
Dawber, 5 <i>Esp.</i> 247	1239	Derbyshire, 3 <i>B. & Adol.</i> 147	1278
Dawnay, Ex p. 8 <i>Jur.</i> 829	37	Derrecourt v. Corbishley, 24 <i>L. J.</i> <i>Q. B.</i> 313	11, 13
Daws, In the matter of, 8 <i>Ad. & El.</i> 936.....	889, 891	Derham, 1 <i>Cox</i> , 56	869
Dawson, 2 <i>Fost. & F.</i> 250	165	Derrington, 2 <i>C. & P.</i> 418	201
Dawson, 8 <i>Cox</i> , 360	259	Designy, <i>Tho. Raym.</i> 474	28
Dawson, <i>East</i> , 978.....	647	Despard, 7 <i>T. R.</i> 736	25
Dawson, <i>Den. & P.</i> 75.....	673	Despard, 1 <i>Man. & R.</i> 444.....	157
Dawson, 3 <i>Stark.</i> 62	840	Despard, 2 <i>Man. & R.</i> 406.....	286
Dawson, 4 <i>B. & Ald.</i> 329	1137	Despard, 28 <i>How. St. Tr.</i> 489	323
Day, 2 <i>Cox</i> , 210.....	195	De Veaux, <i>Leach</i> , 585	401
Day, 6 <i>Cox</i> , 55	208, 210	Devett and another, 6 <i>C. & P.</i> 639	887
Day, 1 <i>Cox</i> , 207.....	793	De Vidil, 188; <i>Ry. & Moo.</i> 144....	1275, 1289
Day, <i>East</i> , 605	1234	Devon and Gloucester Railway Com- pany, 1 <i>Gale & D.</i> 467	106
Day, 9 <i>C. & P.</i> 722	841	Devon, County, 9 <i>Cox</i> , 4	188
Day v. King, 5 <i>Ad. & El.</i> 359	939	Devon, County, 4 <i>B. & C.</i> 670	1283
Day v. The Queen, 2 <i>Cox</i> , 178 ..23,	1199	Devon, Earl of, <i>R. v.</i> 14 <i>East</i> , 477:	1285, 1286
Deacon, <i>Ry. & M. N. P. C.</i> 27..165,	1121	Devonshire, 2 <i>Nev. & M.</i> 212	1278
Deacon, <i>Fost.</i> 9.....	322, 325	Dewhirst, 2 <i>Nev. & M.</i> 253.....	109
Deakin, <i>Leach</i> , 863	88, 395	Dewhirst, 5 <i>B. & Adol.</i> 405.....	109
Deakin, <i>East</i> , <i>P. C.</i> 653	393	Dewhirst, 1 <i>Lew.</i> 47	199
Deakin, 1 <i>Sid.</i> 142.....	633, 634		

Table of Cases.

xxix

	PAGE		PAGE
Dewitt, 2 <i>Car. & K.</i> 905	697	Douglas, 1 <i>Campb.</i> 312	520
Dewsnap, 16 <i>East</i> , 194...1238, 1244, 1270		Douglas, 1 <i>Moo.</i> 46	523
Deybel, 4 <i>B. & Ald.</i> 243.....	37	Douglas, 1 <i>Moo.</i> 480.....	871
Dibbens, <i>Parker</i> , 165	285	Douglas, 16 <i>L. J. M. C.</i> 116	1227
Dibley, 2 <i>Car. & K.</i> 818	258	Douglas, <i>In re</i> , 12 <i>L. J. Q. B.</i> 49:	
Dickinson, <i>Russ. & Ry.</i> 401	43		30, 33
Dickinson, <i>Russ. & Ry.</i> 420	372	Douglas v. The Queen, 13 <i>Q. B.</i> 74, 1199	
Dickinson v. Watson, <i>Tho. Jones</i> ,		Dove, <i>Comb.</i> 477	138, 1105
205	823	Doveton, <i>Ex p.</i> 7 <i>Cox</i> , 16	136
Dicks, 1 <i>Russ. C. M.</i> 19.....	73	Dovey, 20 <i>L. J. M. C.</i> 105	545
Dignam, 7 <i>Ad. & El.</i> 593	286	Dovey, <i>Den. & P.</i> 86	546
Dillon, 2 <i>Ch. Rep.</i> 314	1122	Dovey v. Hobson, 6 <i>Taunt.</i> 460 ..	161
Dilmore, 6 <i>Cox</i> , 52	213	Dowlin, 3 <i>T. R.</i> 511.....	976, 1007, 1015
Dilworth, 2 <i>Moo. & Rob.</i> 531.....	801	Dowlin, <i>Peake</i> , 170	1031
Dimes, 14 <i>Q. B.</i> 554	39	Dowling, 10 <i>Jur.</i> 1056	28
Dimes v. Arden, 6 <i>Nev. & M.</i> 494 :	1293	Dowling, <i>Ry. & M.</i> 433	62
Dingley, 1 <i>Car. & K.</i> 637.....	193, 200	Dowling, 3 <i>Cox</i> , 509.....	124, 161, 245
Dingley, <i>Leach</i> , 840	453	Downes, <i>East, P. C.</i> 997	678, 679
Dinslow, <i>Cro. El.</i> 105	1012	Downey, 7 <i>Q. B.</i> 281	3
Dixon, 10 <i>Mod.</i> 335	75	Downham, 1 <i>Fost. & F.</i> 386	216
Dixon, 6 <i>Mod.</i> 61	112, 614	Downholland, 2 <i>Nev. S. C.</i> 177....	1269
Dixon, 3 <i>Burr.</i> 687.....	233, 255	Downing, <i>Taylor, Ec.</i> 720	192
Dixon, 25 <i>L. J. M. C.</i> 39	367	Downing, <i>Den.</i> 52 ; 2 <i>Car. & K.</i>	
Dixon, <i>Russ. & Ry.</i> 53	479	322	780, 786
Dixon, 4 <i>Camp.</i> 12	609	Downshire, Marchioness, 4 <i>Ad. &</i>	
Dixon, 3 <i>M. & S.</i> 11	609	<i>El.</i> 232.....	1262
Dixon, 3 <i>Cox</i> , 289.....	687	Dowse, 1 <i>Ld. R.</i> 672.....	946
Dixon, <i>East</i> , 313	757	Dowsell, 6 <i>C. & P.</i> 398.....	906
Dixon, 12 <i>Mod.</i> 198	1251	Doyle, 1 <i>Esp.</i> 125.....	52
Dobson, 9 <i>Ad. & El.</i> 704	581	Doyle, <i>Moo. & M.</i> 329.....	231
Dobson, 7 <i>East</i> , 213.....	612	Doyle, <i>Leach</i> , 67	303
Dobson, 1 <i>Lew.</i> 43.....	869	Drake, 12 <i>Shaw's J. P.</i> 483 ; 4 <i>Cox</i> ,	
Dodd, <i>Leach</i> , 155	43	333	86
Dodd, <i>Leach</i> , 130	183	Drake, 22 <i>L. J. Q. B.</i> 304	103
Dodd, 2 <i>Seas. Ca.</i> 33	1145	Drake, 1 <i>Lew.</i> 25	861
Dodd, 9 <i>East</i> , 516	1208	Drake, 11 <i>Mod.</i> 95	1090
Dodd, <i>In re</i> , 4 <i>Jur.</i> 291	38	Drake, 1 <i>Salk.</i> 660	1152
Doddridge, 8 <i>Cox</i> , 335.....	912	Drake, <i>Holt's Ca.</i> 426	1163
Dodson, 3 <i>Car. & K.</i> 148... ..	776	Draper, 1 <i>Car. & K.</i> 176.....	801
Dodsworth, 8 <i>C. & P.</i> 218	1321	Draper, 3 <i>Smith</i> , 396	1149
Doe d. Evans v. Evans, 5 <i>B. & C.</i>		Draper, 4 <i>B. & Ald.</i> 321	1163
584	300	Drayton Bassett, 1 <i>Hale</i> , 444	752
Doe d. Evans v. Pritchard, 2 <i>Nev.</i>		Dredge, 1 <i>Cox</i> , 235	364
& <i>M.</i> 489	300	Drew, <i>Str.</i> 404	136
Doherty, 13 <i>East</i> , 191	897	Drew, 8 <i>C. & P.</i> 140	188
Dolan, <i>Dearsl.</i> 436	275, 540	Drew, 1 <i>Keb.</i> 935	1004
Dolby, 1 <i>Car. & K.</i> 238	152	Driffield, <i>Say.</i> 106.....	613
Dolby, 2 <i>B. & C.</i> 104	158	Dring et ux. <i>Dearsl.</i> 329	74
Donally, <i>East, P. C.</i> 783	435	Dring et ux. 3 <i>Car. & K.</i> 193	128
Donally, <i>Leach</i> , 195.....	446	Drinkwater v. London Assurance,	
Donnallan, <i>Leach</i> , 69 ; 2 <i>Sir Wm.</i>		2 <i>Wils.</i> 363.....	315
<i>Bl.</i> 682	560	Drinkwater, <i>Leach</i> , 15	406
Donnelly, 1 <i>Moo.</i> 438	675	Driscoll, <i>Car. & M.</i> 214	823
Doncaster Betting-room case, 2		Drue, 1 <i>Sid.</i> 274	985
<i>Lew.</i> 114	232	Drummond, Lord, 11 <i>Mod.</i> 200 ..	21
Doncaster Betting-room case, 1 <i>Lew.</i>		Drummond, <i>Leach</i> , 337 .	206
71	245	Drury, 3 <i>Car. & K.</i> 190	179
Donnison, 4 <i>B. & Adol.</i> 698	1157	Dudley, 2 <i>Sid.</i> 71	635, 696
Donovan, 4 <i>Cox</i> , 399	788	Dudman, 2 <i>Gly. & J.</i> 389	978
Doody, 4 <i>Cox</i> , 485.....	1194	Dudman, 4 <i>B. & C.</i> 850	1009
Doran, <i>Leach</i> , 538.....	97, 173	Duffin, <i>Russ. & Ry.</i> 365	796
Doran, 2 <i>Moo.</i> 37	177	Duffin, <i>East, P. C.</i> 437	831
Doran, 1 <i>Esp.</i> 127	238	Duffy, 1 <i>Lew.</i> 58, 60.....	814
Dorny, 1 <i>Salk.</i> 260....	1115, 1121, 1123	Dugdale, <i>Dearsl.</i> 64.....	1185
Dorny, 12 <i>Mod.</i> 417	1116	Dugdale v. Reg. <i>Dearsl.</i> 254 ; 2 <i>El.</i>	
Dorset, JJ., 15 <i>East</i> , 594	1287	& <i>Bl.</i> 129.....	297
Dossett, 2 <i>Car. & K.</i> 206	241	Dugdale v. Reg. 22 <i>L. J. M. C.</i> 50 :	1185
Douglas, <i>Car. & M.</i> 293 ..	22, 175, 214	Dummer, 1 <i>Salk.</i> 374	999
Douglas, 13 <i>C. B.</i> 42	210	Dunboyne, Lord, 3 <i>Car. & K.</i> 1 :	
			993, 1169

	PAGE		PAGE
Duncombe, 8 C. & P. 369	224	Eden, 1 Esp. 98	1007, 1028
Duncombe, Cro. Car. 366	1256	Eden, Cro. El. 697	1119
Dundas, 6 Cox, 380	551	Eden, Left. 72	1155
Dunkin, 2 Lew. 162	265	Edge, Dearsl. & B. 1	413
Dunkley, 1 Moo. 90	448	Edge Lane, 4 Ad. & El. 723	1258
Dunn, 12 Ad. & El. 599; 4 Per. & D. 405	32	Edmeads, 3 C. & P. 390	749
Dunn, 5 Burr. 2640	35	Edmonds, 1 B. & Ald. 471	153, 157
Dunn, 11 Jur. 287	64	Edmonton, Cald. 435	858
Dunn, 8 Jur. 773	111	Edmonton, 1 Moo. & Rob. 24	1257
Dunn, 1 Car. & K. 730....	122, 289, 1037	Edmunds, 6 C. & P. 164.....	203
Dunn, 4 C. & P. 543.....	188	Edmunds, 5 Mees. & W. 309.....	214
Dunn, Leach, 577.....	661	Edmundson, 28 L. J. M. C. 263 ..	497
Dunn, East, 976	686	Edsall v. Russell, 6 Jur. 996	817
Dunn, 12 Ad. & El. 593.....	894, 897	Edwards, 4 T. R. 440	38
Dunn, 16 L. J. Q. B. 382	991	Edwards, 2 Nev. & M. 407; 5 B. & Adol. 507.....	109
Dunn, 1 Dowl. & Ry. 10....	1015, 1037	Edwards, 8 Mod. 326.....	137, 138, 171
Dunn, Ex p., 5 Dowl. & L. 355; 5 C. B. 215.....	33	Edwards, 3 Campb. 208	164
Dunn, In re, 17 L. J. C. P. 105 ..	32	Edwards, 8 C. & P. 26.....	168
Dunn, 12 Jur. 99	1044	Edwards, 1 Burn. 564.....	196
Dunn v. Reg. 18 L. J. M. C. 41: 896, 1044		Edwards, 1 Ph. Ev. 415	197
Dunn v. Reg. 12 L. J. Q. B. 1026: 991		Edwards, 8 C. & P. 26	224, 225
Dunnage, 2 Burr. 1130	614	Edwards, 4 Burr. 2259	269
Dunnett, Leach, 581.....	687	Edwards, Russ. & Ry. 497	391, 398
Dunning, 5 Cox, 142	264	Edwards, 6 C. & P. 515	437
Dunston, Ry. & M. 109	968	Edwards, 1 Cox, 32	440, 443
Dupree, East, 1010	934	Edwards, 1 Moo. & Rob. 257; 5 C. & P. 518	447
Durham, Leach, 478	180	Edwards, East, 820	610
Durore, Leach, 351	89, 95	Edwards, 8 Mod. 320	612, 1051
Duvergier v. Fellows, 5 Bingh. 248: 1209		Edwards, 3 Cox, 89, n.....	680
Dwerryhouse, 2 Cox, 295	120	Edwards, 8 C. & P. 611: 746, 762, 779, 782	
Dwyers, 2 Russ. C. M. 88	211	Edwards, 6 C. & P. 401	779
Dyde, 7 T. R. 661.....	163	Edwards, Russ. & Ry. 283.....	851
Dye, 11 Mod. 174	1314	Edwards, 3 Salk. 27	946
Dyer, East, P. C. 76	80, 539	Edwards, 2 Russ. C. M. 518 ..	965, 973
Dyer, 1 Cox, 113	170	Edwards, Str. 707.....	1063
Dyer, 6 Mod. 96	1105, 1121	Edwards, 8 Mod. 326	1313
Dyke, 8 C. & P. 261	180	Edwards v. Buchanan, 3 B. & Adol. 788	653
Dyke, Say. Rep. 19	1245	Edyvean, 3 T. R. 352.....	935
Dyson, Russ. & Ry. 523.....	80, 758	Egan, 1 Cox, 29	688
Dyson, 7 C. & P. 305	119	Egerly, 3 Salk. 183	1248
E.			
Eades, 2 Show. 248	1143	Egerton, Russ. & Ry. 375.....	239, 446
Eagleton, Dearsl. 376	614	Egginton, Leach, 913.....	364, 382
Eardisland, 2 Camp. 494	1273	Egginton, East, P. C. 494	458
Eastaff, Gow. 138.....	949	Eldershaw, 3 C. & P. 396	830
Eastall, 2 Russ. C. M. 92	387, 393	Eldridge, Russ. & Ry. 440	201
Easterby, Leach, 94; Russ. & Ry. 37	596	Elkins, Burr. 2129	950
East Adderbury, 5 Q. B. 187..	1276, 1289	Ellers, Say. 222	929
Eastern Counties, 10 Mees. & W. 52	883	Ellicombe, 5 C. & P. 522	216
East Hagbourne, Bell, 135	1252	Ellins, Russ. & Ry. 188.....	1234
Eastington, 5 Ad. & El. 765	1253	Elliott, Leach, 175.....	237, 648
East Lidfurd, Say. 201	1264	Elliott, 1 Hawk. c. 65, s. 9	795
Easton, Den. & P. 275.....	906	Elliott, Leigh & Cave, 103.....	1182
Easton, Ex p., 9 D. P. C. 207; 12 Ad. & El. 645	30	Ellis, 6 C. & P. 145	64, 241
Eaton, 8 C. & P. 417	874	Ellis, Car. & M. 564	121
Eaton, 3 B. & Ald. 162	1173	Ellis, Ry. & Moo. 432.....	200
Ecclesfield, Deac. Cr. L. 36; 1 B. & Ald. 348.....	1265, 1266	Ellis, 6 B. & C. 148.....	286
Ecclesfield, 1 Stark. 395	1265	Ellis, 8 B. & C. 395.....	290
Eccles, Leach, 837	531	Ellis, 8 C. & P. 654	441, 801
Eddy, East, 837	531	Ellis, 8 Dowl. & Ry. 173	472
		Ellis, 4 Cox, 258	690
		Ellis, 2 Car. & K. 470	767, 779, 782
		Ellis, 1 Fost. & F. 309	862
		Ellis, 2 Car. & K. 470.....	879
		Ellis, Str. 1104	1027
		Ellis, 2 Salk. 595	1093
		Ellis, Cro. Jac. 634	1121
		Ellis, 1 Freem. 377	1126

Table of Cases.

xxx

	PAGE
Ellis, <i>Russ. & Ry.</i> 188.....	1234
Ellis v. Sheffield Gas Company, 23 <i>L. J. Q. B.</i> 42	1250
Ellis, <i>Car. & M.</i> 564.....	1322
Ellison, 1 <i>Moo.</i> 336.....	559, 562
Ellor, <i>Leach</i> , 323	671
Elmsley, 1 <i>Lew.</i> 226	392
Elmstead, 2 <i>Russ. C. M.</i> 894.....	446
Elmy, 3 <i>Nev. & M.</i> 733	37
Elnor, <i>Cro. Jac.</i> 180.	63
Elrington, 31 <i>L. J. M. C.</i> 14 ...	132, 829
Else, <i>Russ. & Ry.</i> 142	80, 727, 730
Elsmore v. Hundred of St. Briavels, 8 <i>B. & C.</i> 468	558, 560
Elsworth, 1 <i>Lew.</i> 117; 20 <i>L. J. M. C.</i> 32	84, 544
Elsworth, <i>East</i> , 986	647, 672
Elwell, 3 <i>Lord Raym.</i> 360	1116
Embden, <i>East</i> , 437	129, 1022
Emerton, 2 <i>Show.</i> 20	608
Emmet v. Lyne, 2 <i>New Rep.</i> 225 ..	819
Emmons, 2 <i>Moo. & Rob.</i> 279.....	265
Emmot, <i>Palm.</i> 277	1121
Empson, <i>Leach</i> , 224.....	791
Enclosures, Case of	314
Enfield, 3 <i>Ch. Burn</i> , 82	1258
England, <i>Leach</i> , 770	210
England, <i>Leach</i> , 767	225, 748
England, 1 <i>Cox</i> , 79	553
England, 1 <i>Car. & K.</i> 583.....	561
Enoch, 5 <i>C. & P.</i> 535	188
Entrechman, <i>Car. & M.</i> 248	178
Erbery, 8 <i>Mod.</i> 77	34
Errington, 2 <i>Lew.</i> 148.....	205
Errington, 2 <i>Lew.</i> 217	769
Erle, 2 <i>Lew.</i> 133	798
Esdaile, 1 <i>Post. & F.</i> 213	1051
Esop, 7 <i>C. & P.</i> 456.....	249
Essex, <i>East</i> , <i>P. C.</i> 1125	449
Essex, Earl of, <i>Kel.</i> 21.....	310
Essex and Southampton, Earls of, <i>Kel.</i> 28.....	138
Essex, <i>Dearsl. & B.</i> 371	374
Essex, <i>Thos. Raym.</i> 38	1277, 1290
Etherington, <i>Leach</i> , 671	261, 478
Evami, 1 <i>Moo. C. C.</i> 70 ..	627, 629, 631
Evans, 8 <i>D. P. C.</i> 454	31
Evans, 8 <i>C. & P.</i> 565	88
Evans, 2 <i>Cox</i> , 270.....	370
Evans, <i>Car. & M.</i> 632.....	373
Evans, <i>East</i> , <i>P. C.</i> 776	441
Evans, <i>Car. & M.</i> 298	451
Evans, 1 <i>Hale</i> , 588	450
Evans, 5 <i>C. & P.</i> 553	517
Evans, <i>Bell</i> , 187	525
Evans, <i>East</i> , <i>P. C.</i> 798	549
Evans, <i>Dearsl. & B.</i> 236.....	692, 932
Evans, 1 <i>Russ. C. M.</i> 489	760
Evans, 3 <i>Stark.</i> 35.....	931
Evans v. Phillips, <i>Schw. N. P.</i> 1003;	277
Eve, 5 <i>Ad. & El.</i> 781	141
Everett, 8 <i>B. & C.</i> 114.....	1203
Evet, 6 <i>B. & C.</i> 247.....	888, 890, 891
Ewer, 2 <i>Salk.</i> 364.....	103, 108
Ewington, <i>Car. & M.</i> 319.....	979
Exeter, Earl of, 6 <i>T. R.</i> 373	928
Ex parte ———, gent., one, 4 <i>Ad. &</i> <i>El.</i> 576.....	827
Ex parte, an infant, 3 <i>Myl. & Cr.</i> 471	858

	PAGE
Eyres, 1 <i>Sid.</i> 307	1075

F.

Fabian, <i>Kel.</i> 39	610
Faderman, <i>Den.</i> 565.....	275
Fagent, 7 <i>C. & P.</i> 238	205
Fagg, 4 <i>C. & P.</i> 566	18, 200
Fairlie, 8 <i>El. & Bl.</i> 486	1240
Falkingham, 1 <i>Sir Wm. Bl.</i> 269 ..	946
Falkner, <i>Russ. & Ry.</i> 481	201
Fallowes, 5 <i>C. & P.</i> 508	17, 432
Fane, 5 <i>C. & P.</i> 213	1154
Fanshaw, 1 <i>Ventr.</i> 381	291
Fanshaw, <i>Skin.</i> 327	1029, 1033
Farewether, <i>Cro. Car.</i> 348	64
Farington, <i>Russ. & Ry.</i> 207	555
Farlar, 8 <i>C. & P.</i> 206	180
Farley, 1 <i>Cox</i> , 76	188
Farley, <i>Den.</i> 197	233
Farley, <i>East</i> , <i>P. C.</i> 740	475
Farmer, <i>East</i> , 820.....	610
Farnam, 2 <i>Leon.</i> 186	1120, 1121
Farnham, 1 <i>Cox</i> , 349	871
Farr, 8 <i>C. & P.</i> 768.....	222, 252
Farr, <i>Kel.</i> 43	454, 463
Farr, <i>Tho. Raym.</i> 844	635
Farrell, <i>Leach</i> , 322, n.	432
Farrow, <i>Dearsl. & B.</i> 164.....	790
Faulkner, 1 <i>Saund.</i> 249	94
Fauntleroy, 1 <i>Moo.</i> 52	641, 655
Fawcett, <i>East</i> , 862	633
Fawcett, 1 <i>Hawk. c.</i> 64, s. 64; <i>Noy.</i> 119.....	1127
Fawle, 2 <i>Ld. Raym.</i> 1452	64
Fearnley, 1 <i>T. R.</i> 316	935
Fearshire, <i>Leach</i> , 202	199, 213
Featherstone, <i>Dearsl.</i> 369.....	275, 386
Featherstonehaugh, 8 <i>C. & P.</i> 109; 116, 826	116, 826
Feist, 27 <i>L. J. M. C.</i> 164.....	1196
Fellowes, 4 <i>D. P. C.</i> 607.....	101
Fellowes, 2 <i>Russ. C. M.</i> 123	369
Fellowes, 1 <i>Car. & K.</i> 115	977
Fells, 5 <i>Mod.</i> 414	958
Fentiman, <i>Re</i> , 1 <i>Ad. & El.</i> 126..	137, 139
Fenton, 1 <i>Lew.</i> 179	769
Fenton, <i>Yelv.</i> 27	1123
Fenwick, 2 <i>Car. & K.</i> 915	85, 999
Fenwick, 1 <i>Sid.</i> 153	1041
Ferguson, <i>Dearsl.</i> 427	97
Ferguson, 1 <i>Lew.</i> 181	767
Ferguson, 2 <i>Stark.</i> 489	1063
Fermor v. Dorrington, <i>Cro. El.</i> 222	162
Fernandez, 31 <i>L. J. M. C.</i> 25; 9 <i>Cox</i> , 40	188
Ferrall, <i>Den. & P.</i> 51	936
Ferrand, 3 <i>B. & Ald.</i> 260	878
Ferrars, <i>Tho. Raym.</i> 84	164
Ferrers, Earl, 1 <i>Burr.</i> 631	38, 897
Ferrers, Earl, <i>Fost.</i> 138	304
Ferrers, 1 <i>Sid.</i> 287	635
Ferrers, <i>Sir H., Cro. Car.</i> 371	755
Ferris, 1 <i>Saund.</i> 312	147, 148
Fidler, 4 <i>Cox</i> , 449	576
Field, <i>Dich. Q. S.</i> 520	180
Field, <i>Leach</i> , 383	904

	PAGE		PAGE
Fielder, 2 <i>D. P. C.</i> 46	270	Ford, <i>Russ. & Ry.</i> 329.....	10
Fieldhurst, <i>Comp.</i> 325	45, 82	Ford, 2 <i>Show.</i> 434	120
Fielding, 2 <i>Car. & K.</i> 621	912	Ford, <i>Den.</i> 285	224
Fielding, <i>Burr.</i> 720	946	Ford, 1 <i>Nev. & M.</i> 776	270, 1068
Filewood, 2 <i>T. R.</i> 145	142	Ford, <i>Rel.</i> 51	774
Filewood, 1 <i>T. R.</i> 692	945	Ford, 2 <i>Ad. & El.</i> 588	815
Finacane, 5 <i>C. & P.</i> 551.....	97, 909	Ford, <i>Cro. Jac.</i> 151	1124
Finch, 1 <i>Moo.</i> 418.....	426	Ford, <i>Yelv.</i> 99	1129
Finchard, 1 <i>Russ. C. M.</i> 692	838	Ford v. Bennet, 2 <i>Salk.</i> 417	1152
Findon, 6 <i>C. & P.</i> 132	252	Forde v. Skinner, 4 <i>C. & P.</i> 329 ..	820
Finmore, 13 <i>East</i> , 4	105	Fordham, 4 <i>Jur.</i> 218	106
Finmore, 8 <i>T. R.</i> 409	110	Fordham, 11 <i>Ad. & El.</i> 73	107
Finnerty, 4 <i>B. & Ald.</i> 320	1163	Forsgate, <i>Leach</i> , 463	393
Finney, 2 <i>Car. & K.</i> 774.....	953	Forster, 1 <i>Lew.</i> 187	772
Fisher, 1 <i>Cox</i> , 68	158	Forsyth, <i>Russ. & Ry.</i> 274 ..217, 629,	630
Fisher, <i>Leach</i> , 310	212	Forsyth, <i>Leach</i> , 836	866
Fisher, 8 <i>C. & P.</i> 182.....	744, 765	Foster, <i>Russ. & Ry.</i> 412.....	70
Fisher, 8 <i>C. & P.</i> 612	1262	Foster, 3 <i>Car. & K.</i> 201	164
Fitch, 26 <i>L. J. M. C.</i> 169	388	Foster, 7 <i>C. & P.</i> 148	198
Fitchie, <i>Dearsl. & B.</i> 175	684	Foster, 1 <i>Lew. C. C.</i> 110	204
Filton, 2 <i>Keb.</i> 502	1142	Foster, 6 <i>C. & P.</i> 305	207
Fitzgerald, 2 <i>Wils.</i> 254	34	Foster, 6 <i>Cox</i> , 93	224
Fitzgerald, 2 <i>Car. & K.</i> 201	52	Foster, 7 <i>C. & P.</i> 495.....	244, 738
Fitzgerald, 1 <i>Salk.</i> 401.....	289	Foster, 1 <i>Ld. Raym.</i> 475.....	392, 1206
Fitzgerald, <i>Leach</i> , 20	657	Foster, 1 <i>Lew.</i> 33	454
Fitzpatrick, <i>Russ. & Ry.</i> 512 ..	237, 953	Foster, 6 <i>Cox</i> , 25	577
Fitzwilliam, <i>Cro. Jac.</i> 49.....	1124	Foster, <i>Dearsl.</i> 456	727, 730
Fitzwilliam, <i>Yelv.</i> 327.....	1128	Foster, <i>Russ. & Ry.</i> 459	975
Flaherty, 2 <i>Car. & K.</i> 782	865	Fountain, 1 <i>Sid.</i> 152	122, 144
Flannagan, <i>Russ. & Ry.</i> 187	475	Fowle, 4 <i>C. & P.</i> 592	1069
Flannery, 1 <i>Lew.</i> 133	256	Fowler, 1 <i>Salk.</i> 350	38
Flecknow, 1 <i>Burr.</i> 461	1256	Fowler, 4 <i>B. & Ald.</i> 273.....	291
Fleet, 1 <i>B. & Ald.</i> 379	1137	Fowler, <i>East</i> , <i>P. C.</i> 461	612, 1051
Fleming, q. t. v. Baily, 5 <i>East</i> , 313:	148	Fox, 5 <i>D. P. C.</i> 232.....	102
Flemming, <i>Leach</i> , 854	210, 832, 839	Fox, 1 <i>Str.</i> 21	137
Fletcher, <i>Str.</i> 633	181	Fox, 1 <i>Str.</i> 652	183
Fletcher, 1 <i>Lew.</i> 68	200	Fox v. Gaunt, 3 <i>B. & Adol.</i> 798....	11
Fletcher, 4 <i>C. & P.</i> 250.....	203	Fox v. Reg. 29 <i>L. J. M. C.</i> 54....	916
Fletcher, 1 <i>Lew.</i> 101	229	Foxby, 1 <i>Salk.</i> 266	1240
Fletcher, 1 <i>Lew.</i> 107	237	Foxhall v. Barnett, 2 <i>El. & Bl.</i> 918	
Fletcher, <i>Russ. & Ry.</i> 58	289, 290	Foxhall v. Barnett, <i>Str.</i> 21.....	137
Fletcher, 4 <i>C. & P.</i> 545.....	382	Frampton, 27 <i>L. J. M. C.</i> 29; 8	
Fletcher, <i>Leach</i> , 23	439	<i>Cox</i> , 16.....	547
Fletcher, 2 <i>Car. & K.</i> 215	664	France, 2 <i>Moo. & Rob.</i> 207.....	208
Fletcher, 1 <i>Russ. C. M.</i> 507.....	771	Frances, <i>Com.</i> 478; <i>Str.</i> 1015	93
Fletcher, <i>Bell</i> , 63	831, 834	Franceys, 2 <i>Ad. & El.</i> 49	1157
Fletcher, 1 <i>Nev. S. C.</i> 40	210	Francia, 6 <i>St. Tr.</i> 93	319
Fletcher, 18 <i>L. J. M. C.</i> 16	908	Francia, <i>East</i> , <i>P. C.</i> 133.....	323
Fletcher, <i>Leach</i> , 23	1215	Francis, 4 <i>Cox</i> , 57.....	119
Fletcher, 2 <i>Nev. S. C.</i> 529	909	Francis, 4 <i>Nev. & M.</i> 251.....	139
Fletcher v. Calthrop, 1 <i>Nev. S. C.</i>		Francis, <i>Ca. T. Hard.</i> 113.....	272
529; 6 <i>Q. B.</i> 880	908, 909	Francis, <i>Str.</i> 1015	432
Fletcher, <i>Ex p.</i> , 1 <i>Dowl. & L.</i> 956:		Francis, <i>Russ. & Ry.</i> 209.....	662
	167, 245	Frank, <i>Leach</i> , 644.....	227
Fletcher, <i>In re</i> , 13 <i>L. J. M. C.</i> 16:	31, 37	Franklin, 4 <i>T. R.</i> 454	163
Flint, 3 <i>Cox</i> , 66	157	Franklin, 9 <i>St. Tr.</i> 259.....	217, 1090
Flint, <i>Russ. & Ry.</i> 460	325	Franklyn, <i>Leach</i> , 225	1216
Flint, <i>Ca. Temp. Hardw.</i> 370..	635, 1052	Fraser, 1 <i>Moo. C. C.</i> 319.....	13
Flower, 8 <i>T. R.</i> 324	34, 35	Fraser, 1 <i>Moo. C. C.</i> 407	865
Flower, 5 <i>B. & C.</i> 736	290, 988	Fray, <i>East</i> , 236	763
Flower, 5 <i>Rep.</i> 99.....	988	Frazer, 8 <i>Cox</i> , 446	845, 846
Flower, 7 <i>D. P. C.</i> 665	1244	Freakley, 1 <i>Dowl. & L.</i> 10	21
Folkes, 1 <i>Moo.</i> 354.....	175, 837	Frederick, <i>Str.</i> 1094.....	183
Folkes, 2 <i>Moo. & Rob.</i> 460	841	Freegard v. Barnes, 21 <i>L. J. M. C.</i>	
Fonereau, 3 <i>Wils.</i> 39	270	320	4
Fonseca, 1 <i>Burr.</i> 10	108	Freeman, 5 <i>C. & P.</i> 534	486
Forbes, 1 <i>D. P. C.</i> 440	65	Freeman, <i>Russ. C. M.</i> 518	765
Forbes, <i>Holt</i> , <i>N. P. C.</i> 599	206	Freeman, <i>Str.</i> 1226	950
Forbes, 7 <i>C. & P.</i> 224	681	Freeth, <i>Russ. & Ry.</i> 127....	518, 520, 525

Table of Cases.

xxxiii

	PAGE
Freiston v. Shillito, <i>Yelv.</i> 165.....	1123
French, 8 <i>Cox</i> , 252	66
French, <i>Russ. & Ry.</i> 491.....	468
Frewin, 6 <i>Cox</i> , 530	192
Friar, 1 <i>Ch. R.</i> 702	948
Friend, 4 <i>St. Tr.</i> 696	226
Friend, <i>Kel.</i> 20; <i>Holt's Ca.</i> 681 ..	310
Friend, <i>Russ. & Ry.</i> 20	1195
Frith, <i>Leach</i> , 11	121, 627
Frost, 24 <i>L. J. M. C.</i> 116	191, 237
Frost, 9 <i>C. & P.</i> 129 .. 155, 312, 325, 327,	328, 330
Frost, 9 <i>C. & P.</i> 163..331, 332, 333, 334,	335, 353
Frost, 2 <i>Moo.</i> 140	331, 332
Froud, <i>Russ. & Ry.</i> 389	675
Frowen, 4 <i>Cox</i> , 266.....	462, 464
Frumpton, 2 <i>Car. & K.</i> 47.....	372
Fry, <i>Leach</i> , 111	116, 826
Fry, <i>Russ. & Ry.</i> 482.....	391, 421
Fry, <i>Dearsl.</i> 449.....	495, 522, 524
Fry, 2 <i>Moo. & Rob.</i> 42.....	908
Fry, 3 <i>Burr.</i> 1703.....	1105
Fulford, 6 <i>Cox</i> , 510	103, 1291
Fuller, 1 <i>C. & P.</i> 259	17
Fuller, 9 <i>C. & P.</i> 35.....	52
Fuller, <i>Russ. & Ry.</i> 408.....	446
Fuller, <i>Leach</i> , 186	457
Fuller, <i>East</i> , 837	531
Fuller, 2 <i>Salk.</i> 417	1152
Fuller, <i>Leach</i> , 790	1322
Fully, 9 <i>C. & P.</i> 227	523, 534
Fulwood, <i>Cro. Car.</i> 485.....	842, 843
Furley v. Newnham, 2 <i>Dougl.</i> 419..	255
Furneaux, <i>Russ. & Ry.</i> 335	498
Furnival, <i>Russ. & Ry.</i> 455.....	465
Furser, <i>Say. Rep.</i> 70	263
Fursey, 6 <i>C. & P.</i> 81	269, 351
Fussell, 3 <i>Cox</i> , 291.....	175, 237, 249
Fylingdales, 1 <i>M. & Ry.</i> 176.....	1260

G.

Gaby, <i>Russ. & Ry.</i> 178	399
Gadbury, 8 <i>C. & P.</i> 676	244
Gade, <i>Leach</i> , 732	638
Gahagan, <i>Leach</i> , 42.....	229
Gainer, 7 <i>C. & P.</i> 231	906, 910
Gale, <i>Ex p.</i> , 3 <i>Dowl. & L.</i> 114; 14	
<i>L. J. Q. B.</i> 316.....	31
Gale, 2 <i>Moo.</i> 95.....	1024, 1106
Gallant, 1 <i>Fost. & F.</i> 517.....	57, 59
Gallard, 10 <i>Kel.</i> 163.....	1185
Galle, <i>Carth.</i> 465.....	138
Gallears, <i>Den.</i> 501.....	391
Galloway, 1 <i>Moo. C. C.</i> 236	174
Gamble, 3 <i>Mees. & W.</i> 384.....	100, 1073
Gamlen, 1 <i>Fost. & F.</i> 90.....	248
Gamlingay, 3 <i>T. R.</i> 513	1261
Gammon, 5 <i>C. & P.</i> 321.....	832
Gansfield, 6 <i>Cox</i> , 43.....	233
Gaoler of Shrewsbury, <i>Str.</i> 532....	959
Garbett, <i>Den.</i> 236.....	225
Garbuti, 1 <i>Lew.</i> 295.....	276
Gardner, 1 <i>Moo. C. C.</i> 390.....	11
Gardner, <i>Dearsl. & B.</i> 518.....	40
Gardner, 2 <i>Camp.</i> 513.....	217
Gardner, 1 <i>Car. & K.</i> 628	171, 1228

	PAGE
Gardner, 5 <i>Cox</i> , 145.....	256
Gardner, 1 <i>C. & P.</i> 479	447
Gardner, 2 <i>Camp.</i> 513.....	611
Gardner, 1 <i>Fost. & F.</i> 669.....	771
Gardner, 9 <i>East</i> , 441	1010
Gardner, 2 <i>Moo.</i> 95	1017
Garland, <i>East</i> , 493	458
Garland, 5 <i>Cox</i> , 165.....	1238
Garlick, 1 <i>Cox</i> , 52.....	394
Garlick, <i>Den.</i> 276.....	521
Garner, <i>Den.</i> 329	121
Garnett v. Ferrand, 6 <i>C. & P.</i> 611.	826
Garnham, 2 <i>Fost. & F.</i> 347	905
Garratt, 8 <i>Cox</i> , 368; 2 <i>Fost. & F.</i>	
14	402
Garratt, 6 <i>C. & P.</i> 369.....	413
Garratt, <i>Dearsl.</i> 232.....	528
Garside, 2 <i>Ad. & El.</i> 206 .. 127, 128,	303
Garside, 2 <i>Lew.</i> 38.....	183
Gascoigne, 7 <i>C. & P.</i> 772.....	166
Gascoigne, <i>Leach</i> , 280; <i>East</i> , 709 :	434
Gash, 1 <i>Stark.</i> 441	938
Gastineaux, <i>Leach</i> , 49.....	788
Gate Fulford, <i>Dearsl. & B.</i> 74,	
94	275
Gate Fulford, 7 <i>Cox</i> , 230.....	1252
Gathercole, 2 <i>Lew.</i> 237	1133, 1148
Gavan, 2 <i>Str.</i> 873.....	322
Gay, 7 <i>C. & P.</i> 530	208
Gayer, 1 <i>Burr.</i> 245	1310
Gaylor, 7 <i>Cox</i> , 253	82
Gaylor, <i>Dearsl.</i> 288.....	762
Gazard, 8 <i>C. & P.</i> 595.....	1024
Geach, 9 <i>C. & P.</i> 499	155, 156
Geering, 18 <i>L. J. M. C.</i> 215	781
Gelan v. Hall, 27 <i>L. J. M. C.</i> 78 :	24
Genese, 1 <i>Salk.</i> 79	1032
Genge, <i>Comp.</i> 13	1309
Genner v. Sparkes, 1 <i>Salk.</i> 79	7
George, <i>Car. & M.</i> 111	181
George, 3 <i>Salk.</i> 188	1205
Gerber, 1 <i>Temp. & M.</i> 647.....	179
Gerrish, 2 <i>Moo. & Rob.</i> 219	727
Gibbon, <i>Leigh & Cave</i>	109
Gibbons, 1 <i>C. & P.</i> 97.....	190, 234
Gibbons, <i>Fost.</i> 167	456
Gibbons, <i>Russ. & Ry.</i> 442.....	458, 558
Gibbons v. Pepper, 4 <i>Mod.</i> 405....	823
Gibbs, 3 <i>D. P. C.</i> 345	151, 915
Gibbs, <i>Dearsl.</i> 445; 24 <i>L. J. M. C.</i>	
62	386
Gibbs, <i>Str.</i> 497	608
Gibbs, 1 <i>East</i> , 173	633, 636
Gibson, <i>East, P. C.</i> 413	80
Gibson, 11 <i>Mod.</i> 340 ..	121
Gibson, 8 <i>East</i> , 107.....	126
Gibson, <i>Russ. & Ry.</i> 138.....	219
Gibson, <i>Car. & M.</i> 672.....	224
Gibson, <i>Str.</i> 978	270
Gibson, <i>East, P. C.</i> 357	458
Gibson, 8 <i>Cox</i> , 436	487
Gibson, <i>Russ. & Ry.</i> 138.....	597
Gibson, <i>Russ. & Ry.</i> 343	657
Gibson, <i>Leach</i> , 359	799
Giddins, <i>Car. & M.</i> 596	174
Giddins, <i>Car. & M.</i> 634	441
Gifford, Lord, 1 <i>New. S. C.</i> 490 ..	896
Gifford, Lord, 30 <i>L. J. M. C.</i> 78;	
<i>Leigh & Cave</i> , 1	367

	PAGE		PAGE
Gilberdyke, 8 <i>Jur.</i> 792	105, 106	Gompertz, 14 <i>L. J. M. C.</i> 118; 9	
Gilbert, 1 <i>Moo. C. C.</i> 185; 1 <i>Car. &</i>		<i>Jur.</i> 401	61
<i>K.</i> 84	469	Gompertz, 9 <i>Q. B.</i> 824; 16 <i>L. J.</i>	
Gilbert, 1 <i>East</i> , 583	1207	<i>Q. B.</i> 121	270, 1071
Gilbie, 5 <i>M. & S.</i> 520	110	Gompertz, 2 <i>Cox</i> , 245	1054
Gilchrist, <i>Car. & M.</i> 224	673	Good, 1 <i>Car. & K.</i> 185: 72, 85,	
Gilchrist, 2 <i>Moo.</i> 233	1229	1058, 1073	
Giles, 1 <i>Moo.</i> 166	648	Good, 8 <i>C. & P.</i> 193	426
Giles, <i>Car. Cr. L.</i> 191	652	Goodall, 1 <i>Ld. R.</i> 122; <i>Say.</i> 129 ..	25
Giles v. Gwyn,	1023	Goodall, <i>Den.</i> 187	867
Gilham, <i>Moo. & Malk.</i> 165	50	Goodbody, 8 <i>C. & P.</i> 665	387
Gilham, 1 <i>Esp.</i> 285	178	Goodchild, 2 <i>Car. & K.</i> 293	867
Gilham, 1 <i>Moo.</i> 186	194, 233	Goode, 1 <i>Ad. & El.</i> 536; <i>Car. & M.</i>	
Gill, <i>Russ. & Ry.</i> 434	85	582	388
Gill, 1 <i>Lew.</i> 305	446	Goodenough, <i>Dearsi.</i> 210	497
Gill, <i>Dearsi.</i> 289; 23 <i>L. J. M. C.</i>		Goodenough, 2 <i>Ld. R.</i> 1036	1125
50	493	Goodfellow, <i>Den.</i> 81	905
Gill, <i>Russ. & Ry.</i> 384	557	Goodfellow, <i>Car. & M.</i> 569: 983,	
Gill, <i>Str.</i> 190	823, 1248	1013, 1024	
Gill, 2 <i>B. & Ald.</i> 204	1055, 1059	Goodhall, <i>Russ. & Ry.</i> 461	523
Gillbrass, 7 <i>C. & P.</i> 444	266, 408	Goodie, 1 <i>Lew.</i> 76	447
Gilkes, 8 <i>B. & C.</i> 439	937	Gooding, <i>Car. & M.</i> 297	861
Gilles, <i>Russ. & Ry.</i> 366	1196	Goodman, 2 <i>Russ. C. M.</i> 130	244
Gillett, 3 <i>Burr.</i> 1707	1105	Goodman, <i>Say. Rep.</i> 19	1245
Gillett, 6 <i>T. R.</i> 265	1314	Goodman, 1 <i>Fost. & F.</i> 502	1321
Gillings, 1 <i>Fost. & F.</i> 36	1229	Goodrich, 3 <i>T. R.</i> 126	657
Gillow, 1 <i>Moo.</i> 85	796	Goodright d. Richards v. Williams,	
Gilroy, 1 <i>C. & P.</i> 87	226	2 <i>M. & S.</i> 270	782
Girdwood, <i>Leach</i> , 142	442, 449	Goodwin, 1 <i>Russ. C. M.</i> 563	746
Gisson, 2 <i>Car. & K.</i> 781	130	Goose, <i>Mo.</i> 461	82
Gladwell v. Blake, 4 <i>Tyr.</i> 166	4	Gorbutt, 26 <i>L. J. M. C.</i> 47; <i>Dearsi.</i>	
Glamorgan, 2 <i>East</i> , 356	1276	<i>& B.</i> 166	500
Glandfield, <i>East</i> , 1034	565	Gordon, <i>East, P. C.</i> 315 7, 10,	754
Glanvill, 11 <i>Moo.</i> 202	613	Gordon, 1 <i>B. & Ald.</i> 72	37
Glass, <i>Den.</i> 215	387	Gordon, <i>Car. & M.</i> 410	52
Glass, 3 <i>Salk.</i> 350	946	Gordon, <i>Leach</i> , 515; <i>East, P. C.</i>	
Glasse, 2 <i>Cox</i> , 236	490	352	82
Glassie, 7 <i>Cox</i> , 11	388	Gordon, <i>Leach</i> , 300	215
Gleed, 2 <i>Russ. C. M.</i> 983	184	Gordon, 2 <i>Dowl. N. S.</i> 417	246
Glenn, 3 <i>B. & Ald.</i> 373	122	Gordon, 1 <i>Russ. C. M.</i> 707	843
Glin, 6 <i>Mod.</i> 87	937	Gordon, <i>Russ. & Ry.</i> 48	866
Gloucestershire, J.J., 7 <i>C. & P.</i> 338 ..	59	Gordon, Lord George, 2 <i>Russ. C. M.</i>	
Glover, 4 <i>D. P. C.</i> 292	35	750	233
Glover, <i>Russ. & Ry.</i> 269	413	Gordon, Lord George, <i>East, P. C.</i>	
Glover, 1 <i>Sid.</i> 259	890	71	313
Glover, <i>Leach</i> , 670	960	Gordon, Lord George, 2 <i>Dougl.</i> ,	
Glover v. Hinde, 1 <i>Mod.</i> 168	1167	591	314
Glusburne Bridge, 2 <i>East</i> , 352	1276	Gordon, Lord George, <i>Holt, Libel</i> ,	
Gnosil, 1 <i>C. & P.</i> 304	432, 433	77	1140
Goate, 2 <i>Ld. Raym.</i> 737	634	Gore, or Gower, 8 <i>D. P. C.</i> 101 ..	288
Goddard, <i>Leach</i> , 543	508	Gore, 9 <i>Rep.</i> 81	751
Goddard, 1 <i>Salk.</i> 371	686	Gore v. Moorton, <i>Cro. El.</i> 905	974
Goddard, 2 <i>Fost. & F.</i> 361	1014	Goss, <i>Den.</i> 276	521
Godfrey, 8 <i>C. & P.</i> 563	384	Gossett, 3 <i>Per. & D.</i> 340	31
Godfrey, 27 <i>L. J. M. C.</i> 151; <i>Dearsi.</i>		Gotley, <i>Russ. & Ry.</i> 384	915
<i>& B.</i> 426	532	Gough, 1 <i>Moo. & Rob.</i> 71	173
Goff, <i>Russ. & Ry.</i> 179	58	Gough, 2 <i>Dougl.</i> 791	1006
Goff, 26 <i>L. J. M. C.</i> 47; <i>Dearsi.</i> <i>&</i>		Gough v. Davies, 2 <i>Kay & J.</i> 623;	
<i>B.</i> 166	500	25 <i>L. J. Ch.</i> 677	127, 300
Goff, 1 <i>Ventr.</i> 216	772	Gould, 9 <i>C. & P.</i> 364	130, 195
Goffe, 1 <i>Lew.</i> 189	1005	Gould, 3 <i>Ch. Burn</i> , 528	164
Gogerly, <i>Russ. & Ry.</i> 343	79	Gould, <i>Leach</i> , 339, n.	475
Gold, 6 <i>Mod.</i> 164	935	Gould, v. Berry, <i>Chit.</i> 143	1003
Golde, 2 <i>Moo. & Rob.</i> 425	510	Gourlay, 7 <i>B. & C.</i> 669; 1 <i>Man. &</i>	
Goldney, <i>M. S.</i>	835	<i>Ry.</i> 619	27
Goldstein, <i>Russ. & Ry.</i> 473	653, 668	Gouldsbrough, <i>Winch.</i> 5	1207
Goldthorpe, 2 <i>Moo.</i> 244	871	Govers, <i>Say.</i> 206	616
Gombert v. Coyney, <i>M^cCl.</i> 469	4	Gowen, <i>East</i> , 1027	504
Gomme, 3 <i>Cox</i> , 64	510	Gower, 1 <i>Keb.</i> 487	1070

Table of Cases.

XXXV

	PAGE
Gower, 8 <i>D. P. C.</i> 102	1246
Grady, 7 <i>C. & P.</i> 650	17, 212
Graham, <i>Leach</i> , 87	84
Graham, <i>Leach</i> , 84	90
Graham, <i>Leach</i> , 547	95
Graham, <i>East</i> , 945	674
Graham, 2 <i>Lew.</i> 97	862
Grainger, 3 <i>Burr.</i> 1617	126
Grampound Corporation, 2 <i>Ld. R.</i> 965	1093, 1094
Grand Junction Railway Company, 11 <i>Ad. & El.</i> 128	879, 883
Granfield, 12 <i>Mod.</i> 98	929
Grantham, <i>Holt</i> , 354	613
Grant, q. t. v. Ridley, 6 <i>Sc.</i> 170; 3 <i>Man. & Gr.</i> 201	151
Grant, <i>East</i> , <i>P. C.</i> 658	194
Grant, 3 <i>Nev. & M.</i> 106	268
Grant, 5 <i>B. & Adol.</i> 1086	269, 1159
Gratland, <i>East</i> , <i>P. C.</i> 826	516
Grattan, <i>Car. Cr. L.</i> 66	184
Gray, 1 <i>Burr.</i> 510	50
Gray, 7 <i>C. & P.</i> 164	96
Gray, <i>Str.</i> 481	453, 455
Gray, <i>Dearl. & B.</i> 303	794
Gray v. Reg. (in error), 11 <i>Cl. & F.</i> 427	154
Great Broughton, 5 <i>Burr.</i> 700	1253
Great Camfield, 1 <i>Esp.</i> 686	1262
Great Midland Railway Company, 2 <i>Cox</i> , 1	95
Great Northern, 16 <i>L. J. M. C.</i> 16: ..	1283
Great Western Railway Company, 3 <i>Q. B.</i> 333	879
Great Yarmouth, Mayor of, <i>Ex p.</i> , 1 <i>Cox</i> , 123	137
Green, <i>Ca. Temp. Hardw.</i> 209	98
Green, <i>Str.</i> 1072	144
Green, 5 <i>C. & P.</i> 312	196
Green, <i>Dearl.</i> 323	374, 484
Green, <i>Dearl. & B.</i> 113	393
Green, 3 <i>Car. & K.</i> 209	546, 651
Green, 7 <i>C. & P.</i> 153	770
Green, <i>Str.</i> 527	894
Green, 8 <i>Cox</i> , 441	961
Green, 3 <i>Dougl.</i> 36	1053
Green, 1 <i>Ld. K.</i> 739	1299
Green v. Edwards, <i>Cro. El.</i> 326	146
Green v. Goddard, 2 <i>Salk.</i> 641	822
Greenacre, 8 <i>C. & P.</i> 35; 83, 167, 246, 743	246, 743
Greenhalgh, <i>Dearl.</i> 267	521
Greenhill, 4 <i>Ad. & El.</i> 624	846
Greeniff, <i>Leach</i> , 363	960
Greenwood, <i>Str.</i> 1138	35
Greenwood, <i>Den. & P.</i> 453; 21 <i>L. J.</i> <i>M. C.</i> 127	81, 730
Greenwood, 2 <i>Car. & K.</i> 339	441
Greenwood, 7 <i>Cox</i> , 404	771
Greepe, <i>Carth.</i> 422	985
Gregg, 10 <i>St. Tr. App.</i> 77	312
Gregg, <i>Fost.</i> 218	315, 323
Gregory, 1 <i>Cox</i> , 198	22
Gregory, 14 <i>L. J. M. C.</i> 82	23, 61
Gregory, 7 <i>Q. B.</i> 274	23, 61
Gregory, 5 <i>D. P. C.</i> 129	28
Gregory, <i>Leach</i> , 98, <i>n.</i>	34
Gregory, 4 <i>Dowl. & L.</i> 777	68
Gregory, 2 <i>Nev. S. C.</i> 229	88

	PAGE
Gregory, 4 <i>Jur.</i> 1015	108
Gregory, 1 <i>Per. & D.</i> 110; 8 <i>Ad. &</i> <i>El.</i> 95	139
Gregory, 1 <i>Salk.</i> 22	144
Gregory, 1 <i>Car. & K.</i> 228	286, 287
Gregory, 15 <i>L. J. M. C.</i> 38	888
Gregory, 8 <i>Q. B.</i> 508	893, 1159
Gregory, 5 <i>B. & Adol.</i> 353	1190
Gregory, 2 <i>Nev. & M.</i> 478: 1244, 1246, 1249	1244, 1249
Gregory v. Reg. 15 <i>Q. B.</i> 95; 5 <i>Jur.</i> 74	61, 284, 288, 1144, 1151
Gregory v. Taverner, 6 <i>C. & P.</i> 280: ..	1241
Gregory v. Tuffs, 1 <i>Cr. M. & R.</i> 310	151
Gresham, Lady, <i>Godb.</i> 59	1265
Grevil, <i>Say. Rep.</i> 249	883
Grey, <i>East</i> , <i>P. C.</i> 708	432
Grey, <i>Kel.</i> 64	746
Grey, 2 <i>Ld. Keny.</i> 387	1245
Grey, Lord, <i>East</i> , <i>P. C.</i> 460 ..	842, 1180
Grey, Lord, <i>Tho. Raym.</i> 473	847
Grey, Lord, 9 <i>St. Tr.</i> 127	1055, 1067
Grey v. Bartholomew, <i>Ow.</i> 20; <i>Gouldsb.</i> 127	415
Grice, 7 <i>C. & P.</i> 803	439, 908
Griepe, <i>Ld. R.</i> 256	987, 1020
Griffin, <i>Russ. & Ry.</i> 151	194
Griffin, 11 <i>Mod.</i> 468	329
Griffin, 2 <i>Barnard.</i> 368	1132
Griffin, app., Colman, resp. 28 <i>L. J. Ex.</i> 134	10
Griffin v. Parsons, <i>Selwy. N. P.</i> 27: ..	822
Griffith, 2 <i>Russ. C. M.</i> 832	189, 195
Griffith, <i>Dearl. & B.</i> 548	635
Griffith, 8 <i>C. & P.</i> 248	788
Griffith, 1 <i>C. & P.</i> 298	793
Griggs, <i>Tho. Raym.</i> 1	185
Grimes, <i>East</i> , <i>P. C.</i> 647	481
Grimes, 3 <i>Mod.</i> 220	1072
Grimshaw, 16 <i>L. J. Q. B.</i> 385	880
Grimwade, 1 <i>Cox</i> , 85	444
Grimwade, <i>Den.</i> 30; 1 <i>Car. & K.</i> 592	445
Grindall, 2 <i>C. & P.</i> 563	1010
Grindley, 1 <i>Russ. C. M.</i> 8	247
Groenvell, 1 <i>Ld. R.</i> 213	1302
Groenvelt v. Burwell, 1 <i>Ld. R.</i> 213: ..	1302
Groombridge, 7 <i>C. & P.</i> 582	831
Groombridge, 3 <i>Salk.</i> 169 ...	1121, 1123
Groombridge, 9 <i>C. & P.</i> 746	836
Grosvenor, 2 <i>Stark.</i> 511	1295
Grosvenor, <i>Str.</i> 1193	1311
Grote, 3 <i>D. P. C.</i> 255	116
Grounsell, 7 <i>C. & P.</i> 788	780
Grout, 6 <i>C. & P.</i> 629	768
Grove, 1 <i>Moo.</i> 447	495
Grove, 5 <i>Mod.</i> 18	924
Grover, 8 <i>D. P. C.</i> 325	100
Grubbins, 1 <i>Lew.</i> 214	110
Gruby, 1 <i>Cox</i> , 249	533
Grundy, 2 <i>Cox</i> , 357	59
Gruncell, 9 <i>C. & P.</i> 365	539
Guelder, 30 <i>L. J. M. C.</i> 34; <i>Bell</i> , 284	497
Guernsey, 1 <i>Fost. & F.</i> 394	383
Gully, <i>Leach</i> , 98	127
Gulston, 2 <i>Ld. R.</i> 1210	1096
Gunn, 11 <i>Mod.</i> 66	998, 1012

	PAGE
Gurnei, 3 <i>Inst.</i> 166	966
Gutch, <i>Lofft.</i> 780; <i>Moo. & M.</i> 433: 1162	
Gutteridge, 9 <i>C. & P.</i> 228	50
Gutteridge, 9 <i>C. & P.</i> 471 ..208, 801, 837	
Gwilt, 11 <i>Ad. & El.</i> 587; 3 <i>Per. &</i>	
<i>D.</i> 176; 8 <i>D. P. C.</i> 476	135, 827
Gwyne, 2 <i>Burr.</i> 749	112
Gyles, <i>Andr.</i> 180	944

H.

Haddock, <i>Say. Rep.</i> 19	1245, 1299
Haddock, <i>Andr.</i> 137	1296, 1299
Hadfield, 1 <i>Russ. C. M.</i> 13	250
Hadfield, 2 <i>Russ. C. M.</i> 231	660
Haigh, 7 <i>Cox</i> , 403	571
Hagan, 8 <i>C. & P.</i> 167 ..11, 108, 754,	764, 800
Hailey, <i>Ry. & M.</i> 94	980
Haines, <i>Leach</i> , 40	127
Haines, <i>Skin.</i> 583	136, 218
Haines, 2 <i>Russ. C. M.</i> 886	198
Haines, <i>Holt</i> , 289	217
Haines, 5 <i>Cox</i> , 114	265
Haines, <i>Russ. & Ry.</i> 451	454
Hair, 1 <i>Car. & K.</i> 389	107
Hair, 2 <i>Car. & K.</i> 368	767
Hake, 1 <i>Cox</i> , 226	207
Hake, 4 <i>Man. & Ry.</i> 483	112
Hales, <i>Str.</i> 816	162
Hales, <i>East</i> , 825	616
Halford, 7 <i>Mod.</i> 193	945
Hall v. Booth, 3 <i>Nev. & M.</i> 315	7, 13
Hall, 1 <i>Lew.</i> 232	20
Hall, 5 <i>Burr.</i> 2684	25
Hall, 1 <i>Lew.</i> 232	85
Hall, 1 <i>T. R.</i> 322	145
Hall, <i>Leach</i> , 559	192, 199
Hall, 3 <i>Stark.</i> 67	219
Hall, <i>Den.</i> 381; 18 <i>L. J. M. C.</i> 62;	
2 <i>Car. & K.</i> 947	379
Hall, 3 <i>C. & P.</i> 409	433, 912
Hall, <i>Russ. & Ry.</i> 355	454
Hall, 1 <i>Moo. C. C.</i> 474	488, 497
Hall, <i>Russ. & Ry.</i> 463	495
Hall, <i>East</i> , 895	717
Hall, <i>Cro. Jac.</i> 95	779
Hall, <i>Al.</i> 51	884
Hall, 2 <i>Fost. & F.</i> 16	904
Hall, 1 <i>Lew.</i> 232	911
Hall, 1 <i>Fost. & F.</i> 33	1054
Hall, 8 <i>C. & P.</i> 358	1065
Hall, 1 <i>Str.</i> 416	1147
Hall, 1 <i>Str.</i> 486	1172
Hall, 1 <i>Mod.</i> 76	1241
Hall, 1 <i>Ventr.</i> 169	1243
Hallett, 9 <i>C. & P.</i> 749	210, 834
Hallett, <i>Den. & P.</i> 237	979
Halliday, 29 <i>L. J. M. C.</i> 148; <i>Bell</i> ,	
257	184
Hallingby, <i>Com. Rep.</i> 93	1092
Halloway, <i>Den.</i> 370; 2 <i>Car. & K.</i>	
942	379
Halloway, 1 <i>Car. & P.</i> 128 ..391, 392, 398	
Halloway, <i>Cro. Car.</i> 131	746

	PAGE
Halpin, 9 <i>B. & C.</i> 65	1162, 1163
Halse, <i>Ry. & M. N. P. C.</i> 20	151
Halsey, <i>Noy.</i> 90	1261
Haman, 2 <i>Ld. R.</i>	1103, 1218
Hamilton, 7 <i>C. & P.</i> 448	132, 1070
Hamilton, 8 <i>C. & P.</i> 49	436, 474
Hamilton, 1 <i>Lew.</i> 77	457, 475
Hamilton, 1 <i>Car. & K.</i> 212	445
Hamilton, <i>Leach</i> , 348	475
Hamilton 16 <i>L. J. M. C.</i> ; 9 <i>Q. B.</i>	
271	531
Hamilton v. Reg. 16 <i>L. J. M. C.</i> ;	
9 <i>Q. B.</i> 271	531
Hamlyn, 4 <i>Camp.</i> 379	1078
Hammersmith, 1 <i>Stark.</i> 357	1263
Hammon, <i>Russ. & Ry.</i> 221	385
Hammond et ux. <i>Leach</i> , 444	74, 444
Hammond, 2 <i>Russ. C. M.</i> 2	362
Hammond, 1 <i>Cox</i> , 123	441
Hammond, 1 <i>Cox</i> , 60	561
Hammond, 2 <i>Esp.</i> 719	1066
Hammond, 10 <i>Mod.</i> 382	1263
Hamp, 6 <i>Cox</i> , 167	216, 1052
Hamper, 2 <i>Leon.</i> 230	969
Hampton, 3 <i>Ch. Burn.</i> 428	395
Hampton, 1 <i>Moo.</i> 235	663
Hamworth, <i>Str.</i> 900	1290
Hancock, <i>East</i> , 170	458
Hancock v. Sones, 28 <i>L. J. M. C.</i>	
196	29
Handcock v. Baker, 1 <i>B. & P.</i>	
260	12
Handley, 5 <i>C. & P.</i> 565	174
Handley, <i>Car. & M.</i> 547	383
Handley, 1 <i>Fost. & F.</i> 648	846
Handy, 6 <i>T. R.</i> 286	1241
Hanks, 3 <i>C. & P.</i> 419	979
Hann, <i>Lofft.</i> 28, 400	281
Hann, 3 <i>Burr.</i> 1716	944
Hankey, 1 <i>Burr.</i> 316	1104
Hannam, <i>Leach</i> , 420	121
Hannam v. Mockett, 2 <i>B. & C.</i> 934:	414
Hannon, 6 <i>Mod.</i> 311	518, 613, 617
Hannon, 2 <i>Moo.</i> 77	653
Hansill, 3 <i>Cox</i> , 597	84
Hanson, <i>Say. Rep.</i> 229	121
Hanson, 2 <i>Russ. C. M.</i> 770	235
Hanson, <i>East, P. C.</i> 610	415
Hanson, 2 <i>Moo.</i> 245	676
Hanson, 1 <i>Cox</i> , 438	803
Hanson, 8 <i>Cox</i> , 111	805
Hanson, 2 <i>Car. & K.</i> 912	821
Hanway v. Boulton, 4 <i>C. & P.</i>	
350	13
Harborne, 4 <i>Nev. & M.</i> 341	859
Hardey, 14 <i>Q. B.</i> 529	1046
Harding, 2 <i>Ventr.</i> 315	310, 311, 315
Harding, <i>Russ. & Ry.</i> 185	385
Harding, <i>M.S. Sarum Lent As.</i>	
1832	391
Harding, 2 <i>Salh.</i> 477	916
Harding v. Greening, 8 <i>Taunt.</i> 42:	1146
Hardwick, 1 <i>Phil. Ev.</i> 153	196
Hardwick, 1 <i>Sid.</i> 282	924
Hardy v. Murphy, 1 <i>Esp.</i> 294	11
Hardy, 24 <i>How. St. Tr.</i> 452	215
Hardy, 2 <i>Stark.</i> 136	235
Hardy, 1 <i>Ph. Ev.</i> 192	248
Hardy, <i>East, P. C.</i> 60	314, 324, 326

Table of Cases.

xxxvii

	PAGE		PAGE
Hardy, <i>East</i> , P. C. 113	335	Harrod, <i>Car. & M.</i> 294	128
Hardy, 5 <i>Esp.</i> 127	1068	Harrold, <i>East</i> , 715	446
Hardy, 19 <i>L. J. Q. B.</i> 796	1070	Harrow, 2 <i>Burr.</i> 2092	1261
Hare, 6 <i>Jur.</i> 326	102	Hart, 6 <i>C. & P.</i> 123	61
Hare, 3 <i>Cox</i> , 24	220	Hart, <i>Leach</i> , 145	237
Harford, <i>Comb.</i> 328	1310	Hart, 6 <i>C. & P.</i> 106	421
Hargrave, 5 <i>C. & P.</i> 170	93, 181	Hart, 2 <i>L. T.</i> 248	523
Harland, 8 <i>Ad. & El.</i> 826	1125, 1127	Hart, 1 <i>Moo.</i> 486	667
Harleston, <i>Cro. El.</i> 571	892	Hart, <i>Sir Wm. Bl.</i> 386	1134
Harley, 4 <i>C. & P.</i> 369	790	Hart, 10 <i>East</i> , 94	1160
Harley, <i>Car. & K.</i> 89	1223	Hartall, 7 <i>C. & P.</i> 475	97, 540
Harman, 2 <i>Ro. Rep.</i> 154	431	Hartell, 7 <i>C. & P.</i> 775	166
Harmer, 2 <i>Cox</i> , 487	368	Hartford, <i>Comp.</i> 111	1264
Harmwood, <i>East</i> , 440	832	Hartley, 4 <i>B. & Adol.</i> 869	141, 1150
Harnisse, 5 <i>Mod.</i> 443	1126	Hartley, <i>Russ. & Ry.</i> 129	487
Harpur, 5 <i>Mod.</i> 96	1310, 1311	Hartshorn, 6 <i>Cox</i> , 395	1322
Harrie, 13 <i>East</i> , 270	140	Harvey of Comb, 10 <i>Mod.</i> 334	25
Harrie, 6 <i>C. & P.</i> 105	447	Harvey, 8 <i>Cox</i> , 99	69, 1015
Harrington, 5 <i>Cox</i> , 231	763	Harvey, <i>East</i> , 658	194
Harrington, 1 <i>Ventr.</i> 324	1090	Harvey, <i>St. Tr.</i> 414	259
Harrington v. Churchward, 29 <i>L. J. Ch.</i> 521	487	Harvey, 1 <i>Cox</i> , 21	364
Harrington v. Long, 2 <i>Myln. & K.</i> 590	920	Harvey, 9 <i>C. & P.</i> 353	378
Harris, <i>Deersl.</i> 346	59	Harvey, <i>Leach</i> , 467	393
Harris, <i>Leach</i> , 800	61	Harvey, <i>Russ. & Ry.</i> 227	682
Harris, 3 <i>Burr.</i> 1330	64	Harvey, 1 <i>Sess. Ca.</i> 424	1005
Harris, 1 <i>Salk.</i> 47	67	Harvey, 2 <i>B. & C.</i> 257	1088, 1143
Harris, <i>Holt, Ca.</i> 353	95	Harwood, <i>Str.</i> 1088	281
Harris, 8 <i>Jur.</i> 516	141	Haslam, <i>Leach</i> , 418	182
Harris, <i>Cro. El.</i> 261	146	Haslam, <i>Den.</i> 93	292
Harris, 1 <i>Cox</i> , 166	188	Haslam, 1 <i>Jur.</i> 1139	499
Harris, 1 <i>Moo.</i> 338	199	Haslingfield, 2 <i>M. & S.</i> 558	1258
Harris, 4 <i>Cox</i> , 157	201	Hassall, 8 <i>Cox</i> , 491; <i>Leigh & Cave</i> , 58; 30 <i>L. J. M. C.</i> 175	403
Harris, 2 <i>Russ. C. M.</i> 932	251	Hassell, 2 <i>C. & P.</i> 434	72
Harris, 7 <i>C. & P.</i> 581	252	Hassell, 5 <i>C. & P.</i> 531	109
Harris, 8 <i>Cox</i> , 333	369	Hassell, <i>Leach</i> , 1	1230
Harris, <i>East</i> , P. C. 498	457	Hastings, 9 <i>C. & P.</i> 152	180
Harris, 1 <i>Deersl.</i> 344	490	Hastings, 1 <i>Moo.</i> 82	548
Harris, <i>Fost.</i> 115	564	Hassett v. Payne, <i>Cro. El.</i> 256	162
Harris, <i>East</i> , 1023	564	Haswell, 1 <i>Dougl.</i> 387.. 139, 1149, 1150	957
Harris, <i>Car. & M.</i> 641	572, 573	Haswell, <i>Russ. & Ry.</i> 450	957
Harris, 19 <i>L. J. M. C.</i> 11	627	Hatcher, 12 <i>Mod.</i> 356	134
Harris, 3 <i>Cox</i> , 565	630	Hatfield, 4 <i>B. & Ald.</i> 75	1253, 1263
Harris, 1 <i>Moo.</i> 393	633	Hathaway, 12 <i>Mod.</i> 556	134, 618
Harris, 2 <i>Moo.</i> 247	674	Haughton, 5 <i>C. & P.</i> 559	555, 559, 562, 590
Harris, <i>Leach</i> , 135	721	Havelock v. Geddes, 12 <i>East</i> , 622 ..	49
Harris, <i>Leach</i> , 929	753	Hawdon, 1 <i>Q. B.</i> 664; 3 <i>Per. & D.</i> 44	104, 111
Harris, 7 <i>C. & P.</i> 446	792	Hawe v. Planner, 1 <i>Saund.</i> 13	821
Harris, 5 <i>C. & P.</i> 159	795	Hawes, <i>Den.</i> 270	865
Harris, 5 <i>B. & Ald.</i> 926	1006, 1023	Hawkes, 2 <i>Moo.</i> 60	665
Harris, 11 <i>Mod.</i> 113	1121	Hawkeswood, <i>Leach</i> , 257	220, 666
Harris, 1 <i>Salk.</i> 268	1124	Hawkeswood, <i>East</i> , 275	774
Harris, 12 <i>Mod.</i> 268	1126	Hawkins, 3 <i>Cox</i> , 452	216
Harris, 3 <i>Salk.</i> 313	1126	Hawkins, 3 <i>C. & P.</i> 392	363, 440
Harris, 1 <i>Ld. Raym.</i> 482	1128	Hawkins, <i>East</i> , P. C. 485	454
Harris, 4 <i>T. R.</i> 202	1301	Hawkins, <i>East</i> , P. C. 501	461
Harris v. Dixon, <i>Cro. Jac.</i> 158: 972, 974		Hawkins, 7 <i>C. & P.</i> 281	492
Harrison, <i>Leach</i> , 477	75, 388	Hawkins, <i>Den.</i> 584	494
Harrison, 1 <i>Ch. Rep.</i> 571	101	Hawkins, <i>Trem.</i> 167	980
Harrison, 7 <i>T. R.</i> 60	143	Hawkins, <i>Peake</i> , 8	1011
Harrison, 1 <i>Dowl. & Ry.</i> 267	281	Haworth, 4 <i>C. & P.</i> 254	216
Harrison, <i>Leach</i> , 180	683	Hawtin, 7 <i>C. & P.</i> 281	492
Harrison, 1 <i>Moo.</i> 470	654	Hay, 2 <i>Fost. & F.</i> 2	234
Harrison, <i>East</i> , P. C. 382	881	Hay, <i>Fost.</i> 26	329
Harrison, <i>Cro. Car.</i> 503	929	Hay, 5 <i>M. & S.</i> 300	939
Harrison v. Evans, 6 <i>Bro. P. C.</i> 181	1311	Haydon, 7 <i>C. & P.</i> 445	484
Harrison v. Hodgson, 10 <i>B. C.</i> 825: 445		Haylock v. Sparke, 22 <i>L. J. M. C.</i> 77	1150

	PAGE		PAGE
Hayes, 1 <i>Show</i> . 272	1118, 1123	Herefordshire, JJ., 1 <i>Pr. Rep.</i>	
Hayes, 2 <i>Q. B.</i> 128	1254	323	901
Hayes, 2 <i>Moo. & Rob.</i> , 155	174, 543	Herford, 29 <i>L. J. Q. B.</i> 249	878
Hayes, 3 <i>Jones & Lat.</i> 568	258	Herring v. Walround, <i>Carth.</i> 503;	
Hayes, 2 <i>Cox</i> , 206	841	1 <i>Salk.</i> 374	144
Hayes, 1 <i>Cox</i> , 302	931	Hescott, 1 <i>Salk.</i> 338	1075
Hayman, <i>Moo. & M.</i> 401	1281, 1290	Hester, 4 <i>D. P. C.</i> 489	102
Haynes, 1 <i>Fost. & F.</i> 666	250, 258	Hetherington, 5 <i>Jur.</i> 529	271, 1172
Haynes, <i>Ry. & Moo.</i> 298	279, 1039	Hethersal, 3 <i>Mod.</i> 80	887, 892
Haynes, 12 <i>Rep.</i> 113; <i>East</i> , 652:		Hevey, <i>Leach</i> , 229, 235..214, 616,	
	394, 1196		660, 1051
Haynes, 4 <i>M. & S.</i> 214	615	Hewes, 3 <i>Ad. & El.</i> 725	262
Hays, 2 <i>Sess. Ca.</i> 198	1097	Hewett, <i>Car. & M.</i> 534	192
Hayward, 6 <i>Cox</i> , 160	205	Hewgill, <i>Deasyl.</i> 315	535
Hayward, 2 <i>Car. & K.</i> 234	233	Hewins, 9 <i>C. & P.</i> 786	66, 67, 1008
Hayward, 1 <i>Car. & K.</i> 518	483	Hewlett, 2 <i>Russ. C. M.</i> 278	369
Hayward, 6 <i>C. & P.</i> 157	747	Hewlett, 1 <i>Fost. & F.</i> 91	794
Hayward, <i>Russ. & Ry.</i> 78	793	Hext, 4 <i>Jur.</i> 339	140
Hayward, <i>Cro. El.</i> 148	1261	Hey, <i>Den.</i> 602	386
Haywood, <i>Russ. & Ry.</i> 16	592	Heydon, 3 <i>Burr.</i> 1270	144, 150
Hayworth, 2 <i>Cox</i> , 220	169	Heydon, 1 <i>Cox</i> , 184	779
Hayworth, 1 <i>Lew.</i> 122	687, 690	Heydon, 4 <i>Rep.</i> 41	780, 890
Hazell, 8 <i>Cox</i> , 44	211	Heydon, 3 <i>Burr.</i> 1359	1201
Hazell, <i>Leach</i> , 368	762	Heyrick v. Foster, 4 <i>T. R.</i> 701	149
Head, 2 <i>C. & P.</i> 458	235	Heywood, 4 <i>Jur.</i> 413	101
Head, 1 <i>Fost. & F.</i> 350	414, 779, 783	Heywood, 2 <i>Car. & K.</i> 352	697
Headge, <i>Russ. & Ry.</i> 160	493	Hibburt, 1 <i>Car. & K.</i> 461	279
Healey, 1 <i>Moo. C. C.</i> 1	95, 508	Hibbs v. Wilkinson, 1 <i>Fost. & F.</i>	
Heanor, 2 <i>Moo. & Rob.</i> 445	1269	608	1143
Heaps, 2 <i>Salk.</i> 593	261, 1099	Hickeringill, 11 <i>Mod.</i> 113	85
Hearn, <i>Car. & M.</i> 109	195, 198	Hickling, 7 <i>Q. B.</i> 880	1269, 1273
Hearn, 4 <i>C. & P.</i> 215	203	Hickman, <i>East, P. C.</i> 293	95
Heath, 2 <i>Moo.</i> 33	384, 420	Hickman, <i>Leach</i> , 318	426, 451
Heaton, 2 <i>T. R.</i> 184	102	Hickman, 1 <i>Moo. C. C.</i> 34	445, 449
Heaton, 1 <i>Lew.</i> 116	242	Hickman, <i>Leach</i> , 278	446
Heber, <i>Str.</i> 915	138, 944	Hickman, 5 <i>C. & P.</i> 151	770
Hebborne, <i>Poph.</i> 106	1257	Hicks, 2 <i>Moo. & Rob.</i> 80	87
Hedgecock, 1 <i>Russ. C. M.</i> 837	131	Hicks, 1 <i>Cox</i> , 145	466
Hedges, <i>Leach</i> , 201	425	Hicks, <i>Hob.</i> 215	1103
Hedges, 3 <i>C. & P.</i> 410	734	Hicks, <i>Poph.</i> 139	1131, 1154
Helsham, 4 <i>C. & P.</i> 394	779, 784	Higginbotham, <i>Ex p.</i> , 9 <i>D. P. C.</i>	
Hely, 10 <i>Jur.</i> 1009	143	200	150
Heming, 5 <i>B. & Adol.</i> 666	139	Higgins, 1 <i>Nev. & P.</i> 50	109
Heming, <i>Leach</i> , 445	444	Higgins, 3 <i>C. & P.</i> 603	107, 202
Hemming, 2 <i>Show.</i> 92	261	Higgins, 4 <i>C. & P.</i> 247	1076
Hemming, 1 <i>Salk.</i> 387	611	Higgins, 2 <i>East</i> , 5	1194
Hemp, 5 <i>C. & P.</i> 468	1032	Higgins, 5 <i>D. P. C.</i> 75	1270
Hempstead, <i>Russ. & Ry.</i> 344	261	Higginson, 1 <i>Car. & K.</i> 129	250
Hems, 7 <i>C. & P.</i> 312	10	Higginson, 1 <i>Ld. Raym.</i> 53	929
Hench, <i>Russ. & Ry.</i> 163	377	Higginson, 2 <i>Burr.</i> 1223	1190
Henderson, 2 <i>Moo.</i> 192	129, 531, 533	Higgon, 2 <i>Car. & K.</i> 769	18
Henderson v. Bromhead, 4 <i>Hurlst.</i>		Higgs, 2 <i>Car. & K.</i> 252	459
& <i>N.</i> 569; 28 <i>L. J.</i> 360	1135	Highfield, 2 <i>Russ. C. M.</i> 859	200
Hendon, 4 <i>B. & Ald.</i> 628	1289	Higley, 4 <i>C. & P.</i> 366	871
Hendricks, <i>Str.</i> 1234	1314	Hillarsden, 1 <i>Keb.</i> 894	1272
Hendy, 4 <i>Cox</i> , 243	445	Hilbers, 2 <i>Ch. Rep.</i> 163	1055
Henry, 2 <i>Moo.</i> 118	437, 446	Hilditch, 5 <i>C. & P.</i> 299	252
Henry, 1 <i>Cox</i> , 101	535, 1058	Hiles v. Hundred of Shrewsbury, 3	
Hensey, 4 <i>B. & Ald.</i> 124	1160	<i>East</i> , 457	563
Henson, <i>Den. & P.</i> 24	1242	Hill, 22 <i>L. J. Q. B.</i> 322; 2 <i>El. &</i>	
Hepper, 1 <i>Moo.</i> 211	112	<i>Bl.</i> 176	105
Hepper, <i>Ry. & M.</i> 210	151, 1016	Hill, <i>Den. & P.</i> 254	177
Heppingstall, 4 <i>Cox</i> , 138	805	Hill, 2 <i>Moo. & Rob.</i> 458	472
Herbert, <i>East</i> , 461	622	Hill, <i>Russ. & Ry.</i> 190	534
Herbert, 2 <i>Ld. Keny.</i> 466	1051	Hill, <i>Den.</i> 453	541
Hereford, JJ., 4 <i>New. S. C.</i> 179:		Hill, 1 <i>Car. & K.</i> 168	628
	17, 1167	Hill, 2 <i>Moo.</i> 30	668
Herefordshire, JJ., 1 <i>New. S. C.</i>		Hill, 2 <i>Cox</i> , 246	685
413	105	Hill, <i>East, P. C.</i> 439	831

Table of Cases.

xxxix

	PAGE		PAGE
Hill, 1 <i>And.</i> 78	925	Holloway, <i>Den. & P.</i> 18	59
Hill, <i>Cro. Car.</i> 232	925	Holloway, 8 <i>Mod.</i> 288	135
Hill, 2 <i>Ch. Burn</i> , 6	958	Holloway, 1 <i>C. & P.</i> 127	237
Hill, <i>Comb.</i> 64	1079	Holloway, <i>Den.</i> 370	274, 430
Hill, <i>Str.</i> 790	1186	Holloway, 5 <i>C. & P.</i> 524	363
Hill, <i>Ex p.</i> , 3 <i>C. & P.</i> 225	38	Holloway, 8 <i>Mod.</i> 283	826
Hill v. Yates, 12 <i>East</i> , 229	361	Holloway, 2 <i>D. P. C.</i> 525	894
Hilton, <i>Bell</i> , 20; 28 <i>L. J. M. C.</i> 28 : 245, 274, 547		Holloway, 5 <i>B. & Ald.</i> 596	930
Hilton, 2 <i>Cox</i> , 318	627	Holloway, 2 <i>D. P. C.</i> 525	1097
Hilton, 2 <i>Lew.</i> 214	770	Holloway v. Reg. <i>Den.</i> 287; 17 <i>Q.</i> B. 210	288, 961
Hilton v. Byron, 12 <i>Mod.</i> 243	894	Holland, 5 <i>T. R.</i> 607	1312
Hilton v. Eckersley, 24 <i>L. J. Q. B.</i> 353	1062	Holland, 4 <i>T. R.</i> 457	150
Hinchcliffe, 1 <i>Lew.</i> 161	774	Holland, 4 <i>T. R.</i> 691	167
Hinchcliffe, 10 <i>Q. B.</i> 356	936	Holland, <i>East, P. C.</i> 498	457
Hincks, <i>Den.</i> 184	179	Holland, 2 <i>Moo. & Rob.</i> 371	760
Hind, 29 <i>L. J. M. C.</i> 147; <i>Bell</i> , 253	207	Holland, 1 <i>T. R.</i> 692	945
Hind, <i>Russ. & Ry.</i> 253	849, 850	Hollingberry, 4 <i>B. & C.</i> 329	1058
Hinde, 5 <i>Q. B.</i> 944	879	Hollingham, 4 <i>B. & C.</i> 329	235, 270
Hindmarsh, <i>Leach</i> , 569	781	Hollingshead, 4 <i>C. & P.</i> 242	193
Hinley, 1 <i>Cox</i> , 12	175	Hollis, 2 <i>Stark.</i> 536	936
Hinley, 2 <i>Moo. & Rob.</i> 524	547	Holm, 11 <i>East</i> , 381	1063
Hinton, 3 <i>Mod.</i> 122	966, 971, 1007, 1022	Holman, 3 <i>Jur.</i> 722	245
Hinxman, <i>Leach</i> , 310	212	Holmes, 22 <i>L. J. M. C.</i> 122	95, 1185
Hirst, 1 <i>Lew.</i> 46	198	Holmes, 1 <i>Burr.</i>	148
Hoare, 1 <i>Fost. & F.</i> 647	402	Holmes, 1 <i>Lew.</i> 149	173
Hoare, 6 <i>M. & S.</i> 206	1122	Holmes, 2 <i>Car. & K.</i> 248	197
Hoatson, 2 <i>Car. & K.</i> 777	642	Holmes, 2 <i>Lew.</i> 256	487
Hobbs v. Branscomb, 3 <i>Camp.</i> 420	8	Holmes, <i>Cro. Car.</i> 376	564
Hobby, 1 <i>C. & P.</i> 660	116	Holmes, 1 <i>Mod.</i> 73	1114, 1122
Hobby, <i>Ry. & Moo.</i> 241	151	Holt, <i>Leach</i> , 593	96, 235
Hobhouse, <i>In re</i> , 3 <i>B. & Ald.</i> 428 : 31, 34		Holt, 5 <i>T. R.</i> 436	217, 267, 1147, 1158
Hobson, 1 <i>Lew.</i> 66	198, 230	Holt, 7 <i>C. & P.</i> 518	276, 791, 799
Hobson, <i>Russ. & Ry.</i> 56	501	Holt, <i>Bell</i> , 280	535
Hobson, <i>Hell.</i> 73	1119	Holt v. Reg. (in error), 2 <i>Dowl. &</i> L. 774	292
Hodge, <i>East, P. C.</i> 658	194	Holroy, 5 <i>Mod.</i> 341	290
Hodges, 8 <i>C. & P.</i> 195	45	Holroyd, 2 <i>Moo. & Rob.</i> 339	810
Hodges, <i>Moo. & M.</i> 341	429	Holtham, 2 <i>Russ. C. M.</i> 959	83
Hodgson, 3 <i>C. & P.</i> 422	50, 496, 499	Homer, <i>Leach</i> , 270	376
Hodgson, 3 <i>B. & Adol.</i> 351	65	Hone, 3 <i>Ch. Burn</i> , 741	1163
Hodgson, <i>Leach</i> , 6	81, 750	Hood, <i>Moo. C. C.</i> 281	3, 184
Hodgson, 1 <i>Lew.</i> 236	89, 237	Hood, <i>Say. Rep.</i> 161	121
Hodgson, <i>Dearl.</i> 14	104	Hook, <i>Dearl.</i> 606	1026
Hodgson, 4 <i>C. & P.</i> 322	133	Hooker, 7 <i>Mod.</i> 193	826
Hodgson, 1 <i>Moo.</i> 202	195	Hooper, 1 <i>Ch. Rep.</i> 491	38
Hodgson, <i>Russ. & Ry.</i> 211; 226, 834, 835		Hooper, 2 <i>Russ. C. M.</i> 879	199
Hodgson, 25 <i>L. J. M. C.</i> 78 ; <i>Dearl. & B.</i> 3	634	Hoost, <i>East, P. C.</i> 950	648
Hodgson, 1 <i>Lew.</i> 103	651	Hope, 7 <i>C. & P.</i> 136; 1 <i>Moo. & Rob.</i> 396	200, 199
Hodnett, 1 <i>T. R.</i> 96	837	Hope, 1 <i>Moo.</i> 414	682
Hogan, <i>Den. & P.</i> 277	807	Hopkins, 8 <i>C. & P.</i> 591	781, 869
Hogg, 2 <i>Moo. & Rob.</i> 380	87	Hopkins, <i>Car. & M.</i> 294	846
Hogg, 6 <i>C. & P.</i> 176	208	Hopley, 2 <i>Fost. & F.</i> 202	762
Hoggins, <i>Russ. & Ry.</i> 145	494	Hord, <i>Say. Rep.</i> 176	1116
Holcroft, 4 <i>Rep.</i> 46	129	Hornbrook, 1 <i>Cox</i> , 54	188
Holcroft, 2 <i>Car. & K.</i> 341	838, 840	Hornby, 1 <i>Car. & K.</i> 305	544
Holden, 8 <i>C. & P.</i> 605	26, 58, 78	Horne, 11 <i>St. Tr.</i> 283	235
Holden, 3 <i>B. & Ald.</i> 347; 2 <i>Nev.</i> & <i>M.</i> 167	65	Horne, 4 <i>Cox</i> , 263	954
Holden, q. t. v. Weeden, <i>Bunb.</i> 177 : 177	145	Horne, <i>Str.</i> 195	1072
Holden, 8 <i>C. & P.</i> 606	222	Horne, <i>Comp.</i> 672	1151
Holden, <i>Russ. & Ry.</i> 154; 1 <i>Jack.</i> 1019	648	Horne v. Reg. 4 <i>Bro. P. C.</i> 363	1151
Holden, <i>Russ. & Ry.</i> 154	650	Horne, <i>Gouldsb.</i> 102	1175
Holding, 1 <i>Arch. Pr.</i> 193	226	Horner, <i>Leach</i> , 270	33
Holloway, 9 <i>P. & C.</i> 43	46	Horner, <i>Leach</i> , 620	164
		Horner, <i>East, P. C.</i> 702	433
		Horner v. Battyn, <i>Bull. N. P.</i> 62	7
		Horner v. Liddiard, 1 <i>Russ. C. M.</i> 210	58

	PAGE		PAGE
Hornsea, <i>Dears.</i> 291	1255	Hughes, 2 <i>Moo.</i> 190	833
Horsly, 5 <i>T. R.</i> 362	950, 1217	Hughes, 24 <i>L. J.</i> 137	871
Horwell, 1 <i>Moo.</i> 405	677	Hughes, <i>Dears.</i> & <i>B.</i> 188	981
Horwood v. Smith, 2 <i>T. R.</i> 750; <i>Leach</i> , 586	401	Hughes, 1 <i>Car.</i> & <i>K.</i> 519	1035
Hoskins, 12 <i>Mod.</i> 324	949	Hughes, <i>Moo.</i> & <i>M.</i> 178	1093
Hoskins, <i>Holt. Ca.</i> 352	1240	Hughes, 4 <i>C. & P.</i> 373	1096
Hough, <i>Russ. & Ry.</i> 120	677, 679	Hugill, 4 <i>Com. (Chr.)</i> 240	479
Houlditch, 1 <i>Stark.</i> 63	163	Hull, <i>Kel.</i> 40	759, 769
Houncell, 2 <i>Moo.</i> & <i>Rob.</i> 29	871	Hulme, 7 <i>C. & P.</i> 8	1029
House, 7 <i>Ad. & El.</i> 69; 3 <i>Nev. & M.</i> 462	292	Hulse, <i>Ex p.</i> , 21 <i>L. J. M. C.</i> 21....	894
Houseman, 8 <i>C. & P.</i> 180	683	Humblings, <i>Comb.</i> 374	611
Houssin v. Barrow, 6 <i>T. R.</i> 122 ...	753	Humphreys, <i>Car. & M.</i> 601	45
How, 11 <i>Ad. & El.</i> 199	105, 106	Humphreys, 2 <i>Russ. C. M.</i> 745	215
How, <i>Str.</i> 699	1152	Humphreys, 19 <i>L. J. M. C.</i> 189	901
Howard, 1 <i>Moo.</i> & <i>Rob.</i> 187	1035	Hungerford, 11 <i>Mod.</i> 42	136
Howarth, 1 <i>Moo.</i> 207	13, 14	Hungerford, 1 <i>East, P. C.</i> 518	261
Howarth, 3 <i>Stark.</i> 26	530	Hunsdon, <i>East, P. C.</i> 611	415, 416, 417
Howatt, <i>Leach</i> , 83	1231	Hunt, 1 <i>Moo.</i> 93	13, 793
Howe, 1 <i>Campb.</i> 461	253	Hunt, 3 <i>B. & Ald.</i> 679	16
Howe, 4 <i>C. & P.</i> 268	448	Hunt, 10 <i>Q. B.</i> 925; 17 <i>L. J.</i> <i>M. C.</i> 14	63
Howe, <i>Leach</i> , 481	505	Hunt, 3 <i>B. & Ald.</i> 444	65
Howe, 6 <i>Esp.</i> 124	949	Hunt, 3 <i>B. & Adol.</i> 351	65
Howe, <i>Str.</i> 699	949	Hunt, 3 <i>Cox</i> , 215	123
Howell, 9 <i>C. & P.</i> 437: 52, 79, 80, 116, 246, 572, 573, 749	749	Hunt, 4 <i>Cox</i> , 149	201
Howell, 1 <i>Car. & K.</i> 689; <i>Den.</i> 1: 205	205	Hunt, 2 <i>Cox</i> , 239	206
Howell, 7 <i>C. & P.</i> 325	381	Hunt, 2 <i>Cox</i> , 261	208, 302
Howell, <i>Den. & P.</i> 363	414	Hunt, 3 <i>B. & Ald.</i> 566	237
Howell, 1 <i>Cox</i> , 190	465	Hunt, 2 <i>Campb.</i> 583	266, 1161
Howell, 3 <i>Ch. Burn</i> , 868	798	Hunt, 4 <i>B. & Ald.</i> 430	268
Howell, 3 <i>Keb.</i> 465	1190	Hunt, 3 <i>Stark.</i> 103	351, 1084
Howell v. Jackson, 6 <i>C. & P.</i> 723..	11	Hunt, 3 <i>B. & Ald.</i> 566	353, 354
Howes, 6 <i>C. & P.</i> 404	196	Hunt, 8 <i>Cox</i> , 493	403, 530
Howes, 7 <i>Ad. & El.</i> 60	290	Hunt, 8 <i>C. & P.</i> 642	489
Howlett, 7 <i>C. & P.</i> 274	793	Hunt, 1 <i>Lord Keny.</i> 108	1098
Hoyle v. Bush, 1 <i>Man. & Gr.</i> 775:	5	Hunter, 3 <i>C. & P.</i> 591	43
Hube, <i>Peake</i> , 132	233, 1165	Hunter, 3 <i>C. & P.</i> 593	52
Hubert, <i>Cro. El.</i> 531	934	Hunter, 1 <i>Wils.</i> 163	281
Hubson, <i>East, P. C.</i> 258	750	Hunter, <i>Russ. & Ry.</i> 511	677
Hucks, 1 <i>Stark.</i> 521	1008, 1019	Hunter, <i>Leach</i> , 624	683, 684
Huddersfield, 1 <i>Cox</i> , 113	209	Hunter, 4 <i>C. & P.</i> 128	690
Hudson, <i>Russ. & Ry.</i> 285	284	Huntley, 29 <i>L. J. M. C.</i> 170; <i>Bell</i> , 238	543
Hudson, 1 <i>Fost. & F.</i> 56	981	Huntly v. Luscombe, 2 <i>Bos. & P.</i> 530	30, 31
Hudson, <i>Str.</i> 909	1251	Hunts, <i>JJ.</i> 14 <i>L. J. M. C.</i> 99	896
Huet, <i>Leach</i> , 820	214, 652	Hurley, 2 <i>Moo. & Rob.</i> 47	681
Huet, <i>Godb.</i> 438	1095	Hurrell, <i>Ry. & M.</i> 296	508
Huggett, <i>Kel.</i> 59	755	Hurse, 2 <i>Moo. & Rob.</i> 360	727
Huggins, <i>Str.</i> 856	745	Hursfield, 8 <i>C. & P.</i> 269	166
Huggins, 3 <i>C. & P.</i> 414	887, 889	Hurt, 1 <i>Hawk. c.</i> 73, <i>s.</i> 5	1140
Hughes, 2 <i>Lew. C. C.</i> 230	74	Hussey, <i>Law Times</i> , 1844	674
Hughes, 1 <i>Russ. C. M.</i> 18	75	Hussey, 1 <i>Cox</i> , 347	689
Hughes, 29 <i>L. J. M. C.</i> 71; <i>Bell</i> , 242	83	Hutchinson, <i>Leach</i> , 135	129
Hughes, 1 <i>Car. & K.</i> 235	152	Hutchinson, 2 <i>Lew.</i> 141	146
Hughes, 1 <i>Cox</i> , 44	252	Hutchinson, 2 <i>B. & C.</i> 608	207
Hughes, <i>Car. & M.</i> 503	393	Hutchinson, 1 <i>Lew. C. C.</i> 74	276
Hughes, 1 <i>Lew.</i> 301	433	Hutchinson, <i>Russ. & Ry.</i> 412	394
Hughes, <i>Leach</i> , 406	456	Hutchinson, 1 <i>Lew.</i> 195	407
Hughes, 2 <i>Cox</i> , 104	491	Hutchinson, <i>Deac. Cr. L.</i> 1687	577
Hughes, 1 <i>Moo.</i> 370	491	Hutchinson, <i>Leach</i> , 339	1215
Hughes, 1 <i>Fost. & F.</i> 355	526	Hutt, 2 <i>Burr.</i> 1039	896
Hughes, <i>Bell</i> , 242; 8 <i>Cox</i> , 278	538	Huxley, <i>Car. & M.</i> 596	438
Hughes, 2 <i>C. & P.</i> 420	592, 792	Hyams, 7 <i>C. & P.</i> 441	454
Hughes, 1 <i>Fost. & F.</i> 726	626, 630	Hyde, 7 <i>T. R.</i> 710	181
Hughes, <i>East, P. C.</i> 1002	652	Hyde, 1 <i>Hale</i> , 537	277
Hughes, 26 <i>L. J. M. C.</i> 202	770	Hyman, <i>Leach</i> , 925	545
Hughes, 5 <i>C. & P.</i> 126	795	Hymen, 7 <i>T. R.</i> 536	146

Table of Cases.

xli

I.

	PAGE
Iles, <i>Bull. N. P.</i> 243	1030
Illidge, <i>Den.</i> 404	689
Imason v. Cope, 5 <i>C. & P.</i> 293	825
Ince, <i>Leach</i> , 342, 439	1215
Inclendon, 1 <i>M. & S.</i> 168	109
Inclendon, 13 <i>East</i> , 164	1254, 1270
Inder, <i>Den.</i> 325	526, 684
Inge, 2 <i>Smith</i> , 256	938
Ingham, 29 <i>L. J. M. C.</i> 18	630
Ingham, 19 <i>L. J. M. C.</i> 69	976
Ingle v. Bell, 1 <i>Mees. & W.</i> 516...	14
Ingleton, 1 <i>Wils.</i> 139	109, 110
Ingram et ux. 1 <i>Salk.</i> 304	75
Ingram et ux. 1 <i>Salk.</i> 593	1098
Innell, 1 <i>Hawk. c.</i> 89, s. 16	1221
Ion, <i>Den. & P.</i> 475	648
Ipswich murder case, <i>Leach</i> , 388 ..	277
Ireland, 3 <i>T. R.</i> 512	111
Ireton, <i>Pollexf.</i> 592	927
Irish Peer, Case of the, <i>Russ. & Ry.</i> 117	42
Isaac, <i>East, P. C.</i> 1031	566
Isaacs v. Brand, 2 <i>Stark.</i> 167	9
Isaacs, 20 <i>L. J. Q. B.</i> 395	38, 721
Isley, <i>Leach</i> , 320	426
Israel, 2 <i>Cox</i> , 263	118
Israel, 3 <i>Dowl. & Ry.</i> 234	1009
Ivers, 7 <i>C. & P.</i> 213	1307

J.

Jackson, 1 <i>Hale</i> , 464	16, 749, 755
Jackson, 2 <i>Harch. c.</i> 15, s. 79	37
Jackson, 6 <i>T. R.</i> 145	102
Jackson, 7 <i>Cox</i> , 357	158
Jackson, 6 <i>Cox</i> , 525	181
Jackson, 4 <i>Mod.</i> 366	320
Jackson, 1 <i>Moo.</i> 119	373
Jackson, 2 <i>Moo.</i> 32	386
Jackson, <i>Leach</i> , 267	440
Jackson, <i>East, P. C. Add.</i> xxi	446
Jackson, 2 <i>Russ. C. M.</i> 801	466
Jackson, 1 <i>Car. & K.</i> 384	496
Jackson, 3 <i>Camp.</i> 370	518, 616
Jackson, 3 <i>Cox</i> , 89	630
Jackson, 7 <i>Cox</i> , 357	749
Jackson, <i>Russ. & Ry.</i> 393	833
Jackson, 1 <i>Lew.</i> 270	965
Jackson, q. t. v. Gisling, <i>Str.</i> 1169..	149
Jacobs, 4 <i>Cox</i> , 54	193
Jacobs, <i>Leach</i> , 309	198, 212
Jacobs, <i>Leach</i> , 267	437
Jacobs, 1 <i>Moo.</i> 146	857, 859, 863, 873
Jacomb, <i>Str.</i> 953	121
Jagger, <i>East, P. C.</i> 458	185
James, 1 <i>Moo.</i> 329	86
James, 6 <i>Cox</i> , 5	260
James, 2 <i>Russ. C. M.</i> 14	368
James, 1 <i>Russ. C. M.</i> 815	461
James, 8 <i>C. & P.</i> 131	583
James, 7 <i>C. & P.</i> 553	668, 676, 677
James, 4 <i>Cox</i> , 90	679
James, 1 <i>Car. & K.</i> 530	795, 802

	PAGE
James, <i>Russ. & Ry.</i> 17	863
James, 5 <i>B. & Ald.</i> 894	929
James, 2 <i>Str.</i> 679	946
James, 1 <i>Show.</i> 397	1033, 1034
James, 1 <i>Russ. C. M.</i> 177	1098
James, 5 <i>C. & P.</i> 152	1099
James, 19 <i>L. J. M. C.</i> 179	1306
James v. Campbell, 5 <i>C. & P.</i> 272 ..	824
James v. Hayward, <i>Cro. Car.</i> 184 ...	1248
Jannet, <i>Russ. & Ry.</i> 351	70
Jannet, 2 <i>Russ. C. M.</i> 443	657
Janson, 4 <i>Cox</i> , 82	375
Jarvis, 2 <i>Moo. & Rob.</i> 44	83
Jarvis, 1 <i>Moo.</i> 7	462
Jarvis, 25 <i>L. J. M. C.</i> 30	730
Jarvis, 2 <i>Moo. & Rob.</i> 40	788, 791
Jary v. King, <i>Palm.</i> 535	985, 1005, 1031
Jeans, 1 <i>Car. & K.</i> 539	592
Jeffery, q. t. v. Coles, <i>Willis</i> , 634..	147
Jefford, <i>East, P. C.</i> 229	869
Jeffries and another, 3 <i>Cox</i> , 85	80
Jeffs, <i>Str.</i> 984	925
Jellias, <i>East, P. C.</i> 130	323
Jellyman, 8 <i>C. & P.</i> 604	180, 873
Jemet, <i>Russ. & Ry.</i> 243	551
Jenkins, 1 <i>Cox</i> , 177	181
Jenkins, <i>Ca. Temp. Hardw.</i> 301 ..	936
Jenks, <i>East, P. C.</i> 514; <i>Leach</i> , 774:	95, 466
Jennings, <i>Dearsi. & B.</i> 447	95, 387
Jennings, 2 <i>Dowl. & L.</i> 741	138
Jennings, 1 <i>Russ. & Ry.</i> 388	787
Jennings, 2 <i>Lew.</i> 130	792
Jennings, 1 <i>Lew.</i> 93	832
Jennings, 1 <i>Cox</i> , 116	1193
Jennings, 11 <i>Mod.</i> 215	1309
Jennison, <i>Dough.</i> 390	139
Jenour, 7 <i>Mod.</i> 400	1133
Jenson, 1 <i>Moo.</i> 434	487, 488, 497
Jepson, <i>East, P. C.</i> 1115	444, 445
Jermy, <i>Say. Rep.</i> 47	943
Jervis, 6 <i>C. & P.</i> 156	544
Jervois, q. t. v. Hall, 1 <i>Wils.</i> 17 ...	270
Jessop, <i>Dearsi. & B.</i> 442	516
Jewett, 2 <i>Cox</i> , 227	408
Jeyes, 5 <i>Nev. & M.</i> 101; 3 <i>Ad. &</i> <i>El.</i> 416	257, 935
Jeyes, 2 <i>Russ. C. M.</i> 188	499
Jobling, <i>Russ. & Ry.</i> 525	461
Johnson, 2 <i>Car. & K.</i> 394	17
Johnson, 2 <i>Car. & K.</i> 354	51
Johnson, 1 <i>Cox</i> , 59	76
Johnson, 1 <i>Moo.</i> 173	109
Johnson, 1 <i>Wils.</i> 325	121, 1094
Johnson, 6 <i>East</i> , 583	123, 126
Johnson, <i>Str.</i> 1000	157
Johnson, <i>Str.</i> 824	162
Johnson, 2 <i>Russ. C. M.</i> 879	199
Johnson, 2 <i>Car. & K.</i> 355	210
Johnson, 3 <i>Car. & K.</i> 354	222
Johnson, 1 <i>Moo.</i> 173	256
Johnson, 29 <i>L. J. M. C.</i> 133	269
Johnson, <i>Post.</i> 26	329
Johnson, <i>Den. & P.</i> 310	395
Johnson, <i>Dearsi. & B.</i> 340; <i>Russ.</i> <i>& Ry.</i> 493	439
Johnson, <i>Leach</i> , 267	440
Johnson, <i>Leach</i> , 193	446
Johnson, <i>Kel.</i> 58	455

xliii

	PAGE
Kitton v. Walters, <i>Hettl.</i> 12 ..	1017, 1038
Knell, 1 <i>Barnard.</i> 305	1141, 1161
Kneller, 1 <i>Salk.</i> 151	128
Knewland, <i>Leach</i> , 721	435
Knight, 1 <i>Salk.</i> 375	134, 634
Knight, <i>East</i> , P. C. 510	453
Knight, 2 <i>Fost. & F.</i> 46	767
Knight, 1 <i>Lew.</i> 168	768
Knight, 3 <i>Mod.</i> 117	1100
Knight et ux. 1 C. & P. 116	72
Knight, Ex p., 2 <i>Mees. & W.</i> 106..	32, 36
Knightly, <i>Holt</i> , Ca. 388	320
Knill, 5 B. & Ald. 929	1024
Knox, 2 <i>Cox</i> , 165	1005
Knut, 2 <i>Barnard.</i> 114.....	1133
Koops, 6 <i>Ad. & El.</i> 198	984
Krans, 1 B. & C. 258	7, 8
Kroehl, 2 <i>Stark.</i> 343	227, 1065
Kynaston, 1 <i>East</i> , 217.....	6
Kynaston, 2 <i>Barnard.</i> 378	1098

L.

Lacey, Mo. 121	54
Lacey, 3 Cox, 517.....	157, 345
Lad, Leach, 96	760, 836
Ladsingham, Tho. Raym. 193	260
Lafone, 1 Esp. 154.....	181, 1065
Laiston, 2 Ro. Rep. 47	986
Lake, 3 Leon. 268.....	1079
Lallement, 6 Cox, 204.....	69, 89
Lamb, 4 Burr. 2171.....	163
Lamb, East, 664.....	368
Lamb, 9 Rep. 59.....	1141, 1143
Lambe, Leach, 552	198
Lambert, 2 Camp. 400.....	248
Lambert, 2 Cox, 309.....	495
Lambert, 11 Mod. 154	971
Lambert, 2 Camp. 398.....	1089
Lancashire, JJ., 3 Per. & D. 86....	106
Lancashire, JJ., 1 Ch. Rep. 602	138
Lancashire, JJ., 1 Dowl. & Ry. 485:	946
Lancashire, JJ., 12 East, 366.....	1272
Lancashire, JJ., 2 East, 352	1276
Lancashire, 2 B. & Adol. 813..	1278, 1279
Lancaster, 2 Stark. Ec.	792, 1289
Landon, 1 Fost. & F. 381	169
Lands, 25 L. J. M. C. 14.....	627, 630
Landulph, 1 Moo. & Rob. 393	1259
Lane, 6 Mod. 128	94
Lane, 3 Salk. 270.....	970
Lane, Cro. El. 148.....	989, 1013, 1015
Lane v. Hegberg, Bull. N. P. 9 ..	826
Langbridge, Den. 448	212
Langford, Car. & M. 602	571, 572
Langforth Bridge, Cro. Car. 365 ..	1289
Langley, 2 Salk. 697	929
Langley, 2 Ld. Raym. 1029	1103
Langley, 2 Ld. Raym. 790.....	1240
Langstaffe, 1 Lev. 162	759
Lansdell v. Bidwell, Locke, Game	
Laws, 101	908
Lapier, Leach, 420	432, 433, 434
Lara, 6 T. R. 365.....	527, 617
Larewood, Ld. Raym. 29	1311
Larking, 1 Lev. 90	1115

	PAGE		PAGE
Larkins, <i>Deare</i> . 365	67, 95	Leeds, 5 <i>D. P. C.</i> 123.....	1261, 1270
Larrieu, 7 <i>Ad. & El.</i> 277	135	Lees, 27 <i>L. J. Q. B.</i> 403...32, 33, 102, 292	
Larwood, 1 <i>Salk.</i> 167	136	Leeser, <i>Cro. Jac.</i> 497	285, 610
Latimer, 29 <i>L. J. Q. B.</i> 129	1162	Leefe, <i>Andr.</i> 226	928
Laugher, 2 <i>Car. & K.</i> 225	74, 190	Leefe, 2 <i>Camp.</i> 1341019, 1023,	
Launock v. Brown, 2 <i>B. & Ald.</i>		1030, 1036	
592	6	Leek, 3 <i>Inst.</i> 15; 12 <i>Rep.</i> 15	638
Lavender, <i>East, P. C.</i> 566	385, 482	Legasley, 1 <i>Hawk. c.</i> 21, s. 13	929
Lavey, <i>Leach</i> , 153.....	722	Leginham, 1 <i>Mod.</i> 71	948
Lavey v. Reg. <i>Den. & P.</i> 504.....	1000	Legg, <i>Kel.</i> 27	743
Lavey, 3 <i>Car. & K.</i> 20.....	1014	Legge, 6 <i>Cox</i> , 220.....	979
Law, 2 <i>Moo. & Rob.</i> 197.....	71	Leggatt v. Tollervy, 14 <i>East</i> , 302..	111
Law v. Crowther, 2 <i>Wils.</i> 21.....	149	Leggett, 8 <i>C. & P.</i> 191.....	766
Lawes, 1 <i>Car. & K.</i> 62	471, 476	Leigh, <i>East, P. C.</i> 694	373
Lawley, Lady, <i>Str.</i> 904	927	Leigh, <i>Leach</i> , 411; 2 <i>Russ. C. M.</i>	
Lawley, 1 <i>Barnard.</i> 263.....	1020	57	378
Lawrance, 4 <i>Cox</i> , 438	364	Leigh, <i>Leach</i> , 52	481
Lawrence v. Hedger, 3 <i>Taunt.</i> 14..	9	Leigh, q. t. v. Kent, 3 <i>T. R.</i> 362 ..	148
Lawrence, 12 <i>Mod.</i> 311	136, 1088	Leigh v. Cole, 6 <i>Cox</i> , 329	6
Lawrence, 4 <i>C. & P.</i> 231.....	455	Lembro, <i>Cro. & El.</i> 14	1017
Lawson, 1 <i>Q. B.</i> 486	135	Le Merchand, <i>Leach</i> , 300	215
Lawson, 2 <i>Esp.</i> 262	814	Le Mott, <i>Kel.</i> 42	453
Laxton, 4 <i>Cox</i> , 149	250	Leng, 1 <i>Fost. & F.</i> 77	244
Laycock, 1 <i>Lew.</i> 132; 4 <i>C. & P.</i>		Lennard, <i>Leach</i> , 90.....	738
326	1033	Lennox, 2 <i>Lew.</i> 268.....	94
Layer, <i>Leach</i> , 559.....	194	Leonard, 10 <i>Mod.</i> 429	34
Layer, 6 <i>St. Tr.</i> 259	226	Leonard, <i>Den.</i> 304	532
Layer, 6 <i>St. Tr.</i> 330	319, 333	Leper, <i>Andr.</i> 209	268
Layer, 6 <i>St. Tr.</i> 314.....	322	Lesingham, <i>Tho. Raym.</i> 205.....	948
Layer, <i>Leach</i> , 308	326	Lesley, <i>Bell</i> , 220	830
Layer, 6 <i>St. Tr.</i> 246	335	Lever, 1 <i>Show.</i> 261	925
Layton, 1 <i>Salk.</i> 106.....	35	Leverick v. Mercer, 22 <i>L. J. M. C.</i>	
Layton, 1 <i>Salk.</i> 353, 450.....	1116	81	27
Layton, 2 <i>Salk.</i> 450	1130	Levet, <i>Cro. Car.</i> 538	774
Lea, 2 <i>Moo.</i> 8	132, 272	Levi v. Levi, 6 <i>Cox</i> , 239	1050
Leach, <i>Cro. Jac.</i> 167	1011	Levy, 2 <i>Stark.</i> 468	1058
Leach v. Simpson, 7 <i>D. P. C.</i> 511 :		Levy v. Edwards, 1 <i>C. & P.</i> 40 ..11,	825
19, 213		Levy, 2 <i>Stark.</i> 458	173
Leader, 2 <i>Russ. C. M.</i> 122.....	398	Levy, 7 <i>Cox</i> , 73	244
Leake, 2 <i>Nev. & M.</i> 583	1257	Levy, 4 <i>C. & P.</i> 141.....	380
Lear, 1 <i>Russ. C. M.</i> 638	769	Levy, <i>Leach</i> , 173	661
Lechemere, 4 <i>Jur.</i> 656	101	Levy, <i>Russ. & Ry.</i> 7	727
Ledbitter, 3 <i>Car. & K.</i> 108.....	213	Leward v. Basley, 1 <i>Ld. Raym.</i>	
Ledbitter, 1 <i>Moo.</i> 76	405	62	822
Leddington, 9 <i>C. & P.</i> 79	758	Lewen, 2 <i>Lew.</i> 161	256
Ledwick, <i>Supp. to Viner. V.</i> 380 ..	1025	Lewen, 1 <i>Sid.</i> 405.....	967
Ledwith v. Catchpole, <i>Cald.</i> 291 ..	12	Lewis, 7 <i>Cox</i> , 406.....	52
Lediard, <i>Say.</i> 242.....	943	Lewis, 6 <i>C. & P.</i> 161..197, 202, 751, 790	
Lediard, <i>Say.</i> 112.....	1135	Lewis, 4 <i>Esp.</i> 225	226
Lee, 6 <i>C. & P.</i> 536	84	Lewis, 2 <i>C. & P.</i> 628	456
Lee, 12 <i>Mod.</i> 514	137	Lewis, 1 <i>Moo.</i> 372.....	505
Lee, <i>Russ. & Ry.</i> 361	184	Lewis, <i>Say.</i> 205	614
Lee, <i>Leach</i> , 258	221, 666	Lewis, <i>Leach</i> , 451	654, 660
Lee, 2 <i>Moo. & Rob.</i> 281	650	Lewis, <i>Deare</i> . & <i>B.</i> 182	782
Lee, 3 <i>Cox</i> , 80	674	Lewis, 1 <i>Car. & K.</i> 419	786, 819
Lee, <i>Leach</i> , 416	717	Lewis, 9 <i>C. & P.</i> 523	795
Lee, 1 <i>Lew.</i> 149.....	910	Lewis, 2 <i>Str.</i> 835	896
Lee, 12 <i>Mod.</i> 514	929	Lewis, <i>Str.</i> 70	975
Lee, 2 <i>Russ. C. M.</i> 650	1025	Ley, 1 <i>Lew.</i> 239	119
Lee, 2 <i>Stark. Ev.</i> 324.....	1069	Ley, 1 <i>Lew.</i> 133.....	256
Lee, 5 <i>Esp.</i> 123.....	1136	Leyton, <i>Cro. Car.</i> 584.....	1265
Lee, <i>Exp.</i> 7 <i>Jur.</i> 441	136	Light, <i>Deare</i> . & <i>B.</i> 332; 27 <i>L. J.</i>	
Lee v. Gansel, <i>Comp.</i> 1	753	<i>M. C.</i> 1	12, 825
Lee v. Secombe, <i>Cro. El.</i> 297	974	Lilly, 7 <i>Mod.</i> 63	813
Leech, 7 <i>Cox</i> , 100.....	61	Lincoln, <i>Russ. & Ry.</i> 4211007, 1015	
Leech, 3 <i>Stark.</i> 71	498	Lincoln, 4 <i>B. & C.</i> 676	1283
Leech, 25 <i>L. J. M. C.</i> 77	536	Lincoln, Mayor of, 8 <i>Ad. & El.</i> 65 :	
Leech, 2 <i>Man. & Ry.</i> 119	1010	1285, 1290	
Leech, 6 <i>Mod.</i> 145	1293	Lincombe, 2 <i>Ch. Rep.</i> 214.....	1272

Table of Cases.

xl v

	PAGE
Lindsay, 14 <i>East</i> , 317	1280
Line, 2 <i>Cox</i> , 56	680
Line, 1 <i>Car. & K.</i> 393	833, 839
Linford v. Fitzroy, 18 <i>L. J. M. C.</i> 108	21
Lingate, 1 <i>Phil. Ev.</i> 113	196
Linkfield Street, 2 <i>T. R.</i> 514	1253
Lippiatt, 1 <i>Cox</i> , 56	87
Lister, <i>Dearsi.</i> & <i>B.</i> 118	494
Lister, 1 <i>B. & P.</i> 427	1004
Lithgo, <i>East</i> , <i>P. C.</i> 357	458
Little, 1 <i>Lew.</i> 261	477
Little, <i>Burr.</i> 610	1316
Little Bolton v. Reg. 12 <i>L. J.</i> 104 ..	1252
Littleton, 9 <i>C. & P.</i> 671	166
Liverpool, Mayor of, 3 <i>East</i> , 86 ...	1253
Llandillo, 2 <i>T. R.</i> 232	1260
Lloyd, 6 <i>C. & P.</i> 193	189
Lloyd, 4 <i>C. & P.</i> 233	207
Lloyd, 1 <i>Cox</i> , 51	244
Lloyd, 4 <i>B. & Adol.</i> 135	287
Lloyd, 1 <i>C. & P.</i> 301	770
Lloyd, <i>Cunn.</i> 84	1075
Lloyd, 4 <i>Esp.</i> 200	1240
Lloyd, 1 <i>Campb.</i> 260	1250
Lock, 1 <i>Freem.</i> 523	1121
Locker, 5 <i>Esp.</i> 107	183, 185, 1065
Lockett, <i>Leach</i> , 94, 95	660, 673
Locost, <i>Kel.</i> 30	453, 465
Loddon Bridge, 1 <i>Salk.</i> 368	1279
Lodie and Arnold, 1 <i>Salk.</i> 458	1245
Loggen, 1 <i>Str.</i> 73	1075
Lolley, <i>Russ. & Ry.</i> 237	860
London, Mayor of, 5 <i>Q. B.</i> 555	167, 210, 245
London, Mayor of, <i>Dav. & M.</i> 486 : ..	245
London, Mayor of, 1 <i>Cr. M. & R.</i> 1 : ..	285
Lone, <i>Str.</i> 920	1308
Long, 7 <i>C. & P.</i> 314	15
Long, 6 <i>C. & P.</i> 179	189
Long, 4 <i>C. & P.</i> 398	239, 766, 767
Long, <i>Cro. El.</i> 490	396
Long, 5 <i>Rep.</i> 120	779
Longbottom, 3 <i>Cox</i> , 439	768
Longbottom, 1 <i>Barnard.</i> 374 ..	1006, 1023
Longden, <i>Russ. & Ry.</i> 228	747
Longmead, <i>Leach</i> , 694	505
Longstreeth, 1 <i>Moo.</i> 137	370, 377
Lonsdale, 2 <i>Cox</i> , 222	674
Lookup, 3 <i>Burr.</i> 1901	94, 1043
Loom, 1 <i>Moo.</i> 160	408
Loose, <i>Bell</i> , 259	132, 395, 403
Lopez, <i>Dearsi.</i> & <i>B.</i> 525	56
Lopez, 4 <i>B. & Ald.</i> 141	1161
Lord, Ex p. 4 <i>Dowl. & L.</i> 405	291
Loughton, 3 <i>Smith</i> , 575	1272
Loveden, 8 <i>T. R.</i> 615	102
Lovelace, Lady, <i>Comb.</i> 260	1129
Lovell, 1 <i>Moo. & Rob.</i> 349	349
Lovell, 2 <i>Moo. & Rob.</i> 236	489
Lovell, <i>Leach</i> , 248	676
Lovell, 2 <i>Moo. & Rob.</i> 39	791
Lovett, 9 <i>C. & P.</i> 462 ...	176, 1141, 1155
Lowe, 7 <i>Mod.</i> 411	1309
Luckhurst, 23 <i>L. J. M. C.</i> 18 ; <i>Dearsi.</i> 245	191
Lucy, <i>Noy.</i> 87	1267
Luellin, 12 <i>Mod.</i> 445	1307
Luke, 2 <i>Russ. C. M.</i> 83	414

	PAGE
Luther v. Holland, <i>Lat.</i> 132	1039
Luxborough, 1 <i>D. P. C.</i> 527	1270
Lyde v. Russel, 1 <i>B. & Adol.</i> 394	426
Lynall v. Longbotham, 2 <i>Wils.</i> 36 : ..	1189
Lynch, 5 <i>C. & P.</i> 324	763
Lyun, 4 <i>Barnard.</i> 242	826
Lynn, Mayor of, 1 <i>Leon.</i> 205	1077
Lynn, Mayor of, 2 <i>T. R.</i> 733	1196
Lyon, 9 <i>C. & P.</i> 550	84
Lyon, 3 <i>Burr.</i> 1461	111
Lyon, 1 <i>C. & P.</i> 528	262
Lyon, 1 <i>Fost. & F.</i> 54	484
Lyon, <i>Russ. & Ry.</i> 255	654
Lyon, <i>Ry. & Moo.</i> 151	1264
Lyons, <i>Leach</i> , 9 <i>C. & P.</i> 555	182
Lyons, <i>Leach</i> , 185	457
Lyons, <i>Car. & M.</i> 217	540
Lyons, <i>Bell</i> , 38	566
Lyons, <i>Leach</i> , 597	681
Lyons v. De Pass, 11 <i>Ad. & El.</i> 326 ; 3 <i>Per. & D.</i> 177	377

M.

Mabel, 9 <i>C. & P.</i> 474	815
Macajah, 2 <i>Barn.</i> 24	1006
M'Allister v. Haden, 2 <i>Camp.</i> 438 : ..	1189
Mabbett, 5 <i>Cox</i> , 339	766
MacArthur, <i>Peake</i> , 155	970
Macarthy, <i>Car. & M.</i> 265	51
Macarthy, 2 <i>Stark. Ev.</i> 252	199
Macarthy, 2 <i>Car. & K.</i> 379	385
Macarthy, 2 <i>Ld. Raym.</i> 1179	1053
Macauley, <i>Leach</i> , 287	433
M'Clarens, 3 <i>Cox</i> , 425	73
M'Cloughau v. Clayton, <i>Holt</i> , 478 : ..	8
M'Connell, 2 <i>Moo.</i> 290	371
Macculley, 2 <i>Moo.</i> 34	409
Macdaniel, <i>Fost.</i> 121	433
Macdaniel, <i>East</i> , 333	759
Macdaniel, <i>Leach</i> , 44	1052
M'Dermott, <i>Russ. & Ry.</i> 356	793, 798
M'Donagh, <i>Carr. Sup.</i> 23	397
Macdonald, <i>Fost.</i> 59	308
Macdonald, 31 <i>L. J. M. C.</i> 67 ; <i>Leigh & Cave</i> , 85	487
Macdonald, 3 <i>Burr.</i> 1645 ; 2 <i>Cox</i> , 10	1185
Macdonnell, 5 <i>Cox</i> , 153	447
Macirone, <i>Peake</i> , 12	1028
M'Gavarran, 6 <i>Cox</i> , 164	814, 821, 841
M'Gregor, <i>Russ. & Ry.</i> 23 ; <i>Leach</i> , 932 ; 3 <i>Bos. & P.</i> 106	497
M'Gregor, 1 <i>Car. & K.</i> 429	548
M'Grouther, <i>Fost. Cr.</i> 43	313
M'Guire, 2 <i>Ld. Raym.</i> 1179	608
M'Guire, <i>East</i> , <i>P. C.</i> 1002	652
Machynlleth, 2 <i>B. & C.</i> 164 ..	1282, 1291
M'Intyre, 2 <i>Cox</i> , 379	760
Mackalley, 9 <i>Rep.</i> 47	80
Mackalley, 9 <i>Rep.</i> 65	753, 754
M'Kay, 1 <i>Moo.</i> 130	649
M'Kenzie, <i>Russ. & Ry.</i> 429	28, 505
M'Kenzie, 3 <i>Burr.</i> 1922	895
M'Keron, 5 <i>T. R.</i> 316	1013
Mackerell, 4 <i>C. & P.</i> 448	577
Mackintosh, <i>Str.</i> 308	36

	PAGE		PAGE
Mackintosh, <i>East</i> , P. C. 942	673	Marley, 2 <i>Russ.</i> C. M. 137	408
Mackintosh, 32 <i>L. T.</i> 146	891	Marner, <i>Car.</i> & <i>M.</i> 628	630, 991
Macklin, 5 <i>Cox</i> , 216	402	Marriott, 8 <i>C.</i> & <i>P.</i> 425	746
Maclelin, 2 <i>Lew.</i> 225	150	Marrow, <i>Ca. Temp. Hardw.</i> 174:	
Macleod, 2 <i>East</i> , 202	163	1113, 1125, 1128	
Malony, 9 <i>Cox</i> , 26	226, 786	Marsden, <i>Moo.</i> & <i>Malk.</i> 349.....	174
M'Loughlin, 8 <i>C.</i> & <i>P.</i> 635	792	Marsden, 4 <i>M.</i> & <i>S.</i> 164	1151
M'Michael, 8 <i>C.</i> & <i>P.</i> 758	1245	Marsh, 2 <i>Sir Wm. Bl.</i> 806	25
M'Millan, <i>Russ.</i> & <i>Ry.</i> 333	780	Marsh, 6 <i>Ad.</i> & <i>El.</i> 236	43
M'Millan, 1 <i>Cox</i> , 41	738	Marsh, 1 <i>Jur.</i> 38	66
M'Naghten, 10 <i>Cl.</i> & <i>F.</i> 200:		Marsh, 5 <i>Rep.</i> 111	292
119, 250		Marsh, <i>Leach</i> , 345	375
M'Namee, 1 <i>Moo.</i> C. C. 368	386	Marsh, <i>Den.</i> 505; 19 <i>L. J. M. C.</i> 12:	
M'Phane, <i>Car.</i> & <i>M.</i> 212.....	800	533, 617	
M'Pherson, 26 <i>L. J. M. C.</i> 134;		Marsh, 2 <i>Keb.</i> 539.....	610
<i>Dearsl.</i> & <i>B.</i> 197	471	Marsh, 3 <i>Mod.</i> 66.....	632
M'Rue, 8 <i>C.</i> & <i>P.</i> 691	832	Marsh, 1 <i>Nev.</i> & <i>P.</i> 157	1319
Madan, <i>Leach</i> , 223	952	Marsh v. Coppock, 9 <i>C.</i> & <i>P.</i> 480:	
Madden, 1 <i>Moo.</i> C. C. 277	97	153, 154	
Maddock, 2 <i>Ro. Rep.</i> 107	610	Marshall, 8 <i>C.</i> & <i>P.</i> 571	116
Maddock, 2 <i>Russ.</i> C. M. 500	662	Marshall, 13 <i>East</i> , 322	140
Madge, 9 <i>C.</i> & <i>P.</i> 89	398	Marshall, 24 <i>L. J. M. C.</i> 242	141
Maddy, 1 <i>Ventr.</i> 158	744	Marshall, 1 <i>Car.</i> & <i>K.</i> 447.....	208
Madox, <i>Russ.</i> & <i>Ry.</i> 92	382, 481	Marshall, 1 <i>Lew.</i> 66.....	247
Mahon, O'Gorman, 4 <i>Ad.</i> & <i>El.</i>		Marshall, <i>Russ.</i> & <i>Ry.</i> 76	661
575.....	138, 827	Marshall, 2 <i>Jur.</i> 254.....	973
M'Quin, 1 <i>Cox</i> , 34	681	Martin, <i>Den.</i> 398; 18 <i>L. J. M. C.</i>	
Major, <i>Leach</i> , 772	445	137	172
Major, <i>Dearsl.</i> 13.....	110, 1042	Martin, 3 <i>Cox</i> , 56	172
Makin, <i>Russ.</i> & <i>Ry.</i> 867	539	Martin, 2 <i>Camp.</i> 100.....	217
Malins, 8 <i>C.</i> & <i>P.</i> 242	169	Martin, 18 <i>L. J. M. C.</i> 137; 2 <i>Car.</i>	
Malland, <i>Str.</i> 818.....	946	& <i>K.</i> 950	275
Mallet, 2 <i>Russ.</i> C. M. 867; 1 <i>Cox</i> ,		Martin, <i>Russ.</i> & <i>Ry.</i> 196	359
336.....	887, 892	Martin, <i>Leach</i> , 171	390
Mallinson, 16 <i>Q. B.</i> 367 ..893, 894,	897	Martin, <i>Russ.</i> & <i>Ry.</i> 103.....	458
Mallison, <i>In re</i> , 2 <i>Lew.</i> 132	253	Martin, 2 <i>Camp.</i> 268.....	611
Malmsbury, Mayor of, 8 <i>Mod.</i> 55 ..	136	Martin, 1 <i>Lew.</i> 104	651
Manchester, Mayor of, 28 <i>L. J.</i>		Martin, 1 <i>Moo.</i> 483.....	684, 687
<i>M. C.</i> 65	105	Martin, 7 <i>C.</i> & <i>P.</i> 549	685
Mandy, 2 <i>Ro. Rep.</i> 427	989	Martin, <i>Russ.</i> & <i>Ry.</i> 324.....	711
Mankletow, <i>Dearsl.</i> 159	846	Martin, <i>Leach</i> , 923	726
Manlove, <i>Leach</i> , 662	960	Martin, 3 <i>C.</i> & <i>P.</i> 211	766
Man, <i>Godb.</i> 383	925	Martin, 5 <i>C.</i> & <i>P.</i> 128	779
Mann, 6 <i>Cox</i> , 456	12	Martin, 6 <i>C.</i> & <i>P.</i> 562	835
Mann, 4 <i>M.</i> & <i>S.</i> 336	269, 1268	Martin, 9 <i>C.</i> & <i>P.</i> 215	840,
Mann v. Owen, 9 <i>B.</i> & <i>C.</i> 295	1219	841, 1194	
Manners, 7 <i>C.</i> & <i>P.</i> 801	730	Martin, <i>Dav.</i> & <i>M.</i> 386	1269
Manney, 12 <i>Rep.</i> 101	970	Martin v. Armstrong, 3 <i>C.</i> & <i>P.</i> 473:	820
Manning, 2 <i>Car.</i> & <i>K.</i> 903....72, 75, 82		Martin v. Reg. 3 <i>Nev.</i> & <i>P.</i> 472; 8 <i>Ad.</i>	
Manning, <i>Den.</i> 467	160	& <i>El.</i> 481.....	532
Manning, <i>Dearsl.</i> 21	379	Marton, <i>Andr.</i> 279	1265
Manning, <i>Tho. Raym.</i> 212744, 765		Mason, <i>Russ.</i> & <i>Ry.</i> 419	434
Mansell, <i>Dearsl.</i> 375	292	Mason, <i>Dowl.</i> & <i>B. N. P. C.</i> 22:	
Mansell, <i>Dy.</i> 128	749	511, 513	
Mansell v. Reg., 26 <i>L. J. M. C.</i> 137;		Mason, 2 <i>T. R.</i> 581; <i>Leach</i> , 487..531, 532	
27 <i>L. J. M. C.</i> 4	154, 156	Mason, 8 <i>Mod.</i> 74; <i>East</i> , P. C. 796:	549
Mansfield, <i>Car.</i> & <i>M.</i> 140.....392, 546		Mason, <i>East</i> , 239	744
Manton, <i>Palm.</i> 383	967	Mason, 2 <i>Car.</i> & <i>K.</i> 622.....993, 1169	
Manwaring, <i>Dearsl.</i> & <i>B.</i> 132	865	Massey, 6 <i>M.</i> & <i>S.</i> 108	28
Manzani, 2 <i>Fost.</i> & <i>F.</i> 64	169	Massingham, 1 <i>Moo.</i> 257.....	545
March, 1 <i>Moo.</i> 182	567, 568	Master, <i>Den.</i> 332; 2 <i>Car.</i> & <i>K.</i> 30:	
March, 1 <i>Car.</i> & <i>K.</i> 496	820	275, 494	
Marcus, 2 <i>Car.</i> & <i>K.</i> 386.....	655	Master, <i>Ex p.</i> , 9 <i>D. P. C.</i> 194.....	37
Margets, <i>Leach</i> , 930.....	460	Masters, <i>Say.</i> 122.....	1133
Marks, 3 <i>East</i> , 157	34, 349	Mastin, 6 <i>C.</i> & <i>P.</i> 346	768
Marks v. Benjamin, 2 <i>Moo.</i> & <i>Rob.</i>		Matthews v. Biddulph, 4 <i>Sc.</i> 54; 1	
225	150	<i>Dowl. N. S.</i> 216	530, 531
Marlborough, Duke of, <i>Ex p.</i> 5		Matthews, <i>Den.</i> 596	74, 262
<i>Q. B.</i> 555; <i>Dav.</i> & <i>M.</i> 720	137	Matthews, 5 <i>T. R.</i> 162.....	95

Table of Cases.

xlvi

	PAGE		PAGE
Mitchell, 2 <i>Fost. & F.</i> 44.....	675	Mercier, <i>Leach</i> , 183	117
Matthews, 1 <i>Ch. Rep.</i> 571	100	Meredith, 8 <i>C. & P.</i> 589	841
Matthews, 4 <i>Cox</i> , 73	224	Merionethsh., 6 <i>Q. B.</i> 313	1286
Matthews, 9 <i>St. Tr.</i> 680	309	Merionethsh., 6 <i>Q. B.</i> 348	1292
Matthews, <i>East</i> , <i>P. C.</i> 58; <i>Dearsi.</i> & <i>B.</i> 826	526	Merriman v. Hund. of Chippenham, <i>East</i> , <i>P. C.</i> 709.....	435
Matthews, 3 <i>Leon.</i> 200977, 989, 1002		Merry, 2 <i>Cox</i> , 240	908, 911
Matthews, 9 <i>St. Tr.</i> 979	1153	Merry v. Green, 7 <i>Mees. & W.</i> 623..	335
Maude, 11 <i>L. J. M. C.</i> 120	807	Messenger, <i>Kel.</i> 70	315
Maudsley, 1 <i>Lew.</i> 85	174	Metcalfe, 3 <i>Cox</i> , 220	160, 162
Maudsley, 1 <i>Lew.</i> 73	207	Metcalfe, 1 <i>Moo. C. C.</i> 433.....	384, 420
Maudsley, 1 <i>Lew.</i> 51	1070	Meynell, 1 <i>Lew.</i> 222.....	196
Mawbey, 6 <i>T. R.</i> 619 .. 270, 945, 1052, 1062		Miard, 1 <i>Cox</i> , 22	445
Mawgan, 3 <i>Nev. & P.</i> 502 1267, 1286		Michael, <i>Russ. & Ry.</i> 291	727, 751
Mawgridge, <i>Kel.</i> 128.....	744	Michel, 11 <i>Mod.</i> 261	35
May, 1 <i>Hawk. c.</i> 43, s. 5.....	74	Micklethwaite, 4 <i>Burr.</i> 2522	1270
May, 1 <i>Mod.</i> 149	98	Middleditch, <i>Den.</i> 92	288, 448
May, <i>Leigh & Carr</i> , 13	487	Middlemass, 6 <i>Mod.</i> 212	1095
May, <i>East</i> , 796	548	Middlesex, Governor of House of Correction, 2 <i>Nev. & M.</i> 138	26
May, 5 <i>Cox</i> , 176.....	906, 909	Middlesex, Inhabitants of, 1 <i>B. &</i> <i>Ald.</i> 64	269, 1271, 1289
May, <i>Leach</i> , 192	1018	Middlesex, Inhabitants of, <i>Andr.</i> 101:	1288
Mayhew, 6 <i>C. & P.</i> 315.....	1025	Middlesex, Justices of, 3 <i>Nev. & M.</i> 111	278
Mayhew v. Locke, 7 <i>Taunt.</i> 63	187	Middlesex, Justices of, 2 <i>B. & Adol.</i> 201	1276
Maynard, <i>Russ. & Ry.</i> 240	261	Middlesex, Sheriff, In re, 11 <i>Ad. &</i> <i>El.</i> 273.....	31
Maynard, <i>East</i> , 501	461	Middlesex Special Commission, 6 <i>C. & P.</i> 90	44
Maynard, 1 <i>Ventr.</i> 182.....999, 1006		Middleship, 5 <i>Cox</i> , 275	766
Mayne v. Fletcher, 3 <i>B. & C.</i> 982 ..	139	Midham, 3 <i>Burr.</i> 1720	277
Mayo, <i>Andr.</i> 209	268	Midville, 4 <i>Q. B.</i> 140	1258
Mayor, <i>Com.</i> 94	614	Milbourne, 1 <i>Lew.</i> 251	368
Mazagora, <i>Russ. & Ry.</i> 291	648	Mildmay, 5 <i>B. & Adol.</i> 254	299
Mazeau, 9 <i>C. & P.</i> 677.....	669	Mildrone, <i>Leach</i> , 412	178
Meade, 1 <i>Burr.</i> 452	36	Miles v. Collett, 3 <i>M. & P.</i> 242	19
Meade, 3 <i>Dowl. & Ry.</i> 304.....	64	Miles, <i>Dougl.</i> 284	139, 189, 1149
Meade, 4 <i>Jur.</i> 1014	134	Miles, 1 <i>Cox</i> , 351	394
Meade, 2 <i>B. & C.</i> 605	207	Miles, 6 <i>Jur.</i> 243	821
Meade, 1 <i>Lew.</i> 294.....	257	Mill, 7 <i>C. & P.</i> 146	188
Meade, 3 <i>Ch. Cr. L.</i> 891.....	385	Millar, 7 <i>C. & P.</i> 665	426
Meade, 4 <i>C. & P.</i> 535	420	Millard, <i>Russ. & Ry.</i> 245	652
Meade, 2 <i>Stark.</i> 205.....753, 771		Millard, <i>Dearsi.</i> 166	984
Meade, 3 <i>Burr.</i> 1335	1201	Millen, 3 <i>Cox</i> , 507.....	191
Meade v. Young, 4 <i>T. R.</i> 28	662	Miller, 1 <i>Cox</i> , 466.....	200
Meadham, 2 <i>Car. & K.</i> 633.....	905	Miller, 2 <i>Moo.</i> 240	468
Meadows, <i>Fost.</i> 76.....	164	Miller, 2 <i>Sir Wm. Bl.</i> 881.....	969
Meadows, 2 <i>Jur.</i> 718.....	245	Miller, <i>Noy.</i> 128.....	970
Meadows, 1 <i>Car. & K.</i> 399; <i>Dearsi.</i> 161	846	Miller, <i>Yelv.</i> 720	976
Meakin, 7 <i>C. & P.</i> 297.....	247	Millington, 1 <i>C. & P.</i> 83.....	256
Medland, 5 <i>Cox</i> , 292.....	371	Millis, 10 <i>CL. & F.</i> 534	865
Medley, 6 <i>C. & P.</i> 292.....	1239	Mills, 4 <i>Nev. & M.</i> 67.....	34
Medlor, 2 <i>Show.</i> 36	1190	Mills, <i>Dearsi.</i> & <i>B.</i> 205	529
Meek, 9 <i>C. & P.</i> 513.....	987	Milne, 2 <i>B. & Ald.</i> 606.....	169
Meeres, 1 <i>Show.</i> 53	453	Milne, <i>East</i> , <i>P. C.</i> 602.....	421
Megson, 9 <i>C. & P.</i> 418	205, 836	Milne, 2 <i>Fost. & F.</i> 10	1034
Meigh, 7 <i>Cox</i> , 401.....	685	Milner, 2 <i>Car. & K.</i> 310.....41, 57, 631	
Meilham,	373	Milner, 4 <i>Cox</i> , 275.....	1226, 1232
Melen v. Andrews, <i>Moo. & M.</i> 336..	208	Milton, <i>Moo. & M.</i> 107	825
Meller, 3 <i>Inst.</i> 167	1017	Minnes, <i>Bull. N. P.</i> 243.....	1030
Melling, 12 <i>Mod.</i> 128	268, 269	Minton, 2 <i>Russ. C. M.</i> 760.....	295
Melling, 5 <i>Mod.</i> 349.....	1041	Minton, <i>East</i> , 102	563
Mellish, <i>Russ. & Ry.</i> 80.....489, 492		Mitchell, 2 <i>Q. B.</i> 636	57
Mellor, <i>Russ. & Ry.</i> 144.....	59	Mitchell, 6 <i>Cox</i> , 82	220
Mellor, <i>Dearsi.</i> & <i>B.</i> 468	161	Mitchell, <i>Den. & P.</i> 468.....	441
Mellor, 2 <i>Russ. C. M.</i> 883	200	Mitchell, 2 <i>C. & P.</i> 451	626
Mellor, 2 <i>D. P. C.</i> 173	908	Mitchell, <i>Den.</i> 282.....	663
Mellor, 1 <i>B. & Adol.</i> 32	1257		
Mence, <i>Car. & M.</i> 234	1228		
Mendez, <i>Str.</i> 473	893		
Mercer, 6 <i>Jur.</i> 243	835, 836		
Merceron, 2 <i>Stark.</i> 366	200, 945		

	PAGE		PAGE
Mitchell, 7 C. & P. 800	887	Morley, Lord, 1 Sid. 277; <i>Ld.</i>	
Moah, 7 Cox, 60	495	<i>Raym.</i> 1496	748
Moah, 25 L. J. M. C. 66	502	Morley, 1 Y. & Jer. 221	635
Moah, <i>Dearsl.</i> & B. 550	635	Morley v. Pragnell, <i>Cro. Car.</i> 510 :	1238
Moate, 3 B. & Adol. 237	163	Morphew, 2 M. & S. 602	210
Moffatt, <i>Leach</i> , 431	660, 666	Morrell v. Martin, 4 <i>Se. New Rep.</i>	
Mogg, 4 C. & P. 361	591	300	816
Mohun, Lord, 1 <i>Salk.</i> 104	33	Morris v. Wise, 2 <i>Fost. & F.</i> 51 ..	7
Mohun, Lord, <i>Holt, Ca.</i> 479	748	Morris, <i>Leach</i> , 1096	82
Moir, 4 Cox, 279	225	Morris, 5 Cox, 205	89
Moir, 7 C. & P. 179	759	Morris, <i>Str.</i> 901	93
Moland, 2 <i>Moo.</i> 276	76, 79	Morris, <i>Leach</i> , 109	95
Mole, 1 <i>Car. & K.</i> 417	364, 365	Morris, 2 <i>Burr.</i> 1189	267
Monday, 5 <i>Rep.</i> 99	988	Morris, 9 C. & P. 349	396
Money, <i>Greaves, Cr. L.</i> (1861) 80 ..	402	Morris, 9 C. & P. 89	423, 424
Money v. Leach, <i>Sir Wm. Bl.</i> 555 ..	3	Morris, <i>Leach</i> , 435	678
Monkhouse, 1 Cox, 55	748	Morris, 2 <i>Burr.</i> 1189	1033
Montague, 4 B. & C. 598	1297	Morris, 1 B. & Adol. 441	1249, 1250
Monteth, <i>Leach</i> , 702	438	Morrison, 28 L. J. M. C. 210; <i>Bell</i> ,	
Montgomery, Lord, 10 <i>Mod.</i> 334 :		158	390
	33, 34	Morrison, 5 Cox, 186	563
Montrion, 9 Cox, 27	741	Morrison, 8 C. & P. 22	774
Moody, 5 C. & P. 23	991	Morrison, 2 Cox, 489	871
Moore, <i>Str.</i> 916	121	Morse, 8 C. & P. 605	203
Moore, 7 C. & P. 270	182	Mortlock, 7 Q. B. 459	935
Moore, 2 <i>Lew.</i> 37	184	Morton, 1 D. P. C. 543	101
Moore, 1 Cox, 59	185	Morton, 2 <i>Moo. & Rob.</i> 514	188
Moore, <i>Den. & P.</i> 522; 21 L. J.		Morton, <i>East, P. C.</i> 755	220, 666
<i>M. C.</i> 199	193	Morton, <i>Russ. & Ry.</i> 19	863
Moore, 1 <i>Lew.</i> 141	237	Moseley, 31 L. J. M. C. 24; 9 Cox,	
Moore, 6 <i>Jur.</i> 750	248	16; <i>Leigh & Cave</i> , 92	76
Moore, 30 L. J. M. C. 77	367	Moses, 1 <i>Lew.</i> 196	410
Moore, <i>East, P. C.</i> 679; <i>Leach</i> ,		Moses, 7 C. & P. 423	654
314	375	Mosey, <i>Leach</i> , 265	194
Moore, <i>Leach</i> , 335	434	Mosley, 1 <i>Moo.</i> 97	204
Moore, 1 <i>Fost. & F.</i> 73	681, 686	Mosley, 1 <i>Lew.</i> 77	780
Moore, 1 <i>Moo.</i> 122; 1 <i>Car. & K.</i>		Moss, 26 L. J. M. C. 9; <i>Dearsl. &</i>	
295	737	<i>B.</i> 104	530, 619
Moore, 3 <i>Car. & K.</i> 319	758	Mothersell, <i>Str.</i> 93	217
Moore, 6 Cox, 137	769	Mott, <i>Crown, C. C.</i> 103	457
Moore, 2 <i>Mod.</i> 128	842	Mott, <i>East, P. C.</i> 1075	591
Moore, <i>Tho. Jones</i> , 159	1169	Mott, 2 C. & P. 521	1054
Moore, 2 <i>Lew.</i> 179	1181	Mouncer, <i>East, P. C.</i> 629	79
Moore, <i>Leach</i> , 575	1231	Mountford, 6 C. & P. 96	44
Moore, 3 B. & Adol. 284	1241	Mountford, 1 <i>Moo.</i> 441	803
Moore, 12 <i>Mod.</i> 235	1242	Moyle, <i>East, P. C.</i> 1076	591
Moore, <i>Carth.</i> 161	1370	Mudie, 1 <i>Moo. & Rob.</i> 128..969, 991,	1025
Moorhouse, <i>Cald.</i> 554	942	Mucklow, 1 <i>Moo.</i> 160	321
Moors, 6 <i>East</i> , 419	215	Mucklow, 1 <i>Moo.</i> 160	371
Moraira, 5 <i>Vin. Supp.</i> 97	134	Mude, <i>Cro. El.</i> 63	1263
Moreau, 11 Q. B. 1028	1032	Mullins, 3 Cox, 526	248, 345
Morfit, <i>Russ. & Ry.</i> 307	382	Mulreaty, 1 <i>Russ. C. M.</i> 699	873
Morgan, 7 C. & P. 642	34	Munday, <i>Leach</i> , 850	508
Morgan, <i>East, P. C.</i> 12	94	Munoos, 7 <i>Mod.</i> 815; <i>Str.</i> 1127 :	
Morgan, <i>Dougl.</i> 314	146	516, 531	
Morgan, <i>Leach</i> , 54	178	Munton, 3 C. & P. 498	1031
Morgan, 1 <i>Moo. & Rob.</i> 34 ..	215, 241	Muntz, 2 <i>Jur.</i> 538	143, 1150
Morgan, 11 <i>East</i> , 457	286	Murdock, 21 L. J. M. C. 22; <i>Den.</i>	
Morgan, <i>Dearsl.</i> 395	370	& P. 298	501
Morgan, 1 <i>Moo. & Rob.</i> 434	448	Mure v. Kaye, 4 <i>Taunt.</i> 34	12
Morgan, 6 Cox, 107	977, 1021	Murlis, <i>Moo. & Malk.</i> 515	228
Morgan, 1 Cox, 109	996	Murphy, <i>Leach</i> , 430	51, 839
Morgan, <i>Str.</i> 1049	1001	Murphy, 8 C. & P. 276	173
Morgan v. Earl of Abergavenny, 8		Murphy, 8 C. & P. 297	221
<i>C. & B.</i> 768	413	Murphy, 8 C. & P. 307	231, 239
Morgan v. Luckup, <i>Str.</i> 1044	149	Murphy, 6 Cox, 340	477
Morice, 13 <i>East</i> , 270	140	Murphy, 10 <i>St. Tr.</i> 183	656
Morison v. Kelly, 1 <i>Sir Wm. Bl.</i>		Murphy, 6 C. & P. 103	764
885	277	Murphy, 8 C. & P. 297..1066, 1067, 1069	

Table of Cases.

xlix

	PAGE
Murray, 1 <i>Jur.</i> 37	141, 1150
Murray, 9 <i>Jur.</i> 410	292
Murray, <i>Leach</i> , 344	385
Murray, 1 <i>C. & P.</i> 545	493
Murray, 1 <i>Fost. & F.</i> 80	967
Murray, 1 <i>Ch. Burn</i> , 817	1053
Murray, 1 <i>Dowl. & L.</i> 100; 7 <i>Q. B.</i> 700	296, 865, 866
Murray v. Reg. 9 <i>Jur.</i> 596; 1 <i>Cox</i> , 202	287
Murrow, 1 <i>Moo.</i> 456	807
Murry, <i>East</i> , 496	458
Muscot, 10 <i>Mod.</i> 193	183, 973
Musgrave, 1 <i>Lew.</i> 112	679
Musgrave v. Medez, 19 <i>Ves.</i> 652: ..	981
Musson, 6 <i>B. & C.</i> 74	940
Myddleton, <i>In re</i> , 7 <i>T. R.</i> 739	63
Myne, 19 <i>Vin. Ab. Riot.</i>	1096
Myers, 6 <i>T. R.</i> 26	940
Myott, 6 <i>Cox</i> , 408	932
Mytton, <i>Cald.</i> 536	942

N.

Nailor, <i>Dearsl. & B.</i> 248	770
Naimie, 4 <i>Cox</i> , 115	626
Nanng v. Elliot, <i>Cro. Jac.</i> 212: ..	150, 170
Napper, 1 <i>Moo.</i> 44	464, 476
Nash, 4 <i>B. & Ald.</i> 295	37
Nash, <i>Den. & P.</i> 493	688
Nash, 1 <i>Russ. C. M.</i> 574	809
Nash, <i>Russ. & Ry.</i> 386	907
Naylock, <i>Supp. to Viner</i> , V. 379..	1025
Naylor, 2 <i>St. Tr.</i> 265	1173
Neale, 9 <i>C. & P.</i> 431	354, 1086
Needham v. Smith, 2 <i>Vern.</i> 461: ..	1029
Nehuff, 1 <i>Salk.</i> 151	615, 616
Neil, 2 <i>C. & P.</i> 485	1238
Nelmes, 6 <i>C. & P.</i> 347	94
Nesham v. Armstrong, 1 <i>B. & Ald.</i> 146	584
Netherthong, 2 <i>B. & Ald.</i> 179	1252
Nettle, 1 <i>Hawk. c.</i> 60, s. 5	896
Nettleton, 1 <i>Moo.</i> 259	486, 491
Neville, <i>Peake</i> , 91	1239
Neville, 6 <i>Cox</i> , 69	
Neville, 2 <i>B. & Ald.</i> 299	
Newcastle, JJ. 1 <i>B. & C.</i> 933	1184
Newhouse, 22 <i>L. J. Q. B.</i> 127	1162
Newland, <i>Leach</i> , 311	183, 652
Newland, 2 <i>Cox</i> , 283	410
Newland, 4 <i>Jur.</i> 322	1107
Newall, 6 <i>Cox</i> , 21	1037
Newdigate, <i>Comb.</i> 10	1105
Newens, <i>Str.</i> 1104	1027
Newill, 1 <i>Moo.</i> 326	562
Newill, 1 <i>Moo.</i> 458	567, 580
Newill, 5 <i>Cox</i> , 162	1050
New Sarum, 7 <i>Q. B.</i> 941	1280
Newman, <i>Dearsl.</i> 85	219, 267, 1147
Newman, 2 <i>Russ. C. M.</i> 6	363
Newman, 3 <i>Car. & K.</i> 252	1159
Newton, 24 <i>L. J. Q. B.</i> 246	34, 292
Newton, 18 <i>L. J. M. C.</i> 201	35, 164
Newton, 2 <i>Moo. & Rob.</i> 503	45
Newton, 1 <i>Car. & K.</i> 469 ..	67, 124, 981
Newton, <i>Str.</i> 413	136, 944

	PAGE
Newton, 1 <i>Fost. & F.</i> 641	205, 212
Newton, 3 <i>Car. & K.</i> 86; 18 <i>L. J.</i> <i>M. C.</i> 201	259
Newton, <i>Car. Cr. L.</i> 285	435
Newton, 3 <i>Keb.</i> 388	686
Newton, 2 <i>Moo.</i> 59	673, 688
Newton v. Harland, 1 <i>Man. & Gr.</i> 644	1111
Newton, <i>In re</i> , 24 <i>L. J. C. P.</i> 148..	39
Newton v. Rowe, 13 <i>L. J. C. P.</i> 73; 7 <i>Sc.</i> 543	39
New Windsor, 1 <i>Smith</i> , 148	1292
Nibbs, 1 <i>Moo. C. C.</i> 25	392
Niccolls, <i>Str.</i> 1227	271, 1072
Nicholas, 2 <i>Car. & K.</i> 246	834, 839
Nicholas, 2 <i>Cox</i> , 136	839
Nicholas, 7 <i>C. & P.</i> 538	890
Nicholls, 8 <i>Mod.</i> 337	136, 944
Nicholls, 2 <i>Russ. C. M.</i> 838	196
Nicholls, 1 <i>Fost. & F.</i> 51	546
Nicholls, 9 <i>C. & P.</i> 269	800
Nicholis, <i>Russ. & Ry.</i> 130	821
Nicholls, 1 <i>B. & Adol.</i> 21	987
Nicholls, 13 <i>East</i> , 412	1067
Nicholls, 2 <i>Ld. Ken.</i> 512	1115
Nicholletts, 6 <i>Nev. & M.</i> 827	1319
Nicholson v. Hardwick, 5 <i>C. & P.</i> 495	867
Nicholson, <i>Ex p.</i> 4 <i>Jur.</i> 506	108
Nicholson, 8 <i>D. P. C.</i> 422: 124, 162,	246
Nicholson, <i>Leach</i> , 610	374
Nicholson, 1 <i>Lew.</i> 300	573
Nicholson, <i>East</i> , 818	613
Nicholson, <i>East</i> , 346	778
Nickless, 8 <i>C. & P.</i> 757	906
Nisbett, 8 <i>Jur.</i> 107	3
Nield, 6 <i>East</i> , 417	1210
Nixon, 7 <i>C. & P.</i> 442	451
Noakes, 5 <i>C. & P.</i> 326	181, 1215
Noakes, 5 <i>C. & P.</i> 600	228
Noakes, 2 <i>Car. & K.</i> 620	499
Noel, 6 <i>C. & P.</i> 336	229
Norden, <i>Fost.</i> 129; <i>East</i> , 666	529
Norfolk, JJ., <i>East, P. C.</i> 383	888
Norman, 1 <i>Wils.</i> 7	134
Norman, <i>Car. & M.</i> 501	496
Norman v. Beaumont, <i>Willes</i> , 484: ..	161
Norris, 9 <i>C. & P.</i> 241	584
Norris, 2 <i>Ld. Keny.</i> 300	1047
North, 8 <i>Cox</i> , 433	380
North, <i>East</i> , 1021	559, 563
North, 1 <i>Str.</i> 140	1096
North Collingham, 1 <i>B. & C.</i> 578..	463
Northampton, Earl of, 12 <i>Rep.</i> 132	1089
Northampton, Mayor of, <i>Str.</i> 421..	1131
Northamptonshire, 2 <i>M. & S.</i> 262: 275, 278	
Norton, <i>Russ. & Ry.</i> 510	89
Norton, 8 <i>C. & P.</i> 675	443, 446
Norton, 8 <i>C. & P.</i> 196	532
Norval, 1 <i>Cox</i> , 95	378
Norwich, <i>Str.</i> 177	1279, 1287, 1289
Norwood, <i>East, P. C.</i> 337	862
Nott, 7 <i>Jur.</i> 621	67, 267
Nott, 9 <i>Q. B.</i> 768	267
Nott, <i>Car. & M.</i> 288	933, 997
Nottingham, 4 <i>East</i> , 208	58
Nottinghamshire, 2 <i>Lew.</i> 112	1289

	PAGE
Nottingham Journal, 9 D. P. C.	
1042	135
Nottingham, J.J., <i>Say</i> . 216.....	944
Nowell, <i>Yelv.</i> 81	1115
Nunn, 1 <i>New. S. C.</i> 49	106
Nunn, 10 <i>Mod.</i> 186	928, 1144
Nunn, 8 B. & C. 644	1217
Nunez, <i>Str.</i> 1043.....	1027, 1033
Nureys, 1 <i>Sir Wm. Bl.</i> 216	1043
Nutbrown, <i>Fost.</i> 76	457
Nute, 2 <i>Russ.</i> 832	194
Nutt, 1 <i>Russ. C. M.</i> 234.....	1090
Nutt, 1 <i>Barnard.</i> 306.....	1146
Nutt, 4 T. R. 127.....	1149

O.

Oakley, 4 B. & Adol. 307.....	1112, 1117
Oates, 1 <i>Moo.</i> 175	109, 256
Oates, <i>Deardsl.</i> 459.....	524
O'Brian, 7 <i>Mod.</i> 378; <i>Str.</i> 1144.....	635
O'Brian, <i>Den.</i> 93.....	779, 780, 786
O'Brien v. Reg. 4 <i>Cox</i> , 398.....	456
O'Carney, <i>Tho. Jones</i> , 180	48
Ockley, 1 <i>Hawk. c.</i> 69, s. 21	966
O'Coigley, 26 <i>St. Tr.</i> 1353	226
O'Connell v. Reg. 11 <i>Cl. & F.</i> 155..	
96, 152, 172, 262, 288, 898, 1064,	
1068, 1071	
O'Connor, 5 Q. B. 16	63
Oddy, 20 L. J. M. C. 198.....	546, 679
Odgers, 2 <i>Moo. & Rob.</i> 479	123, 804
O'Neill, 1 <i>Car. & K.</i> 138.....	116
Offord, 5 C. & P. 168.....	250
Ogden, 6 C. & P. 631	717
Ogilvie, 2 C & P. 230	95
Oglethorpe, Lady, 11 <i>Mod.</i> 114	320
Okey, 8 <i>Mod.</i> 45	136, 944
Oldcastle's Accomplices, <i>Fost.</i> 217..	313
Oldfield, 2 <i>Russ. C. M.</i> 376.....	237
Oldfield, B. & Adol. 659	1189
Oldham, <i>Den. & P.</i> 472; 21 L. J.	
M. C. 134.....	472, 1194
Oldroyd, <i>Russ. & Ry.</i> 889	230, 272
Old Malton, 4 B. & Ald. 478	1271
Oliver, 30 L. J. M. C. 12; <i>Bell</i> , 287:	
263, 828	
Oliver, <i>Leach</i> , 1072	379
Omant, 6 <i>Cox</i> , 466.....	268
O'Mealy v. Newell, 8 <i>East</i> , 364..	934, 981
Oneby, <i>Str.</i> 766	744
Only v. Gee, 30 L. J. M. C. 222....	1188
O'Neill	
Onslowe, <i>Dy.</i> 248	999, 1043
Opie, 8 <i>Cox</i> , 312.....	871
Orbell, 6 <i>Mod.</i> 42	121, 1053
Orchard, 8 C. & P. 565.....	68
Orchard, 3 <i>Cox</i> , 348	1184
Orgill, 9 C. & P. 80.....	861, 863
Orm, 1 <i>Sess. Ca.</i> 160.....	1076
Orman, 1 <i>Jur.</i> 1115.....	492
Orme, 1 <i>Ld. R.</i> 486	1133
Orrell, 1 <i>Moo. & Rob.</i> 468	166
Orrery, Earl of, 8 <i>Mod.</i> 96	33
Osborn, 7 C. & P. 799	50
Osborn, 4 <i>Burr.</i> 2126	111
Osborn, 8 C. & P. 113.....	207, 210
Osborn, <i>Car. & M.</i> 622.....	233, 836
Osborn, 5 <i>Jur.</i> 200	382
Osborn, 3 <i>Burr.</i> 196.....	613

	PAGE
Osborn, 2 <i>Burr.</i> 1967	613
Osborn, <i>Com. Rep.</i> 240	1212
Osmer, 819; 5 <i>East</i> , 304	814
Osmer v. Veitch, 1 <i>Fost. & F.</i> 317..	819
Ossulston, 3 <i>Dougl.</i> 37	1053
Oswestry, 6 M. & S. 361	1279
Ouseley, 6 <i>Jur.</i> 193	101
Ouseley, 6 <i>Jur.</i> 62.....	102
Overton, <i>Deardsl.</i> 308	220
Overton, <i>Car. & M.</i> 655	272, 1013
Overton, 2 <i>Rose, B. L.</i> 257	967, 973
Overton v. Reg. 4 Q. B. 83.....	1000
Owen, 9 C. & P. 83.....	35, 182, 197, 276
Owen, 1 <i>Moo.</i> 96.....	79, 539
Owen, 1 <i>Moo.</i> 118	96
Owen, 9 C. & P. 238.....	198
Owen, 4 C. & P. 236.....	251
Owen, <i>Leach</i> , 572.....	375, 474
Owen, 1 <i>Lew.</i> 35.....	455
Owen, 1 <i>Moo.</i> 205	592
Oxford, 9 C. & P. 525..	119, 250, 325, 737
Oxford, Earl of, 1 <i>Chanc. Rep.</i> 1 ..	1001
Oxford, J.J. 1 B. & Adol. 289, 297..	1274
Oxfordshire, Inhabitants, 1 B. &	
Adol. 289, 297, 587	1274
Oxfordshire, Inhabitants, 16 <i>East</i> ,	
223	269, 1271, 1291, 1292
Oxfordshire, J.J. 4 Q. B. 177; 4 B.	
& C. 194	1274
Oxley, 3 <i>Car. & K.</i> 317	1018
Oxley v. Flower, <i>Selv. N. P.</i> 920 ..	819

P.

Pack, 6 T. R. 374	1209
Packard, <i>Car. & M.</i> 236	751
Packer, 2 <i>Russ. C. M.</i> 876.....	199, 213
Packer, <i>East, P. C.</i> 653	392
Paddington Vestry, 9 B. & C. 456..	1257
Paddle, <i>Russ. & Ry.</i> 484	445, 448
Page, 2 <i>Russ. C. M.</i> 80	81
Page, 1 D. P. C. 507.....	124
Page, 6 <i>Esp.</i> 83	238
Page, <i>Russ. & Ry.</i> 392.....	625
Page, 8 C. & P. 122	728
Page, 9 C. & P. 756	729
Page, 1 <i>Russ. C. M.</i> 82.....	730, 731
Page, 6 <i>Esp.</i> 83	1030
Page, 2 <i>Esp.</i> 649.....	1035
Page v. Keble, <i>Cro. Jac.</i> 436	974
Pagham, 8 B. & C. 355.....	1297
Palce, 1 <i>Car. & K.</i> 73	568
Paine, 1 <i>Salk.</i> 284.....	207
Paine, 9 C. & P. 135	256, 455
Paine, <i>Yelv.</i> 111	973
Paine, <i>Carth.</i> 405	1141
Paine, 5 <i>Mod.</i> 163	1158
Paine, 1 <i>East, P. C.</i> 5	1172
Painter, 2 <i>Cox</i> , 244; 2 <i>Car. & K.</i>	
319.....	178, 830
Palfrey, <i>Cro. Jac.</i> 527	924
Palmer, <i>Leach</i> , 978.....	76, 647
Palmer, 5 <i>El. & Bl.</i> 1024.....	100
Palmer, 5 <i>Cox</i> , 236.....	224
Palmer, 1 <i>Moo. & Rob.</i> 70.....	439, 908
Palmer, <i>Leach</i> , 352	703
Palmer, 1 <i>Russ. C. M.</i> 209.....	851
Palmer, <i>Ex p.</i> , 6 C. & P. 122.....	279
Pappineau, <i>Str.</i> 686.....	1243, 1248
Paradice, <i>East, P. C.</i> 565	384, 483

Table of Cases

li

	PAGE		PAGE
Pardenton, 6 <i>Cox</i> , 247	810	Payne, 4 <i>C. & P.</i> 558	291
Parfait, <i>Leach</i> , 19	43	Payne, 9 <i>East</i> , 158	1007
Pargeter, 3 <i>Cox</i> , 191	767	Peace, 3 <i>B. & Ald.</i> 579	89
Pargiter, <i>Skin.</i> 109	134	Peach, 1 <i>Burr.</i> 548	136, 143, 1050
Paris, 2 <i>Keb.</i> 572	183	Peacock, <i>Russ. & Ry.</i> 278	662, 678
Parish, 7 <i>C. & P.</i> 782	50	Pear, <i>Leach</i> , 1089	374
Parish, 8 <i>C. & P.</i> 194	169, 667	Pear, <i>East</i> , <i>P. C.</i> 689	516
Parke, 1 <i>Cox</i> , 4	660	Pearce, <i>Peake</i> , 75	214, 1157, 1158
Parker, <i>In re</i> , 5 <i>Mees. & W.</i> 52 ..	33	Pearce, 9 <i>C. & P.</i> 667	251
Parker, <i>In re</i> , 7 <i>D. P. C.</i> 203	33	Pearce, <i>Russ. & Ry.</i> 174	436
Parker, 3 <i>Cox</i> , 299	116	Pearce, <i>Leach</i> , 527	591
Parker, 8 <i>Cox</i> , 465	192	Pearce, <i>East</i> , 603	1229
Parker, 8 <i>Cox</i> , 465; 30 <i>L. J. M. C.</i>		Pearles, <i>East</i> , 741	410
144	192	Pearson, 1 <i>Moo.</i> 513	94
Parker, 1 <i>Cox</i> , 76	226	Pearson, 2 <i>Burr.</i> 1039	124
Parker, 1 <i>Russ. C. M.</i> 9	250	Pearson, 1 <i>Lew.</i> 67	208
Parker, 3 <i>Dougl.</i> 244	253	Pearson, 7 <i>C. & P.</i> 761	213, 246
Parker, 2 <i>Moo. C. C.</i> 5; 7 <i>C. & P.</i>		Pearson, 2 <i>Lew.</i> 144	748, 765
825	518	Pearson, 8 <i>C. & P.</i> 119	1017, 1024
Parker, 9 <i>C. & P.</i> 45	558	Pearson, 4 <i>C. & P.</i> 572	1227, 1228, 1232
Parker, 2 <i>Cox</i> , 274	682	Pease, 4 <i>B. & Ald.</i> 30	1250
Parker, 1 <i>Russ. C. M.</i> 681	831, 873	Peat, <i>Leach</i> , 228	432
Parker, 2 <i>Lew.</i> 140	889	Peat, 2 <i>Lew.</i> 288	861
Parker, 1 <i>Barnard.</i> 52	999	Peat, <i>East</i> , <i>P. C.</i> 219	869, 870
Parker, <i>Car. & M.</i> 639	1010	Peck, 2 <i>Russ. C. M.</i> 180	483, 489
Parker, 3 <i>D. P. C.</i> 242	1031	Peck v. The Queen, 1 <i>Per. & D.</i> 508 :	
Parker, 3 <i>Q. B.</i> 292	1060		1060, 1061
Parkes, <i>Leach</i> , 614	373	Pedley, <i>Leach</i> , 720	128, 564
Parkes, <i>East</i> , <i>P. C.</i> 674	378	Pedley, <i>Leach</i> , 327	969
Parkes, <i>Leach</i> , 775	662	Peel, 2 <i>Fost. & F.</i> 21	204
Parkhouse, <i>East</i> , <i>P. C.</i> 462 ..	612, 1063	Peel, <i>Russ. & Ry.</i> 407	410
Parkins, <i>Ry. & M.</i> 166	170	Pegge, 29 <i>L. J. M. C.</i> 134	269
Parkins, 1 <i>Moo.</i> 45	260, 397	Pegge, <i>East</i> , <i>P. C.</i> 420	436
Parkinson, <i>Russ. C. M.</i> 571	869	Pegler, 5 <i>C. & P.</i> 521	225
Parkyn, 4 <i>Str.</i> 651	310, 329	Pelfryman, <i>Leach</i> , 503	435
Parminter, <i>Leach</i> , 537	476	Pelham, 8 <i>Q. B.</i> 959	807
Parnell, 1 <i>Jac. & W.</i> 451	880	Peltier, <i>Holt, Libel</i> , 78 ..	1092, 1139, 1153
Parnell, 2 <i>Burr.</i> 806	978	Pembridge, 6 <i>Jur.</i> 1037	163
Parr, 2 <i>Ventr.</i> 94	370	Pembridge, 3 <i>Q. B.</i> 901	1269
Parr, 2 <i>Moo. & Rob.</i> 346	544	Penderryn, 2 <i>T. R.</i> 513	1253
Parr, <i>Leach</i> , 434	642	Penhallo, <i>Cro. El.</i> 231	94
Parr, 2 <i>Sess. Ca.</i> 6	1242	Penn, <i>Cro. Car.</i> 314	1206
Parratt, 4 <i>C. & P.</i> 570	189	Pennigoes, 1 <i>B. & C.</i> 142	1270
Parris, 1 <i>Sid.</i> 431	134, 616	Penny, 1 <i>Lord Raym.</i> 153	929
Parry, <i>Leach</i> , 108	54	Penprase, 4 <i>B. & Adol.</i> 575	64, 124
Parry, 7 <i>C. & P.</i> 836 ..	128, 129, 153, 154	Penros, 2 <i>Inst.</i> 164	919
Parry, 6 <i>C. & P.</i> 402	559, 562	Penson, 5 <i>C. & P.</i> 412	851, 861
Parry, 8 <i>Mod.</i> 136	582	Pepper, <i>Comb.</i> 298	34
Parry, 1 <i>Lord R.</i> 865	1053	Pepys, <i>Peake</i> , 138	986, 1038, 1039
Parsons, 1 <i>Sir Wm. Bl.</i> 392	1066	Perceval, 1 <i>Lew.</i> 156	46
Partridge, 7 <i>C. & P.</i> 557	188, 369	Perfit, 8 <i>C. & P.</i> 288	466
Partridge, 6 <i>Cox</i> , 182	524	Perkins, 4 <i>C. & P.</i> 363	62
Pascoe, <i>Den.</i> 456	405	Perkins, 3 <i>C. & P.</i> 395	205
Pasemore, 2 <i>D. P. C.</i> 529		Perkins, 1 <i>Lew.</i> 273	247
Patch, <i>Leach</i> , 238	375	Perkins, <i>Holt's Ca.</i> 683	324
Patchin, <i>Gilb. Rep.</i> 276	1206	Perkins, <i>Den. & P.</i> 459	539
Pateman, <i>Russ. & Ry.</i> 455	649	Perkins, 21 <i>L. J. M. C.</i> 152	680
Patience, 7 <i>C. & P.</i> 795	4	Perkins, 1 <i>Lew.</i> 44	869
Patinson, <i>Leach</i> , 850	495	Perkins, 14 <i>L. J. M. C.</i> 87	889
Patmore, <i>Leach</i> , 137	762	Perkins, 4 <i>C. & P.</i> 537	1100
Patram, <i>East</i> , <i>P. C.</i> 782	182	Perks, 1 <i>C. & P.</i> 300	456
Patrick, <i>Leach</i> , 355	92	Perrot, 2 <i>M. & S.</i> 379	533
Patrick, <i>Leach</i> , 253	581	Perry, 4 <i>T. R.</i> 453	163
Paty, <i>Ld. Raym.</i> 1105	35	Perry, 2 <i>Russ. C. M.</i> 984	185
Paty, <i>East</i> , <i>P. C.</i> 1074	591, 592	Perry, 5 <i>T. R.</i> 478; 6 <i>T. R.</i> 573 ..	292
Paul, 6 <i>C. & P.</i> 323	24	Perry, <i>Den.</i> 69	420
Paul, 2 <i>Moo. & Rob.</i> 307	1269	Perry, 1 <i>Hawk. c.</i> 41	844
Pawlett, 11 <i>Mod.</i> 114	947, 1177	Perry, 2 <i>Cox</i> , 223	867
Payne, 1 <i>Moo.</i> 378	15	Peters, 1 <i>Burr.</i> 568	288
Payne, <i>M. S.</i>	197	Peters, 1 <i>Car. & K.</i> 245	365

	PAGE		PAGE
Petrie, <i>Leach</i> , 294	475	Pinney, 3 <i>B. & Adol.</i> 947: 64, 932, 1086, 1087	
Pettit, 4 <i>Cox</i> , 169	197	Pippett v. Hearn, 5 <i>B. & Ald.</i> 634: 184	
Pettit v. Addington, <i>Peake</i> , 62	187	Pitcher, 1 <i>C. & P.</i> 85	226
Pew, <i>Cro. Car.</i> 183	7, 754	Pitman, 2 <i>C. & P.</i> 423	407
Pewtress, <i>Str.</i> 1026	122	Pitt, 8 <i>C. & P.</i> 771	90
Peytenyn, 2 <i>Ro. Rep.</i> 51	638	Pitt, 3 <i>Burr.</i> 1335	1201
Peyton, <i>Leach</i> , 324	476	Pitts, <i>Car. & M.</i> 284	759
Pheasant v. Finch, <i>Tho. Raym.</i> 394	147	Plaice v. Howe, <i>Cro. El.</i> 185	974
Phelps, <i>Car. & M.</i> 180	10, 81, 95, 123, 948	Plant, 7 <i>C. & P.</i> 575	130
Phelps, 2 <i>Moo.</i> 240	786, 801	Platt, <i>Leach</i> , 157	25, 34, 279
Phelps, 2 <i>Lord Keny.</i> 570	945	Plestow, 1 <i>Camp.</i> 494	238, 535
Phetheon, 9 <i>C. & P.</i> 552	371	Plowden, <i>Poph.</i> 205	1115
Phillips, 2 <i>Cox</i> , 114	39	Plowman, <i>Cro. El.</i> 752	958
Phillips, <i>Str.</i> 261	84, 887	Plumer, <i>Russ. & Ry.</i> 264	213
Phillips, <i>Str.</i> 921	120	Plummer, 12 <i>Mod.</i> 627	750
Phillips, 1 <i>Jur.</i> 427	132	Plummer, 1 <i>Car. & K.</i> 600	762
Phillips, 3 <i>Burr.</i> 1564	138, 150	Plummer, <i>Russ. & Ry.</i> 264.. 1154, 1228, 1230	
Phillips, 4 <i>Burr.</i> 2089	138, 150	Plympton, 2 <i>Ld. R.</i> 1377	1202
Phillips, <i>Ca. Temp. Hardw.</i> 241: 138, 150		Pocock, <i>Str.</i> 1137	137, 929
Phillips, 2 <i>Russ. C. M.</i> 876	199, 212	Pocock, 5 <i>Cox</i> , 172	766
Phillips, 1 <i>Fost. & F.</i> 165	210	Pocock v. Thornicroft, 12 <i>Mod.</i> 454..	134
Phillips, <i>Russ. & Ry.</i> 363	238	Pole v. Carrel, 2 <i>Ro. Rep.</i> 410	974
Phillips, 2 <i>Moo.</i> 252	571, 572	Polfield, 4 <i>D. P. C.</i> 469	888
Phillips, 3 <i>Cox</i> , 88	573	Pollard, <i>Leach</i> , 586	545
Phillips, 1 <i>Lew.</i> 105	650	Pollard v. Moreton, <i>Mo.</i> 656	1109
Phillips, <i>Russ. & Ry.</i> 369	720, 737	Pollman, 2 <i>Camp.</i> 229	1068, 1197
Phillips, <i>Comp.</i> 830	768	Polly, 1 <i>Car. & K.</i> 77	466
Phillips, 8 <i>C. & P.</i> 536	831	Polwart, 1 <i>Q. B.</i> 818	883
Phillips, 3 <i>Campb.</i> 77	867	Pomeroy v. Ford, <i>Mo.</i> 657	1001
Phillips, <i>Str.</i> 921	1006	Pomfret Honour, Coroner for the Liberty of, 8 <i>Jur.</i> 910	890
Phillips, 6 <i>East</i> , 464	1103	Pond, <i>Com. Rep.</i> 312	1311
Phillips v. Davies, 2 <i>Anstr.</i> 572 ...	1261	Poole, 27 <i>L. J. M. C.</i> 53; <i>Dearl.</i> & <i>B.</i> 345	380
Phillips v. Jansen, 2 <i>Esp.</i> 624	1154	Poole, 9 <i>C. & P.</i> 728	786, 801
Phillpot, <i>Dearl.</i> , 179; 22 <i>L. J. M. C.</i> 113	807	Pooley, <i>Leach</i> , 900	220
Philp, 1 <i>Moo.</i> 263	595, 597	Pooley, <i>Russ. & Ry.</i> 31.. 1227, 1231, 1232	
Philpotts, 1 <i>Car. & K.</i> 112	533	Pope, 6 <i>C. & P.</i> 346	364
Philpotts, 22 <i>L. J. M. C.</i> 113	818	Pope, <i>Leach</i> , 336	508
Philpotts, <i>Den. & P.</i> 302	967	Pope, 5 <i>C. & P.</i> 208	1065
Phipoe, <i>Leach</i> , 678	94, 419, 437	Pordage, 1 <i>Mod.</i> 22	1309
Picket, <i>East</i> , 501	460	Porter, 1 <i>Barnard.</i> 52	999
Pickford, 4 <i>C. & P.</i> 227	445	Porter v. O'Meara, 5 <i>Bing. N. S.</i> 627	49
Pickles, 12 <i>L. J.</i> 40	68	Porye, 1 <i>Keb.</i> 565	974
Pie v. Cooke, <i>Hob.</i> 128	146	Post, <i>Russ. & Ry.</i> 101	647
Pie, <i>Hutt.</i> 36	915	Postlethwaite v. Gibson, 3 <i>Esp.</i> 226: 5	
Pierce, 6 <i>Cox</i> , 117	27, 368	Potter, 2 <i>Ld. Raym.</i> 938	102
Pierce, 27 <i>L. J. M. C.</i> 31; <i>Bell</i> , 235	299	Potter, <i>Den. & P.</i> 235	472
Pierce, 7 <i>Cox</i> , 206	401	Potts, <i>Russ. & Ry.</i> 353	79, 710
Pierce, 3 <i>M. & S.</i> 62	937	Poultny v. Wilkinson, <i>Cro. El.</i> 907: 1015	
Pierce, 2 <i>Show.</i> 327	1238	Poulton, 5 <i>C. & P.</i> 329	757, 758
Pierson, <i>Andr.</i> 320	134, 845, 1181	Pountney, 7 <i>C. & P.</i> 302	190, 192
Pierson, <i>And.</i> 313	143	Povey, <i>Dearl.</i> 32; 22 <i>L. J. M. C.</i> 19	864
Pierson, 1 <i>Salk.</i> 382	1182	Povey, 1 <i>Sid.</i> 237	1027
Pigeon, 1 <i>C. & P.</i> 98	678	Powell, 2 <i>Ld. R.</i> 1452	64
Pigot, 1 <i>Cox</i> , 124	728	Powell, <i>Leach</i> , 110	177, 839
Pike et ux. 3 <i>C. & P.</i> 598	206	Powell, <i>Car. & M.</i> 500	201
Pike, <i>Leach</i> , 317	480	Powell, 1 <i>C. & P.</i> 96	256
Pike, 2 <i>Moo.</i> 70	675	Powell, 2 <i>B. & Adol.</i> 75	262, 827
Pikesley, 9 <i>C. & P.</i> 124	197, 198, 211	Powell, 7 <i>C. & P.</i> 640	401
Pilgrim, 4 <i>D. P. C.</i> 89	255	Powell, <i>Den. & P.</i> 403	465
Piller, 7 <i>C. & P.</i> 337	59	Powell, <i>Sir Wm. Bl.</i> 787	676
Pilling, 1 <i>Fost. & F.</i> 324	675	Powell, <i>Leach</i> , 77	683, 687
Pim, <i>Russ. & Ry.</i> 425	71	Powell, <i>Ry. & Moo.</i> 101	1021
Pinder, <i>Dearl. & B.</i> 236	523	Powell's murderer's case, <i>Leach</i> , 508	258
Pine, <i>Cro. Car.</i> 117	324, 1088		
Pinhorn, 1 <i>Cox</i> , 70	779, 782		
Pinkerton, 2 <i>East</i> , 556	1163		
Pinkney, 2 <i>Burr.</i> 1129	613		

Table of Cases.

liii

	PAGE
Powles, 4 C. & P. 571	868
Powlter, 11 Rep. 29	566
Pownell, W. Kel. 58	1132
Poynder, 1 B. & C. 178	1310
Poyntz, Cro. Jac. 214	1123
Poyser, Den. & P. 233	382, 385
Pratley, 5 C. & P. 533	382
Pratt, 1 Moo. 250	377
Pratt, Dearel. 360	483
Pratt, 8 Cox, 334	527
Pratt, Dearel. 502	907
Pratt v. Hutchinson, 15 East, 511: ..	1209
Pratten, 6 T. R. 559	145
Pressly, 6 C. & P. 183	200
Prest, 20 L. J. Q. B. 7	111
Prestney, 3 Cox, 505	15
Preston v. Collins, 3 Jur. 329	151
Preston, Inhabitants of, 30 L. J. M. C. 169	93
Preston, Inhabitants of, Ca. Temp. Hardw. 251	258
Preston, Inhabitants, 7 D. P. C. 593	1269
Preston, Lord, 1 Salk. 678	187
Preston, Lord, 4 St. Tr. 448	310
Preston, Lord, 4 St. Tr. 411	319
Preston, 1 Den. & P. 353	367
Price, 8 C. & P. 282	12
Price, 5 Cox, 277	15
Price, 8 C. & P. 19	75
Price, Leach, 419	182
Price, 7 Cox, 405	222
Price, 6 East, 328	289
Price, 4 Burr. 1925	383
Price, 5 C. & P. 510	573
Price, 9 C. & P. 729	580
Price, 8 Cox, 96	750
Price, Cro. Jac. 120	970
Price, 6 East, 323	1037, 1044
Price, 3 Per. & D. 421	1305
Price, Tho. Jones, 46	1310
Price v. Selby, 10 Cl. & F. 282	12, 14
Prickett v. Greatrex, 8 Q. B. 1020 ..	898
Pries, 6 Cox, 165	684
Priestley, 1 Lew. 74	198
Priestley v. Hughes, 11 East, 1	856
Priestley v. Lamb, 6 Vis. 421	1053
Prigg, Fost. 127	1310
Primett, 1 Fost. & F. 50	846
Prince, Moo. & Malk. 21; 2 C. & P. 517	510, 513
Pringle, 2 Moo. & Rob. 276	85
Pringie, 2 Moo. 127	712
Pritchard, 1 C. & P. 303	118
Privett, Den. 193	383
Probert, Den. & P. 20	102
Prosser v. Edmonds, 1 Y. & Col. 481	920
Prosser v. Rowe, 2 C. & P. 421	46
Prosser, Leach, 290	252
Prosser, East, P. C. 502	463
Proud, 31 L. J. M. C. 71; 9 Cox, 22; Leigh & Cave, 97	499
Prowes, 1 Moo. 349	397
Prowse v. Nany, Cro. El. 93	972
Prynn, Holt's Ca. 635	1092
Puckering, 1 Moo. 242	392, 409
Puckering v. Fisher, 1 Andr. 100 ..	634
Puddifoot, 1 Moo. 247	408
Pugh, Dougl. 188	159

	PAGE
Pugh, Holt's Ca. 635	1093
Pugh, 6 Mod. 140	1098
Pugh v. Owen, Hardr. 501	972
Pulbrook, 9 C. & P. 37	689
Pulham, 9 C. & P. 280	543
Pulling v. Frost, 1 Esp. 235	1189
Punshon, 3 Camp. 96	1036
Purcell, 1 Cox, 107	391
Purchase, Car. & M. 617	123, 499
Purchase, East, P. C. 116	319
Purnell, 1 Sir Wm. Bl. 37	1290
Pursell, 8 Mod. 289	268
Pusey, Str. 717	1001
Pye, Leach, 352	89
Pym, 1 Cox, 339	206, 760
Pyne v. Pyne, 27 L. J. Prob. 54 ..	180
Pywell, 1 Stark. 402	1055, 1057, 1060

Q.

Qualters, 6 Cox, 357	207
Quarman v. Burnett, 6 Mees. & W. 499	386
Quarter Sessions, 9 C. & P. 790 ..	39
Queen, Case of the, 2 Br. & B. 297	201
Queen, Case of the, 2 Br. & B. 289	224
Queen, Case of the, 2 Br. & B. 310	246
Queen, Case of the, 2 Br. & B. 302	1065
Quick, Leach, 28	278
Quinch, 4 C. & P. 571	885
Quinn, 1 Lew. 1	72

R.

Raake, 2 Moo. 66	674
Radbourne, Leach, 457	207
Radcliffe, 2 Moo. 68	94
Radcliffe, 2 Sir Wm. Bl. 3	154, 171
Radcliffe, 2 Lew. 59	202
Radford, 1 Moo. 197	195
Radford, Den. 59	680, 685
Radley, 3 Cox, 460	95
Radley, Den. 450	391
Raffety, 2 Lew. 271	440
Ragg, Bell, 214	522
Rainer, 2 Barnard. 293	1089
Rampton, Kel. 41	774
Ramsbottom, Leach, 25	657
Ramsden, 1 Cox, 37	39, 440
Ramsden, 2 C. & P. 604	220
Ramsden, In re, 15 L. J. M. C. 113	51
Randall, Russ. & Ry. 195	665
Ranger, East, 1074	591
Rankett, 16 Vin. Ab. 23	1238
Rankin, Russ. & Ry. 43	747
Ranson, Russ. & Ry. 232	420, 1231
Rant, Kyd on Awards, 64	916
Raphael, Man. N. P. Dig. 232: ..	978, 1036
Rastrick, 2 Cox, 39	215
Ratcliffe, 1 Sir Wm. Bl. 3	52, 117, 329
Ratcliffe, 1 Lew. 122	285
Rathbone, 2 Moo. 242	1227

	PAGE		PAGE
Ravenscroft, <i>Russ. & Ry.</i> 161	673	Rex vel Reg. v. ——— 1 <i>Cox</i> , 50 ..	1024
Rawlins, <i>East</i> , P. C. 617.....	407	Rex vel Reg. ——— 1 <i>Ch. Rep.</i> 698:	
Rawlins, 7 <i>C. & P.</i> 150	461	1058, 1062, 1070	
Rawlins, 8 <i>C. & P.</i> 439	1012	Rex vel Reg. v. ——— <i>Andr.</i> 229:	1132
Rawlins v. Ellis, 16 <i>Mees. & W.</i> 172:	5	Rex vel Reg. v. ——— 1 <i>Russ. C. M.</i>	
Rawlinson, 4 <i>Dowl. & Ry.</i> 186 ..	1247	241	1132
Rawson, 2 <i>B. & C.</i> 598	271, 287	Rex vel Reg. v. S. et ux. 5 <i>Cox</i> ,	
Raymond, <i>Noy.</i> 122.....	1263	279	1194
Read, <i>Den.</i> 377	840, 841	Reynell, 6 <i>East</i> , 315	1242
Read, 3 <i>Cox.</i> 266	841	Reynolds, 2 <i>Cox</i> , 170	374
Read, 11 <i>Mod.</i> 142	1186	Reynolds, <i>Russ. & Ry.</i> 465	1217
Read v. Coker, 22 <i>L. J. C. P.</i> 201..	819	Reynolds, <i>In re</i> , 1 <i>New. S. C.</i> 51 ..	37
Read v. Dawson, 1 <i>Sid.</i> 49	1041	Rhodes, 4 <i>T. R.</i> 220.....	25
Reading, 6 <i>C. & P.</i> 649.....	199	Rhodes, 2 <i>Ld. Raym.</i> 886..62, 1011,	
Reading, 7 <i>How. St. Tr.</i> 196.....	223	1020, 1022, 1032	
Reading, 1 <i>Keb.</i> 17	760	Rhodes, <i>Leach</i> , 24	657
Reane, <i>East</i> , P. C. 734	446	Rice, 28 <i>L. J. M. C.</i> 64	426
Reany, 20 <i>L. J. M. C.</i> 43	204	Rice, 6 <i>C. & P.</i> 634	683, 1102
Reason, <i>Str.</i> 500	204	Rich, 1 <i>Russ. C. M.</i> 421.....	958
Reason, 6 <i>T. R.</i> 375	269, 1209	Rich v. Barker, <i>Hardr.</i> 131	1293
Reason, <i>Deansl.</i> 226.....	1227	Rich v. Regem, <i>Cro. Jac.</i> 404	925
Rebord, 5 <i>Burr.</i> 1569	35	Richards, 1 <i>Moo. & Rob.</i> 177	62
Record, 2 <i>Show.</i> 216	1240, 1243	Richards, 8 <i>B. & C.</i> 410.....	109, 256
Reculist, <i>Leach</i> , 763	228, 666	Richards, 5 <i>C. & P.</i> 518	188, 195
Redfern, 2 <i>Ad. & El.</i> 387; 4 <i>Nev.</i>		Richards, 1 <i>Fost. & F.</i> 87	250
& <i>M.</i> 198	48	Richards, 1 <i>Car. & K.</i> 532	384
Redford v. Birley, 3 <i>Stark.</i> 103.....		Richards, <i>Russ. & Ry.</i> 193	665
351, 354, 1084		Richards, 7 <i>Dowl. & Ry.</i> 665.....	1017
Redman, <i>Holt's Ca.</i> 477.....	95	Richards, 8 <i>T. R.</i> 634	1258
Redman, <i>Say. Rep.</i> 303	163	Richardson, <i>Leach</i> , 560	112
Redman, 1 <i>Ld. Kenyon</i> , 384.....	1128	Richardson, 4 <i>Jur.</i> 319	162
Reece, 2 <i>Russ. C. M.</i> 65.....	425	Richardson, 1 <i>Cox</i> , 62	169
Reed v. Cowmeadow, 7 <i>C. & P.</i> 821:	13	Richardson, 1 <i>Cox</i> , 361	232
Reed, <i>Car. & M.</i> 403	199	Richardson, 4 <i>Jur.</i> 104	268
Reed, <i>Moo. & M.</i> 403	200	Richardson, 6 <i>Dowl. & Ry.</i> 141: 271, 1245	
Reed, <i>Car. & M.</i> 306	365	Richardson, <i>Leach</i> , 387	277
Reed, 7 <i>C. & P.</i> 848	522	Richardson, 1 <i>Fost. & F.</i> 488	287
Reed, 23 <i>L. J. M. C.</i> 25	613	Richardson, 6 <i>C. & P.</i> 335	451
Reed, 2 <i>Moo.</i> 62; 8 <i>C. & P.</i> 623 ..	671	Richardson, 8 <i>Cox</i> , 448	499
Reeksphear, 1 <i>Moo.</i> 342.....	873	Richardson, 1 <i>Fost. & F.</i> 488	518
Rees, 7 <i>C. & P.</i> 568.....	199, 461	Richardson, <i>Leach</i> , 560	1002
Rees, 5 <i>C. & P.</i> 302	256	Richardson, 1 <i>Moo. & Rob.</i> 492....	1062
Rees, 6 <i>C. & P.</i> 608	277	Richardson, 8 <i>D. P. C.</i> 511	1163
Rees, 6 <i>C. & P.</i> 124	1232	Richmond, 1 <i>Car. & K.</i> 240	123, 739
Reeves, 5 <i>Jur.</i> 716	403	Richmond, 28 <i>L. J. M. C.</i> 188	692
Reeves, <i>Leach</i> , 808	708	Richmond, <i>Bell</i> , 142	932
Reeves, 9 <i>C. & P.</i> 25	758	Ricketts, 3 <i>Camp.</i> 68	14
Reilly, <i>Ry. & Moo.</i> 82.....	856	Rickman, <i>East</i> , 1035..	239, 565
Reilly, <i>Leach</i> , 454.....	1035, 1046, 1089	Rider, 8 <i>C. & P.</i> 531	169
Remnant, <i>Leach</i> , 583	25	Ridgelay, <i>Leach</i> , 189	737
Remnant, <i>Russ. & Ry.</i> 136.....	257, 393	Ridley, 2 <i>Camp.</i> 650	818, 1195
Remnant, 5 <i>T. R.</i> 169	438	Ridley, <i>Russ. & Ry.</i> 515	909
Renshaw, 2 <i>Cox</i> , 285	807	Ridpath, 10 <i>Mod.</i> 152	24
Renshaw, 11 <i>Jur.</i> 615.....	794, 818	Rigby, 8 <i>C. & P.</i> 770	121
Revel, <i>Str.</i> 420.....	187, 928, 929	Rigby, 7 <i>Cox</i> , 507..	521
Rew, <i>Kel.</i> 26	760	Rigmaidon, 1 <i>Lew.</i> 180	769
Rex vel Reg. v. ——— 6 <i>Jur.</i> 131:	65	Riley, 3 <i>Car. & K.</i> 116	209
Rex vel Reg. v. ——— 6 <i>Cox</i> , 391:	69	Riley, <i>Deansl.</i> 149.....	367
Rex vel Reg. v. ——— <i>Russ. & Ry.</i>		Riley, 1 <i>Cox</i> , 98.....	574
489.....	71	Riley, 1 <i>Lew.</i> 149	910
Rex vel Reg. v. ——— 20 <i>L. J. M.</i>		Ring, 8 <i>T. R.</i> 565.....	254, 255
<i>C.</i> 53; 15 <i>Q. B.</i> 1060	109, 110	Riordan, <i>Car. Cr. L.</i> 255	857
Rex vel Reg. v. ——— 2 <i>Anstr.</i> 523:	285	Rioters, <i>Leach</i> , 314.	183
Rex vel Reg. v. ——— 3 <i>Mod.</i> 104:	655	Ripley, <i>Str.</i> 1073; <i>Tho. Jones</i> , 198:	892
Rex vel Reg. v. ——— 1 <i>Cox</i> , 250:	728	Rispal, 3 <i>Burr.</i> 1320....	1052, 1056, 1070
Rex vel Reg. v. ——— <i>O. B.</i> 1815..	859	Rither, <i>Cro. El.</i> 148.....	989
Reg vel Reg. v. ——— 3 <i>Mod.</i> 98:	924	Rivers, 7 <i>C. & P.</i> 177	199
Rex vel Reg. v. ——— 3 <i>Mod.</i> 98;		Robe, 2 <i>Str.</i> 999.....	1079
1 <i>Ld. Raym.</i> 258	985	Roberts, <i>Car. Cr. L.</i> 57.....	117

Table of Cases.

lv

	PAGE		PAGE
Roberts, <i>Kel.</i> 25.....	130	Rollo, <i>Say.</i> 138	121
Roberts, <i>Carth.</i> 226; 1 <i>Shore.</i> 389..	134, 144	Roo, 1 <i>Barnard.</i> 87.....	617
Roberts, 2 <i>Russ. C. M.</i> 609; 1 <i>Wils.</i>		Rook, <i>Hardr.</i> 20	145
77	162	Rook, 2 <i>Hawk. e.</i> 55 (2), <i>s.</i> 6.....	
Roberts, 1 <i>Jur.</i> 1094.....	162	Rooke, 1 <i>Post. & F.</i> 107	588, 810
Roberts, 1 <i>Camp.</i> 399	241	Rookwood, 4 <i>St. Tr.</i> 696, 13, <i>Howell,</i>	319, 325
Roberts, 3 <i>Cox.</i> 74.....	378	Rooney, 6 <i>C. & P.</i> 515.....	27, 116
Roberts, 7 <i>C. & P.</i> 485.....	392	Rooney, 7 <i>C. & P.</i> 517.....	441
Roberts, <i>East.</i> 487.....	454	Rollston v. Chambers, 1 <i>Leon.</i> 282:	1124
Roberts, <i>East.</i> 1030	566	Roper, 1 <i>Stark.</i> 518.....	1008
Roberts, 2 <i>Moo.</i> 258.....	688, 1074, 1079	Rose, <i>Leach.</i> 342, 243, <i>n.</i>	439, 1216
Roberts, 7 <i>Cox.</i> 39	738	Rose, 2 <i>Cox.</i> 329	549
Roberts, 2 <i>Car. & K.</i> 607	1026	Rosenberg, 1 <i>Car. & K.</i> 233.....	389
Roberts, 1 <i>Camp.</i> 399	1050, 1066	Rosenstein, 2 <i>C. & P.</i> 414	1142, 1186
Roberts, 1 <i>Barnard.</i> 90	1149	Rosier, 1 <i>Phil. Ev.</i> 105	196
Roberts v. Allatt, <i>Moo. & M.</i> 192..	223	Rosinski, 1 <i>Moo.</i> 19	821
Robey, 5 <i>C. & P.</i> 552.....	256	Rosser, 7 <i>C. & P.</i> 648	186
Robins, <i>Dears.</i> 318.....	670	Rough, <i>East, P. C.</i> 607	391, 414
Robins, 2 <i>Moo. & Rob.</i> 512.....	835	Rourke, <i>Russ. & Ry.</i> 386	451
Robins, 1 <i>Car. & K.</i> 456.....	846	Rouse, 4 <i>Cox.</i> 7	351, 531, 672
Robins, 1 <i>Cox.</i> 114	873	Routledge, <i>Dougl.</i> 532	1309
Robins, 6 <i>T. R.</i> 626	991	Row, 12 <i>Mod.</i> 82	34
Robinson, 2 <i>Stark. Ev.</i> 693	14	Row, <i>Russ. & Ry.</i> 153	189
Robinson, 1 <i>Lew.</i> 203	72	Rowbattel, 1 <i>Lew.</i> 278	58
Robinson, <i>Holt, N. P. C.</i> 595....	88, 395	Rowbattel, 1 <i>Lew.</i> 83	173
Robinson, 5 <i>Vin. Supp.</i> 99.....	143	Rowe, <i>Bell.</i> 93	394
Robinson, 5 <i>Cox.</i> 783	217	Rowed, 3 <i>Q. B.</i> 180	873
Robinson, <i>East, P. C.</i> 1110	241	Rowland, <i>Ry. & Moo.</i> 401	182, 1065
Robinson, 1 <i>Lew.</i> 129	265, 467	Rowland, 1 <i>Fost. & F.</i> 72	977
Robinson, <i>East, P. C.</i> 565	384	Rowland, <i>Den. & P.</i> 364	1062
Robinson, <i>Russ. & Ry.</i> 321	436	Rowland, <i>ap. Eliza.</i> 3 <i>Inst.</i> 164....	970
Robinson, <i>Leach.</i> 749	444	Rowland v. Ashby, <i>Ry. & M.</i> 232:	199, 213
Robinson, 2 <i>Moo. & Rob.</i> 214.....	447	Rowley, <i>Russ. & Ry.</i> 110.....	652
Robinson, 1 <i>Moo. C. C.</i> 327	454	Rowley, <i>Fost.</i> 294	766
Robinson, <i>Leach.</i> 767	505	Rowley, <i>Ry. & Moo.</i> 199	1030, 1031
Robinson, 28 <i>L. J. M. C.</i> 58; <i>Bell,</i>		Royce, 4 <i>Burr.</i> 2073.....	79
34	527	Royley, <i>Cro. Jac.</i> 296.....	744, 765
Robinson, 2 <i>Ro. Rep.</i> 59	638	Royson, <i>Cro. Car.</i> 146	971
Robinson, 1 <i>Moo.</i> 413	727	Roysted, 1 <i>Ld. Keny.</i> 255	120
Robinson, 12 <i>Ad. & El.</i> 672	829	Royston, 1 <i>Lew.</i> 267.....	216
Robinson, 1 <i>Burr.</i> 799	935	Ruddy, 16 <i>Vin. Ab.</i> 308	1012
Robinson, <i>Leach.</i> 37	1053, 1057	Russell, 1 <i>Car. & M.</i> 247	44
Robinson, 1 <i>Sir Wm. Bl.</i> 541	1201	Russell, 23 <i>L. J. M. C.</i> 173	269, 270
Robson, <i>Russ. & Ry.</i> 413.....	375	Russell, 4 <i>T. R.</i> 534	292
Robson, 31 <i>L. J. M. C.</i> 22; <i>Leigh</i>		Russell, 1 <i>Moo.</i> 377	455
& <i>Cave.</i> 93	404	Russell, <i>Car. & M.</i> 541.....	558
Robson, <i>Dears.</i> 400.....	546	Russell, <i>Leach.</i> 9	675, 678, 681
Robson, 2 <i>Moo.</i> 183	690	Russell, 1 <i>Moo.</i> 356	788
Roche, <i>Leach.</i> 134.....	131	Russell, 1 <i>Moo. & Rob.</i> 122	832
Roche, <i>Car. & M.</i> 341	199, 210	Russell, 1 <i>Cox.</i> 81.....	953
Roddam, <i>R. v., Comp.</i> 672	38	Russell, 8 <i>East.</i> 427	1247
Roderick, 7 <i>C. & P.</i> 795	1194	Russell, 6 <i>B. & C.</i> 566.....	1295
Rodway, 9 <i>C. & P.</i> 784	380	Russell, <i>Dame, v. Countee de Not-</i>	
Roe, <i>Str.</i> 117	958	tingham, <i>Mo.</i> 786	1112
Roe d. Jeffreys v. Hicks, 2 <i>Wils.</i> 13:	299	Russell, <i>Lady, Cro. Jac.</i> 17.....	1134
Roebuck, 25 <i>L. J. M. C.</i> 101; <i>Dears.</i>		Russell v. Men of Devon, 2 <i>T. R.</i>	
& <i>B.</i> 24.....	526, 528	667	1287
Rogers, 2 <i>Camp.</i> 654.....	236	Ruck, 1 <i>Russ. C. M.</i> 827	467
Rogers, 3 <i>Burr.</i> 1809.....	302, 303	Rudd, <i>Leach.</i> 117	35
Rogers, <i>Leach.</i> 89	460, 677	Rudd, <i>Comp.</i> 331	183
Rogers, 8 <i>C. & P.</i> 629	661	Rudd, <i>Leach.</i> 127	185
Rogers, 9 <i>C. & P.</i> 41	672	Rudge, 1 <i>Russ. C. M.</i> 825	95
Rogers, 2 <i>Moo.</i> 85.....	727	Rudick, 8 <i>C. & P.</i> 327	393
Rogers, <i>East, P. C.</i> 310	753	Rusby, <i>Peake.</i> 189	1206
Rogers, <i>Holt's Ca.</i> 331.....	929	Rushworth, 2 <i>New. S. C.</i> 415	102
Rogers, 5 <i>Cox.</i> 193	1226	Rushworth, 1 <i>Moo.</i> 404	217, 260
Rogers, 2 <i>Ld. R.</i> 373	1260	Rushworth, <i>Russ. & Ry.</i> 317 ..	635,
Rogier, 1 <i>B. & C.</i> 272	1189	674, 675, 676	
Rolfe, <i>Fost.</i> 266.....	883		

	PAGE		PAGE
Russen, <i>East, P. C.</i> 416.....	831	Saunders, 10 <i>Q. B.</i> 484.....	140
Rust, 1 <i>Moo. C. C.</i> 183	456	Saunders, 7 <i>C. & P.</i> 277	745
Ruston, <i>Leach</i> , 408	176	Saunders, <i>Plowd.</i> 474	751
Ryall v. <i>Reg.</i> , 17 <i>L. J. M. C.</i> 95; 18 <i>L. J. M. C.</i> 69 ..95, 291, 1014, 1039		Saunders, <i>Str.</i> 167	892
Ryan, 1 <i>C. & P.</i> 117	74	Savage, 5 <i>C. & P.</i> 143	50, 258
Ryan, 2 <i>Moo.</i> 213.....	751, 782	Savage, 1 <i>Car. & K.</i> 75	51
Ryan, 2 <i>Moo.</i> 15	796	Savage, 1 <i>Ld. Raym.</i> 347	121, 1314
Ryan, 2 <i>Cox</i> , 115	831	Savage, 1 <i>Moo.</i> 51.....	152
Rycroft, 6 <i>Cox</i> , 76	1070	Savile, 8 <i>Q. B.</i> 703	142
Ryder, 6 <i>East</i> , 587	123	Savile v. Roberts, 1 <i>Ld. Raym.</i> 378:	1056
Rymes, 3 <i>Car. & K.</i> 379	237	Saward, 5 <i>Cox</i> , 295	382
Rymes, 3 <i>Car. & K.</i> 327	541	Sawyer, <i>Russ. & Ry.</i> 294	780
S.		Sayer v. Glossop, 2 <i>Car. & K.</i> 694 .	865
Sacheverell, 9 <i>Ann. Stark. Cr. P.</i> 124	1152	Scadding, <i>Yelv.</i> 134	959
Sadbury, 1 <i>Ld. Raym.</i> 484.....	1096	Scaife, 9 <i>D. P. C.</i> 653	28
Sadler, 4 <i>C. & P.</i> 218	257, 1268	Scalbert, <i>Leach</i> , 620.....	164
Sadler, 1 <i>Sid.</i> 97	1124, 1128	Scarborough, 3 <i>Cox</i> , 727	88
Sainsbury, 4 <i>T. R.</i> 451.....	946	Scarborough, 12 <i>Shaw, J. P.</i> 285 ..	88
Saint Asaph, Dean of, 3 <i>T. R.</i> 428:		Scaresbrick, 6 <i>Ad. & El.</i> 509	1254
	1147, 1162	Scarfe, <i>Den. & P.</i> 281	208
Saint Benedict, 4 <i>B. & Ald.</i> 44	1257	Scarfe, 17 <i>Q. B.</i> 230.....	268
Saint Botolph, Minister of, 1 <i>Sir</i> <i>Wm. Bl.</i> 443	611	Scattergood v. Silvester, 19 <i>L. J.</i> <i>Q. B.</i> 447	401
Saint George, 9 <i>C. & P.</i> 483: 175.		Scavage v. Tatcham, <i>Cro. El.</i> 829..	24
	227, 229, 795, 801, 803, 819	Schiever, 2 <i>Burr.</i> 765	34
Saint George's, 3 <i>Camp.</i> 222..	1252, 1254	Schlesinger, 17 <i>L. J. M. C.</i> 29..	969, 1018
Saint Giles, 5 <i>M. & S.</i> 260	1254	Scholefield, <i>Cald.</i> 397	1194
Sainthill, 2 <i>Ld. R.</i> 1174; 1 <i>Salk.</i> 359	1269	Schoole, <i>Peake</i> , 112	1021
Saint John, 9 <i>C. & P.</i> 40.....	62	Scofield, <i>East, P. C.</i> 1028	564, 566
Saint John, 6 <i>M. & S.</i> 130	1268	Scorey, <i>Leach</i> , 43	885
Saint Mary, Whitechapel, 9 <i>D. P. C.</i> 964	105, 106, 107	Scott, 9 <i>B. & C.</i> 446.....	8
Saint Michaels, 2 <i>Sir Wm. Bl.</i> 718:	43	Scott, <i>Russ. & Ry.</i> 415	94
Saint Pancras, <i>Peake</i> , 219....	1065, 1273	Scott, <i>Leach</i> , 401	131, 132
Saint Peters, York, 2 <i>Ld. R.</i> 1249..	1277	Scott, <i>Russ. & Ry.</i> 13	410
Saint Weonard, 8 <i>C. & P.</i> 879	1264	Scott, 2 <i>Moo.</i> 71.....	532
Salisbury, 5 <i>C. & P.</i> 555	241, 1232	Scott, 3 <i>Burr.</i> 1262.....	1072, 1097
Salisbury, <i>Plowd.</i> 100	750	Scott, 3 <i>Q. B.</i> 543	1250, 1251
Salisbury, Earl of, v. Sir A. Ashley, <i>Palm.</i> 194.....	1037, 1119	Scott v. Shepherd, 3 <i>Wils.</i> 403	820
Sallows, 2 <i>Cox</i> , 631	392	Scotton, 5 <i>Q. B.</i> 493	906
Salmon, 2 <i>Russ. & Ry.</i> 26..	555, 557, 567	Scotton, 8 <i>Jur.</i> 409	1024
Salop, JJ. 13 <i>East</i> , 95.....	271, 1275	Scratchley, 2 <i>Dowl. & L.</i> 29	891
Salter, 5 <i>Esp.</i> 125	1068	Scudder, 1 <i>Moo. C. C.</i> 316.....	867
Salwick, 2 <i>B. & Adol.</i> 136	1268	Scully, 1 <i>Cox</i> , 189.....	364
Sampson, 1 <i>Cox</i> , 355	486	Scully, 1 <i>C. & P.</i> 319	774
Samuel v. Payne, <i>Dougl.</i> 359	813	Searing, <i>Russ. & Ry.</i> 350	414
Samways, <i>Dearsl.</i> 371	370	Searle, 1 <i>Moo. & Rob.</i> 75	242
Sanders, 9 <i>C. & P.</i> 79	472	Sears, <i>Leach</i> , 415	368
Sanders, 9 <i>Q. B.</i> 235	1183	Seaton, 6 <i>Cox</i> , 78	265
Sanderson, 1 <i>Fost. & F.</i> 598	15, 905	Sedley, 1 <i>Sid.</i> 568.....	1184
Sanderson, 1 <i>Fost. & F.</i> 37	588, 810	Seeles, <i>Cro. Car.</i> 557	1181
Sandys, <i>Car. & M.</i> 345	208	Seeley v. Mayhew, 4 <i>Bing.</i> 561....	1004
Sandys, 1 <i>Cox</i> , 8.. ..	437	Seery	165
Sandys, 2 <i>Moo.</i> 227; <i>Car. & M.</i> 345:	779	Sefton, <i>Russ. & Ry.</i> 202	463
Sansome, <i>Den.</i> 545	18	Selbe, 9 <i>C. & P.</i> 346	125
Sarmon, 1 <i>Burr.</i> 516	1248	Self, <i>Leach</i> , 137	745, 762
Sarum, Case at, <i>M. S.</i>	108	Sellars, 3 <i>Mod.</i> 167	1311
Satchell, 2 <i>Cox</i> , 13	1009	Sellers, <i>Car. Cr. L.</i> 233	206
Sattler, <i>Dearsl. & B.</i> 639	56	Sellinger, 12 <i>Mod.</i> 413	1181
Saunders, <i>Tho. Raym.</i> 201.....	135	Sellis, 7 <i>C. & P.</i> 850	757
Saunders, 2 <i>Cox</i> , 249	137	Sells v. Hoare, 3 <i>Br. & Bing.</i> 232..	178
		Selsby, <i>Den. & P.</i> 384	1049
		Selway and another, 8 <i>Cox</i> , 235 ..	436
		Semple, <i>Leach</i> , 426	377
		Senior, <i>Leach</i> , 496	425
		Senior, 1 <i>Moo.</i> 346.....	767
		Serjeant, <i>Ry. & M. N. P. C.</i> 352 ..	185
		Serjeant, 1 <i>Sid.</i> 414	1124
		Serlested, <i>Latch.</i> 202	608
		Serlested, 1 <i>Ventr.</i> 181.....	979

Table of Cases.

lvii

	PAGE		PAGE
Serocold v. Hampsey, 12 East, 622...	49	Sheridan, East, P. C. 416	831
Serva, 2 Car. & K. 53	94, 178	Sherman, Ca. Temp. Hardw. 303 ..	181
Serva, Den. 104	549, 1192	Sherrington, Leach, 513	93, 497
Seton, Inhabitants, Law Times, 1846	204	Sherrington, 1 Lew. 123	196
Seton, Inhabitants, 7 T. R. 373.....	290	Sherwood, Dearsl. & B. 251	522
Seven Bishops, 12 St. Tr. 183: 1082, 1159, 1160	1159, 1160	Sherwood, 1 Car. & K. 556	763
Seward, 3 Nev. & M. 557.....	1063	Shiles, 1 Madd. 248	625
Sewel, 7 Mod. 118	1314	Shillick, 2 Russ. C. M. 876	199
Sewell, 1 Cox, 255	942	Shingleton v. Smith, 2 Lutw. 1481..	824
Sewell, 1 Ad. & El. 706	1052, 1062	Shiple, 4 Dougl. 73	1147
Sexton, 2 Russ. C. M. 827, 833.....	189	Shipman, q. t. v. Henbest, 4 T. R. 109	147
Seymour, 7 Mod. 382	1075	Shipton, 8 C. & P. 772	935
Shackell, M'Cl. & F. 514	285	Shore v. Meddison, Holt's Ca. 356 :	971
Shadbolt, 5 C. & P. 504	792	Short v. Lovejoy, Burr. N. P. 18..	820
Shaftesbury, Earl of, 8 How. St. Tr. 817.....	223	Shott, 3 Car. & K. 203.....263, 841, 1194	
Shaftow, 11 Mod. 195	929	Shrewsbury, JJ. 9 D. P. C. 501, 105, 106	
Shakespeare, 10 East, 83	70, 126	Shrimpton, Den. & P. 319	244
Sharman, Dearsl. 285	634	Shuckburgh, 1 Wils. 29	36
Sharpe, Ex. p., 9 D. P. C. 513	35	Shukard, Russ. & Ry. 209	648
Sharpe, Dearsl. 615	398	Shuttleworth, Den. & P. 351.....	243
Sharpe, 8 C. & P. 436	698	Sidebotham, Bell, 171	1249
Sharpe, Andr. 384	928	Sidney, Str. 1165	108
Sharpe, Cro. Car. 352	990	Sidney, East, P. C. 119	325
Sharpe, Dearsl. & B. 160	1156	Sidoli, 1 Lew. 211.....	45
Sharpe, 1 Moo. 125	1231	Sidoli, 1 Lew. 244.....	160
Sharples, 4 T. R. 771	1203	Sill v. Reg. Den. & P. 10	102
Sharpless, Leach, 92	376	Sill v. Reg. Dearsl. & B. 132	532
Sharpness, 1 T. R. 288.....	286	Sills, 1 Car. & K. 494	185
Sharwin, East, P. C. 421	439, 440	Silversides v. Reg. 2 Gale & D. 617:	291
Shaw, 6 D. & Ry. 154	28	Silversides v. Reg. 3 Q. B. 406: 1219, 1220	
Shaw, 1 Donl. & L. 154	38	Silverton Parish, 2 Wils. 298.....	269
Shaw, 5 M. & S. 403	55	Simmonds, 1 C. & P. 84	230
Shaw, East, P. C. 351.....	81	Simmonds, 1 Wils. 329; Say. 34..	263
Shaw, Leach, 79, 372	189	Simmonds, 1 Moo. 408	410
Shaw, Russ. & Ry. 526.....217, 960, 961		Simmonds, 4 Cox, 277.....	536
Shaw, 2 Lew. 116	242	Simmonds v. Taylor, 27 L. J. C. P. 574	667
Shaw, 6 C. & P. 372.....	1234	Simmonite, 1 Car. & K. 164	45, 862
Shaw v. Tompson, Cro. EL. 609.....	974	Simmons, Bell, 168	981
Sheard, 2 Moo. 13.....	792	Simmons, Al. 49	1120
Shebbeare, 1 Burr. 460	36, 1090	Simmons v. Millingen, 2 C. & P. 524	11
Shee v. Abbott, 2 Br. & B. 619.....	1003	Simon, 6 C. & P. 546	184
Sheen, 2 C. & P. 634	125	Simons, 6 C. & P. 538.....	201
Sheen, 2 Russ. C. M. 724	128	Simons, East, P. C. 772, 731.....	434
Sheen, Bell, 97	515	Simpson, 1 Car. & M. 669	24
Sheering, 7 C. & P. 440	1042	Simpson, 1 Lew. 78	215
Sheffield, 2 T. R. 106	1252	Simpson, 1 Lew. 295	255
Shelburn, 9 C. & P. 277	224	Simpson, 2 Cox, 235.....	381
Shelderton, 2 Keb. 221.....	1264	Simpson, Dearsl. 424	436
Sheldon, Str. 748	635	Simpson, 1 Lew. 172	766
Shellard, 9 C. & P. 279	222, 1067	Simpson, 4 Inst. 333	772
Shelley, Leach, 340	1215	Simpson, 1 Russ. C. M. 481	909
Shellswell, 2 Russ. 855	197	Simpson, 4 Cox, 275	1227, 1232
Shelton, 3 Car. & K. 319.....	869	Simpson v. Lamb, 7 EL. & BL. 84..	920
Shepherd, 7 C. & P. 579	188	Simpson v. Smith, 1 Ph. Ev. 397..	228
Shepherd, 1 Cor, 237	239, 448	Sims, 12 Mod. 511.....	971
Shepherd, East, 1073	591	Sinclair, 2 Lew. 49	796
Shepherd, East, 944	673	Sippet, Taylor, Ev. 725	194
Shepherd, East, P. C. 467	661	Sirrell, Den. & P. 267, 273.....	540
Shepherd, Leigh & Cave, 147	745	Sissinghurst Rioters, 1 Hale, 462 ..	754
Shepherd, 2 Sid. 259	890	Skeen, 28 L. J. M. C. 91.....	512
Shepherd, 25 L. J. M. C. 52	1228	Skeen, Bell, 27	628
Sheppard, Say. Rep. 65	122	Skerrit, 2 C. & P. 427	731
Sheppard, Leach, 101	152	Skerrit, 1 Sid. 312.....	1053
Sheppard, 9 C. & P. 121	376	Skinner, Lofft. 55	1144
Sheppard, Russ. & Ry. 169	691	Skinner, 5 Esp. 219	1256
Shergold v. Holloway, Str. 1002 ..	4		

	PAGE		PAGE
Skinner v. Trobe, <i>Cro. Jac.</i> 190 ..	974	Smith, <i>Leigh & Cave</i> , 131	626
Skuse v. Bain, 10 <i>Ad. & El.</i> 635 ..	829	Smith, <i>Dearsl. & B.</i> 566; 27 <i>L. J.</i>	
Skutt, 5 <i>Jur.</i> 462	64	<i>M. C.</i> 225	633
Skutt, 10 <i>Mod.</i> 48	85	Smith, 2 <i>C. & P.</i> 633	651
Skutt, 1 <i>Moo.</i> 410	191	Smith, 4 <i>C. & P.</i> 411	652, 680
Skutt, <i>Leach</i> , 106	1230	Smith, 2 <i>Moo.</i> 295	665
Slaney, 5 <i>C. & P.</i> 213	1158	Smith, <i>Den.</i> 79; 1 <i>Car. & K.</i> 700:	674
Slater, 6 <i>C. & P.</i> 334	249	Smith, <i>East</i> , 1000	678
Slaughter, <i>Cald.</i> 246	612	Smith, <i>East</i> , <i>P. C.</i> 376	686
Sleeman, <i>Dearsl.</i> 249	190	Smith, 3 <i>Cox</i> , 258	687
Sleep, 8 <i>Cox</i> , 472	1220	Smith, 1 <i>Moo.</i> 415	704
Sloggett, 25 <i>L. J. M. C.</i> 93	200, 628	Smith, <i>Russ. & Ry.</i> 5	727
Slogrove, 1 <i>Lew.</i> 325	181	Smith, 8 <i>C. & P.</i> 153	745
Sloman, 1 <i>D. P. C.</i> 618	257	Smith, 8 <i>C. & P.</i> 160	747
Sloper, <i>Leach</i> , 81	1231	Smith, 1 <i>Russ. C. M.</i> 546	758, 762
Small, 8 <i>C. & P.</i> 46	378	Smith, 25 <i>L. J. M. C.</i> 20	789
Smith, 2 <i>Car. & K.</i> 207	17	Smith, 8 <i>C. & P.</i> 273	792
Smith, 2 <i>Cox</i> , 586	39	Smith, 6 <i>C. & P.</i> 126	815
Smith, <i>Dearsl.</i> 553	75	Smith, 2 <i>C. & P.</i> 449	818
Smith, 1 <i>Cox</i> , 238	87	Smith, <i>Russ. & Ry.</i> 368	905
Smith, 1 <i>Moo. C. C.</i> 407; 6 <i>C. & P.</i>		Smith, 1 <i>Bott. P. L.</i> 403	937
151	87	Smith, 2 <i>Show.</i> 165	973, 1041
Smith, <i>Dougl.</i> 441	94, 95	Smith, 1 <i>Fost. & F.</i> 98	1015
Smith, 2 <i>Moo. & Rob.</i> 109	94	Smith, 6 <i>Cox</i> , 31	1061
Smith, <i>Comp.</i> 24	102	Smith, <i>Gilb. Rep.</i> 5	1088
Smith, 1 <i>Burr.</i> 54	112	Smith, <i>Russ. & Ry.</i> 368	1216
Smith, 7 <i>T. R.</i> 80	141	Smith, <i>Str.</i> 704	1240
Smith, <i>Peake</i> , 236, <i>n.</i>	171	Smith, 4 <i>Esp.</i> 111	1251
Smith, <i>Ry. & Moo. N. P. C.</i> 295 ..	172	Smith, <i>Sav. Rep.</i> 98	1264
Smith, 3 <i>C. & P.</i> 412	173	Smith, <i>Dougl.</i> 441	1298
Smith, <i>Leach</i> , 479	181	Smith, 1 <i>Salk.</i> 680	1314
Smith, 1 <i>Moo.</i> 289	184	Smith v. Bond, 11 <i>M. & W.</i> 326 ..	151
Smith, 1 <i>Stark.</i> 242	197	Smith v. Langham, <i>Skin.</i> 60	136
Smith, 2 <i>Lew.</i> 81	206	Smith v. Maxwell, <i>Ry. & Moo.</i> 80 ..	856
Smith, <i>Russ. & Ry.</i> 339	207, 212	Smith, <i>q. t. v. Prager</i> , 7 <i>T. R.</i> 60 ..	1029
Smith, <i>Holt</i> , 614	212	Smith v. Reg. (in error), 18 <i>L. J.</i>	
Smith, 8 <i>B. & C.</i> 341	219	<i>M. C.</i> 207	290
Smith, 1 <i>Phil. Ev.</i> 171	234	Smithers, 3 <i>T. R.</i> 351	935
Smith, 3 <i>Burr.</i> 1475	236	Smithson, 4 <i>B. & Adol.</i> 841	141
Smith, <i>Leach</i> , 288	251	Smollett, 3 <i>T. R.</i> 432	287
Smith, 1 <i>Temp. & M.</i> 214	274	Smollett, <i>Sir Wm. Bl.</i> 269	1131
Smith, <i>East</i> , <i>P. C.</i> 130	322	Smyth, 5 <i>C. & P.</i> 201	1069
Smith, 2 <i>Car. & K.</i> 207	370	Smyth, <i>Palm.</i> 318	1073
Smith, 1 <i>Car. & K.</i> 428	380	Smyth, 1 <i>Moo. & Rob.</i> 155 ..	1109,
Smith, 1 <i>Moo.</i> 473	381	1113, 1122	
Smith, 1 <i>Cox</i> , 10	382	Smythies, <i>Den.</i> 498	634, 636, 866
Smith, 7 <i>C. & P.</i> 147	394	Snead, 2 <i>Show.</i> 339	1053
Smith, 21 <i>L. J. M. C.</i> 111; <i>Den.</i>		Snell, 2 <i>Moo. & Rob.</i> 44	811
<i>& P.</i> 449	421	Snelling, <i>Dearsl.</i> 219	674
Smith, 25 <i>L. J. M. C.</i> 31	421	Snigge v. Shirton, <i>Cro. Jac.</i> 190:	
Smith, 1 <i>Lew.</i> 301	431	1108, 1111, 1126	
Smith, <i>East</i> , <i>P. C.</i> 783	435	Snow, <i>Leach</i> , 151	763
Smith, <i>Den.</i> 510	445	Snowley, 4 <i>C. & P.</i> 390	490
Smith, <i>Russ. & Ry.</i> 417	452	Soaden, 4 <i>B. & Adol.</i> 294	37
Smith, 1 <i>Moo.</i> 178	456	Soares, <i>Russ. & Ry.</i> 28	80, 82, 647
Smith, <i>East</i> , <i>P. C.</i> 49	458	Soleguard, <i>Andr.</i> 231	136, 551, 949
Smith, 1 <i>Moo. & Rob.</i> 256	460	Soley, 11 <i>Mod.</i> 117	145
Smith, 7 <i>C. & P.</i> 150	461	Soley, 2 <i>Salk.</i> 594; 11 <i>Mod.</i> 100 ..	1026
Smith, 2 <i>Moo. & Rob.</i> 115	472	Solly, 9 <i>D. P. C.</i> 115	105
Smith, <i>Russ. & Ry.</i> 267	489, 493	Solomon, 1 <i>Moo.</i> 292	538
Smith, 1 <i>Lew.</i> 86, <i>Russ. & Ry.</i> 516:	490	Solomon, <i>Ry. & M.</i> 252	1019, 1022
Smith, 2 <i>Russ. C. M.</i> 312	534	Somerland, 16 <i>Vin. Ab.</i> 321	1017
Smith, 6 <i>Cox</i> , 314	535	Somerset, <i>JJ.</i> , 7 <i>B. & C.</i> 514	46
Smith, 24 <i>L. J. M. C.</i> 135; <i>Dearsl.</i>		Somerset, <i>JJ.</i> , 1 <i>Man. & Ry.</i> 272:	
494	541	1287	
Smith, 3 <i>Cox</i> , 443	549	Somersetshire, 16 <i>East</i> , 305	1282
Smith, 2 <i>Moo. & Rob.</i> 256	558	Somerton, 7 <i>B. & C.</i> 463	
Smith, 6 <i>Cox</i> , 198	575, 576	Somerville, 1 <i>And.</i> 104	72, 310
Smith, 5 <i>C. & P.</i> 469	596	Somerville, 2 <i>Lew.</i> 113	459

Table of Cases.

lix

	PAGE		PAGE
Soper, 1 <i>Cox</i> , 128	243	Standen, 4 <i>Jur.</i> 702	246
Soper, 3 <i>B. & C.</i> 857	938	Standley, <i>Russ. & Ry.</i> 305	80, 376
Sorill, 2 <i>Bulstr.</i> 119	1299	Stanhope, 12 <i>Ad. & El.</i> 620	897
Souter, 2 <i>Stark.</i> 423	1015, 1039	Stanlake, 1 <i>Mod.</i> 82	892
Southampton, 2 <i>Ch. Rep.</i> 215	1292	Stanley, <i>Kel.</i> 86	755
Southampton, 2 <i>Ch. Rep.</i> 215	1271	Stannard, 6 <i>C. & P.</i> 673	171
Southampton Railway Company, 2		Stansfield, 1 <i>Lew.</i> 145	76
<i>Dowl. N. S.</i> 53	106	Stansfield, 1 <i>Lew.</i> 118	203
Southern, 1 <i>C. M.</i> 572	870	Stanton, 9 <i>C. & P.</i> 431	266
Southern, <i>Russ. & Ry.</i> 444	907	Stanton, 7 <i>C. & P.</i> 431	266
Southerton, 6 <i>East</i> , 126	1074	Stanton, 1 <i>Car. & K.</i> 415	833
Sover, 1 <i>Leon.</i> 327	1125	Stanton, 2 <i>Show.</i> 307	1296, 1298
Spaekman, 9 <i>D. P. C.</i> 1060	106	Staples, 1 <i>Sir Wm. Bl.</i> 294	135
Spalding, <i>Leach</i> , 218	564	Stapleton, <i>Str.</i> 443	270
Spanish Sailors, 2 <i>Sir Wm. Bl.</i>		Stapleton v. Croft, 21 <i>L. J. Q. B.</i>	
1320	34	247	179
Sparkes, 1 <i>Post. & F.</i> 388	182	Starkey, 2 <i>Nev. & P.</i> 169	1242
Sparkes, <i>Peake</i> , 78	194, 233	Starkey, 7 <i>Ad. & El.</i> 95	1249
Sparkes, 3 <i>Mod.</i> 78	1175	Starling, 1 <i>Sid.</i> 174	1048
Sparrow, 2 <i>T. R.</i> 196	102	Statham, <i>Leach</i> , 357	393
Sparrow, <i>Bell</i> , 298	263, 828	Stead, 8 <i>T. R.</i> 142	1243, 1245, 1251
Sparrow, 2 <i>Cox</i> , 287	381	Stears, 13 <i>Jur.</i> 41	274
Spears, <i>East</i> , <i>P. C.</i> 586	483	Stears, <i>Den.</i> 349	381
Speke, 2 <i>Salk.</i> 358	247	Stedman, <i>East</i> , <i>P. C.</i> 234	747, 762
Spelman, 1 <i>Keb.</i> 93	1128	Stedman, <i>Cro. El.</i> 137	1015
Spence, 2 <i>Phil.</i> 253	28	Steel, <i>Leach</i> , 451	117
Spence, 1 <i>Lew.</i> 107	374	Steel, 4 <i>Burr.</i> 1927	383
Spencer, 9 <i>Ad. & El.</i> 485	99	Steel, 3 <i>Salk.</i> 189	416
Spencer, 8 <i>D. P. C.</i> 127	106	Steel, 2 <i>Moo.</i> 246	1058
Spencer, 1 <i>Wils.</i> 315	277	Steel v. Houghton, 4 <i>Burr.</i> 1927 ..	383
Spencer, <i>Willmore</i> , 418	423, 424	Steer, 2 <i>Car. & K.</i> 988	375
Spencer, <i>East</i> , 712	434	Stephens v. Myers, 4 <i>C. & P.</i> 340 ..	820
Spencer, <i>Russ. & Ry.</i> 299	491	Stephenson, 5 <i>Jur.</i> 341	64
Spencer, 3 <i>C. & P.</i> 420	525	Steptoe, 4 <i>C. & P.</i> 397	203
Spencer, <i>Dears.</i> & <i>B.</i> 121	580	Sterling, 1 <i>Sid.</i> 114	134
Spencer, 1 <i>Cox</i> , 352	770	Sterling, <i>Leach</i> , 99	656
Spencer, 1 <i>C. & P.</i> 260	970	Stevens, 3 <i>Smith</i> , 366	285
Spencer, <i>Ry. & Moo.</i> 97	1021, 1034	Stevens, 1 <i>Cox</i> , 83	526
Spencer, Earl, v. Swannell, 3 <i>Mees.</i>		Stevens, 1 <i>Moo.</i> 409	792
& <i>W.</i> 154	149	Stevens, 5 <i>B. & C.</i> 246	1016, 1017
Spice, <i>Leach</i> , 343	1215	Stevens, 5 <i>East</i> , 244	1203
Spicer, <i>Den.</i> 82	409	Stevens v. Bagwell, 13 <i>Ves.</i> 159	919
Spicer, <i>Hob.</i> 62	1043	Stevenson, 10 <i>St. Tr.</i> 462	2
Spiller, 5 <i>C. & P.</i> 332	767, 779	Stevenson, <i>Leach</i> , 546	164
Spiller, <i>Sty.</i> 108	1289	Stevenson, <i>Taylor</i> , <i>Ev.</i> 1096	180
Spilling, 2 <i>Moo. & Rob.</i> 207	767	Steventon, 2 <i>East</i> , 362	753, 1217
Spilsbury, 7 <i>C. & P.</i> 187	194	Steventon, 1 <i>Car. & K.</i> 55	1262
Spittal, 6 <i>Jur.</i> 438	102	Steward, 2 <i>B. & Adol.</i> 12	143
Sponsonby, <i>Leach</i> , 332	678	Steward, <i>Str.</i> 701	177
Spragg, 2 <i>Burr.</i> 930	270	Stewart, <i>Russ. & Ry.</i> 363	30
Spragg, 2 <i>Burr.</i> 993	1061, 1062	Stewart, 1 <i>Cox</i> , 174	157, 378
Spriggs, 1 <i>Moo. & Rob.</i> 57	456	Steyning, <i>Say. Rep.</i> 92	1258, 1260
Spriggins, 1 <i>Sir Wm. Bl.</i> 2	946	Stile v. Heape, <i>Fel.</i> 72	974
Springal, 1 <i>Bulstr.</i> 203	1263	Stiles, 2 <i>Russ. C. M.</i> 109	392
Spry, 3 <i>Cox</i> , 221	751	Stimpson, 2 <i>C. & P.</i> 415	253
Spurgeon, 2 <i>Cox</i> , 102	365	Stobbs, 3 <i>T. R.</i> 735	825
Squire, 1 <i>Russ. C. M.</i> 20	75	Stock, 1 <i>Moo. C. C.</i> 87	335
Squire, <i>Russ. & Ry.</i> 349	487	Stock, <i>Leach</i> , 1015	461
Squire, 1 <i>Russ. C. M.</i> 190	745	Stockdale, <i>Str.</i> 856	745
Squires v. Whisken, 3 <i>Campb.</i> 140 ..	1190	Stockdale, 1 <i>Russ. C. M.</i> 236	1089
Stacey, 2 <i>Russ. C. M.</i> 839	191	Stocken v. Carter, 4 <i>C. & P.</i> 477 ..	825
Stacey, <i>Latch.</i> 182	1115	Stockham v. French, 1 <i>Bingh.</i> 365 ..	1003
Stacey, 1 <i>Sid.</i> 28	1124	Stockley, <i>East</i> , <i>P. C.</i> 310	2, 7
Stafford, Lord, <i>Skin.</i> 52	138, 1305	Stockley, 3 <i>Q. B.</i> 238	122
Stallion, 1 <i>Moo.</i> 398 .. 557, 558, 559,	563	Stockton and Darlington Railway	
Stamper, 1 <i>Arn. & Hodges</i> , 319 ..	942	Company, 8 <i>D. P. C.</i> 516 .. 883, 887,	889
Stanbury, 2 <i>Cox</i> , 272	375	Stolady, 1 <i>Post. & F.</i> 518	1010
Stanbury, <i>Leigh & Cave</i> , 128	536	Stokes, 5 <i>C. & P.</i> 148	3
Stancher, 3 <i>Price</i> , 266	24	Stokes, 2 <i>Car. & K.</i> 526	95

	PAGE		PAGE
Stokes, 6 C. & P. 151	165	Sunley, Bell, 145	1220
Stokes, 17 Jur. 192	190	Surgeon's Company, Case of the, 1 Salk. 514.....	138
Stokes, 3 Car. & K. 185	250	Surrey, 2 Campb. 455	1275,
Stokes, 8 C. & P. 151	305	1276, 1028	
Stokes, Den. 307	779	Surrey, 8 Mod. 119	1287, 1292
Stone, 1 Fost. & F. 310	51	Surry Treasurer, 1 Ch. Rep. 650 ..	935
Stone, 2 Stark. 137	234	Sutton, 4 Burr. 416	121, 1302
Stone, 1 East, 639.....	235	Sutton, 8 B. & C. 17	153, 157
Stone, 6 T. R. 530.....	258	Sutton, 4 M. & S. 546	217
Stone, 6 St. Tr. 27	316	Sutton, 2 Nev. & M. 57	269
Stone, 6 T. R. 527	324, 1068	Sutton, 7 Ad. & El. 593	286
Stone, 1 Fost. & F. 311	578	Sutton, 4 M. & S. 532	1158
Stone, Den. 181.....	673	Sutton, 4 Burr. 2116	1240
Stone, 4 C. & P. 379	916	Sutton, 5 B. & Adol. 52	1268, 1271
Stone, 6 Cox, 235	926	Sutton, 3 Ad. & El. 597	1283
Stone, Trem. P. C. 148	980	Sutton, 3 Nev. & P. 569	1296
Stone, Dears. 251	982	Sutton v. Fenn, 3 Wils. 339	62
Stone, 1 Show. 335	1019	Sutton Pool case, 6 B. & C. 573 ..	1285
Stoneham, Sty. 366	1272	Swalles, 1 Lew. 19	28
Stonehouse, 1 Cox, 69.....	476, 477	Swain, 1 Moo. & Rob. 112	154
Stonehouse, 3 Salk. 188	1078	Swallow, 2 Russ. C. M. 793	454
Stonehouse v. Elicott, 6 T. R. 315..	8	Swan, 4 Cox, 108	548, 626
Stonnell, 1 Cox, 142.....	244	Swanson, 7 Mod. 100	844
Stonyer, 2 Russ. C. M. 728	241	Swatkins, 4 C. & P. 148	93,
Storie, Dy. 300	30	190, 568	
Storke, 3 Keb. 800.....	892	Sweendjen, 5 St. Tr. 450	844
Storr, 3 Burr. 1699.....	1105, 1121	Sweenie, 8 Cox, 223	833
Storwood Overseers, 3 Jur. 448....	138	Sweeting, East, P. C. 457	845
Story, Russ. & Ry. 81.....	521, 666	Swindall, 2 Cox, 241	174, 768
Stotesbury v. Smith, 2 Burr. 924 ..	1075	Swinnerton, Car. & M. 593	203
Stoitt, East, P. C. 780	544	Sydnam, Cro. Car. 486	1112
Stoughton, 2 Saund. 158.....	1268	Sydser, 11 Q. B. 245	1059
Stoveld, 6 C. & P. 489.....	1031	Sykes, Tho. Raym. 202	1024
Stowell, 5 C. B. 44; Dav. & M. 189	61	Sykes v. Dunbar, Selw. N. P. 44 ..	
Stowell, 9 C. & P. 437.....	61	Symond-, Ca. Temp. Hardw. 240 :	816
Stowell, 5 Jur. 1010	122	Szudurskie, 1 Moo. 429	669
Stowton, 1 Barnard. 425	1243		
Strahan, 7 Cox, 85	125		
Strahan, 7 Cox, 75	515, 628		
Strahan, 5 Burr. 2689.....	1146		
Strange, 8 C. & P. 172.....	174		
Strange, 1 Cox, 58.....	413		
Stratford-on-Avon, Mayor of, 14 East, 348	1279		
Stratton, 1 Dougl. 239.....	121		
Stratton, 1 Campb. 549	1055		
Streek, 2 C. & P. 412	164		
Stretch, 3 Ad. & El. 503	257		
Stretford, 2 Ld. R. 1169	1259		
Stringer, 2 Moo. 261	437, 447		
Stripp, 7 Cox, 97	199		
Stronger, 1 Car. & K. 600.....	835		
Strong, 5 D. P. C. 213.....	34		
Stroud, 2 Moo. 170	87		
Stroud, 2 Show. 150	1094		
Stubbs, 25 L. J. M. C. 16	180		
Stukeley, 12 Mod. 493.....	134, 891		
Sturge, 23 L. J. M. C. 172	237		
Styles, Hettl. 97	966		
Suddis, 1 East, 306	33		
Suffolk, JJ. 5 Nev. & M. 139	262		
Sullens, 1 Moo. 129	484, 493		
Sullivan, 8 Ad. & El. 831	163, 268		
Sullivan, 7 C. & P. 641	769		
Sullivan, Car. & M. 209	801, 804		
Summers, 1 Salk. 55	285		
Summers, 1 Lev. 139	1154		
Sunderland, 2 Lew. 109	651, 861		

Table of Cases.

lxi

	PAGE		PAGE
Taverner, 1 <i>Ro. Rep.</i> 360.....	748, 1102	Thetford, Mayor of, 11 <i>Mod.</i> 241 ..	140
Tawney, 16 <i>Vin. Ab.</i> 416	1312	Thirkell, 3 <i>Burr.</i> 1696	260
Taylor, 7 <i>C. & P.</i> 266	15	Thistlewood, 38 <i>St. Tr.</i> 691	341
Taylor, 3 <i>B. & C.</i> 502	94	Thody, 1 <i>Ventr.</i> 234	1072
Taylor, 9 <i>D. P. C.</i> 600	120	Thomas, 4 <i>M. & S.</i> 442	60
Taylor, 3 <i>B. & C.</i> 502	131	Thomas, 9 <i>Jur.</i> 984	136
Taylor, 12 <i>Mod.</i> 214	134	Thomas, 13 <i>East</i> , 322	140
Taylor, <i>Str.</i> 1167	135	Thomas, 3 <i>Jur.</i> 272	169
Taylor, 1 <i>Jur.</i> 53	139, 1149	Thomas, <i>Leach</i> , 877	173
Taylor, 1 <i>Fost. & F.</i> 535.....	170	Thomas, 6 <i>C. & P.</i> 353.....	188
Taylor, <i>Peake</i> , 11	177	Thomas, 7 <i>C. & P.</i> 345	189
Taylor, 8 <i>C. & P.</i> 733	191, 192	Thomas, <i>Leach</i> , 637	198
Taylor, 8 <i>C. & P.</i> 726.....	213, 222, 224	Thomas, 1 <i>Cox</i> , 52.....	205
Taylor, 1 <i>C. & P.</i> 84.....	230	Thomas, 7 <i>C. & P.</i> 817	212, 763
Taylor, 6 <i>Cox</i> , 58	238, 1036	Thomas, 9 <i>C. & P.</i> 741	374
Taylor, 5 <i>C. & P.</i> 301	256	Thomas, <i>East</i> , <i>P. C.</i> 781.....	396
Taylor, <i>Leach</i> , 356	393	Thomas, <i>East</i> , <i>P. C.</i> 217.....	438
Taylor, 1 <i>Fost. & F.</i> 513	443	Thomas, <i>Car. Cr. L.</i> 205.....	474
Taylor, <i>Russ. & Ry.</i> 418	475	Thomas, 6 <i>Cox</i> , 403	491
Taylor, <i>Russ. & Ry.</i> 63	501	Thomas, <i>East</i> , <i>P. C.</i> 781.....	544
Taylor, <i>Leach</i> , 49; <i>East</i> , <i>P. C.</i>		Thomas, 4 <i>C. & P.</i> 237.....	572, 573
1020	557, 563	Thomas, <i>Leach</i> , 877	683
Taylor, 1 <i>Fost. & F.</i> 511.....	563	Thomas, 2 <i>Moo.</i> 16	689
Taylor, 5 <i>Cox</i> , 138	567	Thomas, 7 <i>C. & P.</i> 817	748
Taylor, <i>Russ. & Ry.</i> 373	581	Thomas, 1 <i>Russ. C. M.</i> 614	757
Taylor, <i>Leach</i> , 214	661, 678	Thomas, 1 <i>M. & S.</i> 442	786
Taylor, 1 <i>Car. & K.</i> 213.....	673	Thomas, 2 <i>Car. & K.</i> 806	983
Taylor, <i>East</i> , 960	682	Thomas, <i>Cro. El.</i> 137.....	989, 1004,
Taylor, 2 <i>Lew.</i> 215	761		1011, 1017
Taylor, 5 <i>Burr.</i> 2793	763	Thomas, 1 <i>C. & P.</i> 472	1061
Taylor, 9 <i>C. & P.</i> 672	768, 885	Thompkins, 2 <i>B. & Adol.</i> 287	109
Taylor, <i>Leach</i> , 360	783	Thompson, 1 <i>Moo. C. C.</i> 80	10
Taylor, 5 <i>C. & P.</i> 301	885	Thompson, 1 <i>Cox</i> , 268.....	45
Taylor, 2 <i>Sess. Ca.</i> 350	944	Thompson, <i>Leach</i> , 291.....	188
Taylor, 2 <i>Keb.</i> 309	972, 1022	Thompson, 1 <i>Cox</i> , 43	265
Taylor, <i>Skin.</i> 403	980	Thompson, <i>Den.</i> 549.....	388
Taylor, <i>Holt's Ca.</i> 534	980, 1034	Thompson, 2 <i>Russ. C. M.</i> 116 :	
Taylor, 1 <i>Campb.</i> 404	1020		397, 441
Taylor, 1 <i>Show.</i> 190	1027	Thompson, 1 <i>Moo. C. C.</i> 78	430, 436
Taylor, <i>Ld. Raym.</i> 879	1088	Thompson, <i>East</i> , 498	457
Taylor, 7 <i>Mod.</i> 123	1122, 1123	Thompson, <i>East</i> , 515	465
Taylor, 1 <i>Ventr.</i> 293	1171, 1172	Thompson, 2 <i>Cox</i> , 377	465
Taylor, 12 <i>Mod.</i> 314	1201	Thompson, <i>Leach</i> , 338.....	475
Taylor, 2 <i>Sess. Ca.</i> 22	1240	Thompson, <i>Leach</i> , 910.....	684
Taylor, <i>Willes</i> , 537	1242	Thompson, 16 <i>Q. B.</i> 382	708
Taylor, <i>Str.</i> 840.....	1243	Thompson, 1 <i>Moo.</i> 139.....	779
Taylor, <i>W. Jo.</i> 269	1248	Thompson, 20 <i>L. J. M. C.</i> 183.....	1071
Teague, <i>Russ. & Ry.</i> 33	666, 677	Thompson, 2 <i>Moo. & Rob.</i> 395	1322
Teague, <i>East</i> , <i>P. C.</i> 979	667	Thompson, <i>Ex p.</i> , 6 <i>Jur.</i> 1247	838
Teal, 13 <i>East</i> , 4.....	105, 112	Thompson <i>v. Shackell</i> , <i>M. & Malk.</i>	
Teal, 11 <i>East</i> , 307	181, 270	187	1034
Tensdale, 3 <i>Esp.</i> 68	183	Thorley, 1 <i>Moo.</i> 343	492
Tellicote, 2 <i>Stark.</i> 483	198	Thorn, 2 <i>Moo.</i> 210.....	688
Tempest, 1 <i>Fost. & F.</i> 381	165	Thorn, <i>East</i> , <i>P. C.</i> 622	1219
Tempest, <i>Tho. Raym.</i> 386	1098	Thorney, <i>Cro. Jac.</i> 276	890
Temple, 2 <i>Keb.</i> 727	944	Thornhill, 8 <i>C. & P.</i> 575.....	1029
Templeman, 7 <i>Mod.</i> 40	125	Thornton, 19 <i>L. J. M. C.</i> 113 :	105
Templeman, 1 <i>Salk.</i> 55	281	Thornton, <i>Leach</i> , 634	678
Tennent, 4 <i>C. & P.</i> 582	89	Thorogood, 8 <i>Mod.</i> 179	1024
Tenterden, Mayor of, 8 <i>Mod.</i> 114 ..	138	Thorogood, 1 <i>Mod.</i> 107	1261, 1299
Terrey, <i>Cro. Car.</i> 464	532	Thorp, <i>Comb.</i> 456; 5 <i>Mod.</i> 218 ..	134
Teste, 1 <i>Fost. & F.</i> 244	170	Thorp, <i>Carth.</i> 384.....	1181
Testick, <i>East</i> , <i>P. C.</i> 925	682	Thorpe, <i>Dears.</i> & <i>B.</i> 562	489
Tessymond, 1 <i>Lew.</i> 109	766	Thorpe, 1 <i>Lew.</i> 171	764
Tew, <i>Dears.</i> 429	176	Thorpe, <i>Leach</i> , 396	952
Tew, <i>Say. Rep.</i> 195	1245	Thring, 5 <i>C. & P.</i> 507	219
Thanet, Earl of, <i>Taylor, Ev.</i> 774 ..	186	Thring, 5 <i>C. & P.</i> 145	1310
Thanet, Earl of, <i>East</i> , 408	955	Thristle, <i>Den.</i> 502.....	380
Thelwall, 6 <i>T. R.</i> 530	258	Throckmorton, <i>Dy.</i> 98.....	310.

	PAGE		PAGE
Throcknorton, v. Allen, 7 Taunt.		Towle, Russ. & Ry. 314	79, 80
66	187	Towle, 3 Price, 145	174
Thrower, 1 Ventr. 280	1257	Townley, East, P. C. 51	308
Thurborn, Den. 387; 2 Car. & K.		Townley, Fost. 7, 8	319
831	366	Townsend, Den. 167	487, 498
Thurtell v. Beaumont, 1 Bing. 339	1004	Townsend, Car. & M. 178	1232
Tibshelf, 1 Moo. C. C. 27	190	Townsend, Dougl. 420	1272
Tibshelf, 2 Russ. C. M. 895	213	Towy, 8 Cox, 328	1027
Tibshelf, 1 B. & Ald. 190	851	Trafford, 1 B. & Adol. 874	1297
Tickell v. Read, Lofft. 215	822	Trafford v. The King, 8 Bing.	
Tiddeman, 4 Cox, 389	448	204	1297
Tierney, Russ. & Ry. 74	1328	Tracey, 6 Mod. 31	1079
Tilly, Str. 316	184	Tracy, 12 Mod. 556	135
Tilly, Leach, 662	960	Tradgeley, 1 Sess. Ca. 180	1268
Tilman v. Johnstone, 2 Fost. & F.		Travers, Str. 700	176
66	836	Treadwell, 1 Russ. C. M. 451	953
Tilson, 1 Fost. & F. 64	853, 864	Treble, R. v. Russ. & Ry. 164; Leach,	
Timberley, 1 Sid. 68	1052	1040	272, 647, 678
Timmins, 7 C. & P. 499	222, 768	Trebilcock, 1 Ath. 633	29
Timmins, Bell, 276	845	Trebilcock, 27 L. J. M. C. 103;	
Timothy, 1 Fost. & F. 39	1051	Dearsi. & B. 453	263
Timothy v. Simpson, 1 Cr. M. & R.		Treeve, East, 821	609
757	14	Tregarthen, 5 B. & Adol. 678	894
Tindal, 6 Ad. & El. 143	1298	Tregarthen, 2 Nev. & M. 379	1097
Tinkler, East, P. C. 354	202,	Treharne, 1 Moo. 298	86
	204, 207	Tremearne, Ry. & M. N. P. C. 147:	
Tinkler, Russ. & Ry. 133	272	151, 1039	
Tinkler, East, P. C. 230	751	Tremearne, 5 B. & C. 254	153
Tinkler, 1 Fost. & F. 513	845	Tremearne, 5 C. & P. 761	161, 1042
Tippet, Russ. & Ry. 509	261	Tremearne, Ry. & Moo. 147	1015
Tippet, 3 B. & Ald. 193	1258, 1298	Trenfield, 9 C. & P. 284	51
Tippin, 2 Salk. 494	48	Trevenner, 2 Moo. & Rob. 476	430
Tippin, Car. & M. 545	393	Trevilian, Str. 1268	1314
Tippington, 1 Cox, 48	836	Trevor, 4 Jur. 292	100
Tite, 8 Cox, 458	487	Trillor, 2 Moo. 260	758
Tiverton, Mayor, 8 Mod. 186	134, 1202	Trinfield, 1 Fost. & F. 43	681
Tivey, Den. 637	591	Trollop, Kel. 39	393
Todd, Leach, 357	392	Trowter, East, P. C. 356	206
Tohayles, Cro. Car. 510	1238	Trueman, 8 C. & P. 727	174
Tolfree, 1 Moo. 243	75, 688	Trueman, 2 Cox, 306	488
Tollemache, 2 Pr. Rep. 201	895	Truman, East, 470	861, 862
Tollett, Car. & M. 112	388, 389	Trusty, East, 417	437
Trapshaw, Leach, 427	462	Tubby, 5 C. P. 530	197
Tomb, 10 Mod. 278	23	Tucker, 4 Burr. 2046	98, 120
Tomkins, 6 East, 180	530	Tucker, 4 Mod. 162	283, 337
Tomlinson, 5 Rep. 122	780	Tucker, 1 Moo. 134	448
Tomson, 12 Mod. 66	750	Tucker, 1 Cox, 73	456
Tong, 2 Cox, 290	44	Tucker, Phil. on Ev. 10	839
Tong, Kel. 17	202	Tucker, Jenk. 315	949
Tongue, 30 L. J. M. C. 48		Tucker, 2 C. & P. 500	968
Tongue v. Tongue, 1 E. F. More,		Tucket, 1 Cox, 103	250
90	851	Tuckwell, Car. & M. 215	82, 475
Topham, 4 T. R. 126	1143, 1156	Tuff, Den. 319	89
Tooke, 25 How. St. Tr. 120	214	Tuff, 5 C. & P. 167	203
Tooke, 25 How. St. Tr. 71	239	Tullay v. Read, 1 C. & P. 6	823
Tooke, 6 T. R. 530	257	Tunnard, East, P. C. 694	373
Tooke, Leach, 823	324	Tunnicliffe, 2 Russ. C. M. 897	230
Tooke, 1 Ch. Burn, 823	1069	Tunnicliffe v. Tedd, 5 C. B. 553	829
Toole, Dearsl. 194	189	Turberville, 4 Cox, 13	667
Tooley, Ld. R. 1296	756	Turberville v. Savage, 1 Mod. 3	821
Toone, 1 Lew. 15	839	Turner, 1 Lew. 176	45
Topham, 4 T. R. 126	1131	Turner, 2 Moo. & Rob. 214	70
Topping, 25 L. J. M. C. 72	861	Turner, Leach, 536	90
Toshack, Den. 492	635	Turner, 15 East, 570	110
Toslin, 2 Salk. 517	1129	Turner, 3 B. & P. 160	110
Tottenham, 1 Moo. 461	580	Turner, 1 Sid. 171	139, 261
Tower Hamlets Commissioners, 7		Turner, 1 Lew. 119	203
Jur. 1169	107	Turner, 1 Moo. 347	204

Table of Cases.

lxiii

	PAGE
Turner, 5 M. & S. 206.....	236
Turner, 1 Moo. 47	285, 729
Turner, Leach, 305; East, 492:	460, 558
Turner, 6 C. & P. 407.....	476
Turner, 1 Lew. 9; 1 Moo. 241	555
Turner, 1 Moo. 239	567
Turner, 2 Moo. 42.....	722
Turner, Comb. 407	762
Turner, 6 C. & P. 370	780
Turner, 1 Lew. 176	785
Turner, 8 C. & P. 755	869
Turner, 3 Cox, 304	906, 908
Turner, 5 Mod. 329	935
Turner, 2 Car. & K. 732.....	1032, 1034
Turner v. Meymott, 1 Bingham. 158..	1111
Turpin, 2 Car. & K. 826.....	664
Turton, 6 Cox, 385	119
Turvy, Holt's Ca. 364	971
Tutchin, Holt's Ca. 424	1189
Tutchin, 2 Show. 468	1151
Twyn, Kel. 22	326
Twisleton, 1 Lev. 257	1179, 1180
Tye, Russ. & Ry. 345	719
Tyers, 8 C. & P. 616.....	80, 754, 755
Tyers, 1 C. & P. 129.....	189
Tyers, 1 Moo. C. C. 428	444
Tyers, Russ. & Ry. 402.....	495, 498
Tyers, 1 Moo. 26	562
Tyler, Den. 319.....	234, 658

U.

Uezzell, Den. & P. 274	906
Underwood v. Hewson, Str. 596 ..	823
Unitt, Str. 567	943
Upchurch, 1 Moo. 165	191
Upper Papworth, 2 East, 413..	1252, 1269
Upsdale, Cald. 247	1051
Upton, 5 Cox, 248	588, 810
Upton, 1 Russ. C. M. 218	862
Upton, 6 C. & P. 133	1266
Upton, Str. 816.....	1314
Upton on Severn, 6 C. & P. 133 ..	1262
Upton St. Leonards, 17 L. J. M. C.	13
13	145
Urlyn, 2 Saund. 208.....	925
Usborne, 5 Jur. 200	382
Usher, Leach, 48	678

V.

Vaile, 6 Cox, 470..	1322
Valler, 1 Cox, 84	737
Van Butchell, 3 C. & P. 629	767
Vandercomb, Leach, 708; East, P.	C. 519.....
130, 236, 278	
Vandercomb, East, P. C. 514; Leach,	711
465	
Vane, Lord, 2 Sir Wm. Bl. 18	826
Vane, Lord, 13 East, 171 ..	894, 895, 897
Vane, 1 Sid. 355.....	1309
Van Muyen, Russ. & Ry. 118.....	371
Vann, Den. & P. 325; 21 L. J.	M. C. 39
1242	
Vantandillo, 4 M. & S. 72	1301, 1302
Varley, Leach, 76	721
Vaughan, 4 Burr. 2494	134, 1203

	PAGE
Vaughan, 8 C. & P. 290.....	172, 827
Vaughan, 5 St. Tr. 37, 15 Howell:	311, 316, 322, 325
Vaughan, 8 C. & P. 276	685, 687
Vaughan, 8 Cox, 256	806
Vaughan, 1 Wils. 22	959
Vaux, 4 Rep. 44.....	754
Venables, 2 Ld. Raym. 1405.....	944
Venastra v. Johnson, 1 Moo. & Rob.	316
199	
Venner, Ex p., 3 Atk. 771	1256
Vereist, 3 Camp. 432	982
Vicar, 1 Lew. 199	374
Vide, Fitz Corone Pl. 86.....	837
Villeneuve, Count, 3 T. R. 104	519
Vincent, Den. & P. 464	67, 376
Vincent, 9 C. & P. 91.....	228, 354, 1309
Vincent, 1 Str. 481.....	657, 658
Viner, 1 Freem. 522	946
Vint, Holt, Libel, 79	79
Virrier, 10 Ad. & El. 317	68
Virrier, 4 Per. & D. 101.....	1043
Vivian, Den. 35.....	672
Vodden, Deansl. 229	260
Voke, Russ. & Ry. 431	86, 174, 799
Vowchurch, 2 Car. & K. 397.....	1270
Vyse, 1 Moo. 218	420

W.

Wade, 1 Moo. C. C. 86.....	51, 165
Wade, 1 Car. & K. 739	540
Wade, 1 Russ. C. M. 648	762
Wade, 1 B. & Ald. 861	938
Waddington, 2 Hark. c. 44, s. 76:	86
Waddington, 1 East, 159	280
Waddington, East, P. C. 513	465
Waddington, 1 B. & C. 26	1172
Waddington, 1 East, 143	1207
Wadley, 4 M. & S. 508	1166
Wadsworth, 5 Mod. 13	121, 1079
Wagstaff, Russ. & Ry. 398	444
Waite, Leach, 28	120
Waite, 1 Wils. 22.....	135, 1132
Waite, 2 Cox, 245	488, 493
Waite, East, P. C. 570	504
Waite, Russ. & Ry. 505; 1 Bingham.	121.....
641	
Waite, 2 Burr. 786	896
Waite, 4 Mod. 248	1118, 1123
Wakefield, 1 Lew. 275.....	116
Wakefield, 2 Lew. 279.....	184
Wakefield, 2 Russ. C. M. 810	242
Wakefield, 2 Lew. 1	842, 844
Wakefield, Str. 69	892
Wakley, 2 Cox, 484	524
Wakley v. Cooke, 3 Jur. 377	135
Wakley v. Cooke, 16 Mees. & W.	822
141	
Wakley v. Cooke, 4 Exch. 511	883
Wakley, Ex p., 14 L. J. M. C.	188
80	
Wakeling, Russ. & Ry. 304	527
Walbourne, W. Kel. 63	1260
Walcott, Holt, Ca. 345	635
Waldegrave, Earl. 2 Q. B. 341	110
Walden, 12 Mod. 414	1144
Walford, 8 C. & P. 767	246
Walford, 5 Exp. 63	415

	PAGE		PAGE
Walgrave, <i>Dy.</i> 203	1175	Wardle, <i>Car. & M.</i> 144.....	245
Walkden, 1 <i>Cox</i> , 282	805	Wardroper, <i>Bell</i> , 249; 29 <i>L. J.</i>	
Walker, <i>Deansl.</i> 358.....	11	<i>M. C.</i> 116	73
Walker, 1 <i>Cox</i> , 14.....	22	Warman, <i>Den.</i> 183; 2 <i>Car. & K.</i>	
Walker, 3 <i>Campb.</i> 264	84, 88, 395	195	779, 781, 792
Walker, 2 <i>Moo. C. C.</i> 446	132	Warne, <i>Str.</i> 644	611
Walker, <i>Leach</i> , 448.....	160, 370	Warner, 1 <i>Moo.</i> 380	15
Walker, <i>Deansl.</i> 280.....	176	Warner, 2 <i>Russ. C. M.</i> 845	196
Walker, 2 <i>Fost. & F.</i> 354	208, 209	Warner, 5 <i>C. & P.</i> 525.....	911
Walker, 1 <i>Phil. Ev.</i> 516	248	Warner, 8 <i>T. R.</i> 375.....	1312
Walker, 1 <i>Moo.</i> 155	424	Warren, <i>Russ. & Ry.</i> 514	412
Walker, <i>Deansl. & B.</i> 600	486	Warren, 6 <i>C. & P.</i> 335.....	451
Walker, 6 <i>C. & P.</i> 657	530	Warren, 1 <i>Cox</i> , 68	564
Walker, 1 <i>Cox</i> , 99.....	536	Warren, <i>Ex. p.</i> , 19 <i>Ves.</i> 163	1051
Walker, 2 <i>Russ. C. M.</i> 326.....	663	Warren, 1 <i>Russ. C. M.</i> 139	1313
Walker, 1 <i>C. & P.</i> 320	768	Warren v. Warren, 1 <i>Cr. M. & R.</i>	
Walker, 2 <i>Moo. & Rob.</i> 212	836	250	1154
Walker, <i>Leach</i> , 97	960	Warrington, 12 <i>Mod.</i> 22	152
Walker, 3 <i>Stark. Ev.</i> 356	1009	Warrington, <i>Den. & P.</i> 447	188, 189
Walker v. Kearney, 2 <i>Hawk. c.</i> 46,		Warshamer, 1 <i>Moo.</i> 366	654
<i>s.</i> 103.....	1045	Wartnaby, 2 <i>Ad. & El.</i> 423	101
Walker v. Reg. 27 <i>L. J. M. C.</i> 43 ..	1012	Warwick v. Bruce, 4 <i>M. & S.</i> 140..	1003
Walking, 8 <i>C. & P.</i> 243	170	Warwickshall, <i>Leach</i> , 263	194
Walkley, 6 <i>C. & P.</i> 175	188, 203	Waterage, 1 <i>Cox</i> , 338	871
Walkley, 4 <i>C. & P.</i> 132	539	Waters, 8 <i>Cox</i> , 350	52
Wall, 2 <i>Cox</i> , 288	15	Waters, 1 <i>Moo.</i> 457	87
Wall, 2 <i>Russ. C. M.</i> 890	208	Waters, <i>Den.</i> 356; 2 <i>Car. & K.</i> 864	88
Wall, <i>East, P. C.</i> 953	657	Waters, 6 <i>C. & P.</i> 328.....	770
Wallace, 1 <i>Moo.</i> 200; <i>Car. & M.</i> 200:	597	Waters, <i>Den.</i> 356	779
Wallace, 3 <i>T. R.</i> 403	935	Waters, 1 <i>Trem.</i> 259	1092
Wallengen, 1 <i>Sid.</i> 106.....	1013, 1020	Watford, 4 <i>Dowl. & L.</i> 593....	1260, 1270
Wallis, 3 <i>Cox</i> , 67	363	Watkins, <i>Car. & M.</i> 264.....	93
Wallis, 1 <i>Moo.</i> 344.....	566	Watkins, 2 <i>Moo.</i> 17	466
Wallis, 1 <i>Salk.</i> 334	754	Watkins, 1 <i>Russ. C. M.</i> 574	871
Wallis, <i>Lofft.</i> 38	945	Watkinson, <i>Str.</i> 1122	233
Walls, 2 <i>Car. & K.</i> 214	434	Watson, 3 <i>Car. & K.</i> 111.....	18
Walmsley v. Russell, 6 <i>Mod.</i> 200..		Watson, 9 <i>Ad. & El.</i> 73	33
972, 974		Watson, 2 <i>Stark.</i> 140	215, 327, 1068
Walsh, 1 <i>Moo.</i> 14	363	Watson, 2 <i>Stark.</i> 128	222
Walsh, <i>Leach</i> , 1054; <i>Russ. & Ry.</i>		Watson, 2 <i>Stark.</i> 135	224
215.....	373	Watson, 2 <i>Stark.</i> 151	227
Waltham, 3 <i>Cox</i> , 442	792	Watson, 2 <i>Stark.</i> 148	236
Walter, 3 <i>T. R.</i> 432	287	Wat-on, 2 <i>Stark.</i> 149	251
Walter, <i>Car. & M.</i> 764.....	754	Watson, 6 <i>C. & P.</i> 553.....	257
Walter, 3 <i>Esp.</i> 21.....	1131, 1146	Watson, 2 <i>Stark.</i> 132	324
Walters, 1 <i>Moo.</i> 13	458	Watson, 2 <i>Stark.</i> 137	325
Walters, 5 <i>C. & P.</i> 138	626	Watson, 2 <i>Stark.</i> 141	326
Walters, <i>Car. & M.</i> 588	690	Watson, 2 <i>Stark.</i> 158	332
Walters, 12 <i>St. Tr.</i> 113	764	Watson, 2 <i>Stark.</i> 116	333
Walters, <i>Car. & M.</i> 164	766	Watson, <i>Leach</i> , 640	375
Walters, 1 <i>Russ. C. M.</i> 565.....	785	Watson, <i>East, P. C.</i> 566.....	385
Wandsworth, 1 <i>B. & Ald.</i> 63.....		Watson, <i>East, P. C.</i> 562	482
269, 1271, 1273		Watson, 4 <i>Jur.</i> 14.....	522
Wanklyn, 8 <i>C. & P.</i> 290.....	172, 827	Watson, 27 <i>L. J. M. C.</i> 18	527
Wannop, <i>Say. Rep.</i> 142.....	1121	Watson, 2 <i>T. R.</i> 199	930, 1091
Want, <i>In re</i> , 30 <i>L. J. Ch.</i> 775	880	Watson, 3 <i>Salk.</i> 26	946
Warburton, 12 <i>Mod.</i> 319.....	144	Watson, <i>Russ. & Ry.</i> 468	953
Ward, 1 <i>Fost. & F.</i> 18.....	97	Watson, 1 <i>Campb.</i> 215.....	1155, 1160
Ward, 2 <i>Stark. Cr. P. L.</i> 301	120	Watson, 2 <i>Cox</i> , 376	1184
Ward, 2 <i>Car. & K.</i> 759	222	Watson v. Carr, 1 <i>Lew.</i> 52	7
Ward, 6 <i>C. & P.</i> 367	218	Watts, <i>Deansl.</i> 326	221, 390
Ward, <i>Gow</i> , 168.....	487	Watts, 1 <i>Cox</i> , 349	364
Ward, 2 <i>Ld. Raym.</i> 1461.....	633	Watts, 19 <i>L. J. M. C.</i> 192; <i>Den. &</i>	
Ward, <i>Str.</i> 748	635	<i>P.</i> 14.....	493
Ward, <i>East</i> , 270	764	Watts, <i>Russ. & Ry.</i> 436	666
Ward, 12 <i>Mod.</i> 516	924	Watts, <i>Noy.</i> 125.....	1123
Ward, 3 <i>Cox</i> , 279	977	Watts, 1 <i>B. & Adol.</i> 166	1217
Ward, 4 <i>Ad. & El.</i> 384.....	1296	Watts, <i>Moo. & Malk.</i> 281; 2 <i>C. &</i>	
Wardle, <i>Car. & M.</i> 647	154	<i>P.</i> 486	1239

Table of Cases.

lxv

	PAGE		PAGE
Watts, 2 <i>Exp.</i> 675	1298	Westley, 2 <i>Scss. Ca.</i> 96	950
Watts v. Brains, <i>Cro. El.</i> 778	765	Westley, 2 <i>Keb.</i> 895.....	1115
Waulley, 1 <i>Moo.</i> 163	859	Westmark, 2 <i>Moo. & Rob.</i> 305 :	1257, 1258
Wavell, 1 <i>Moo.</i> 224	528	Westminster Coroner, <i>Str.</i> 199.....	892
Weale, 5 <i>C. & P.</i> 135	413	Westmoreland, <i>JJ.</i> , 7 <i>Jur.</i> 898.....	105
Weaver v. Bush, 8 <i>T. R.</i> 78	822	Weston, <i>Str.</i> 623	120
Weaver v. Ward, <i>Hob.</i> 134.....	823	Weston, <i>Leach</i> , 157	795
Webb, 3 <i>Burr.</i> 1468	122	Weston, 1 <i>Barnard.</i> 56	989
Webb, 6 <i>C. & P.</i> 595	181	West Riding, 1 <i>New. S. C.</i> 406 :	105, 106
Webb, 2 <i>Russ. C. M.</i> 982	185	West Riding, 7 <i>T. R.</i> 447	288
Webb, 4 <i>C. & P.</i> 564.....	198	West Riding, 2 <i>East</i> , 345, 353 :	1274, 1275, 1276, 1285, 1286, 1288
Webb, <i>Man. Dig.</i> 324	231	Westwood, <i>Russ. & Ry.</i> 495	460
Webb, <i>Den.</i> 338	275, 1185	Wetherell, <i>Russ. & Ry.</i> 381	40, 279
Webb, 5 <i>Cox</i> , 154	378	Wetherill, <i>Cald</i> 432	1312, 1313
Webb, 1 <i>Moo. C. C.</i> 431	379, 430	Whaley v. Pajet, 2 <i>Bos. & P.</i> 51 ..	1189
Webb, <i>Russ. & Ry.</i> 405	663, 664	Whalley, 7 <i>C. & P.</i> 245	4
Webb, 1 <i>Moo. & Rob.</i> 405	766	Whalley, 2 <i>Car. & K.</i> 376	258
Webb, 14 <i>East</i> , 406	1208	Whalley, 19 <i>L. J. Q. B.</i> 14	889
Webb, <i>Ld. R.</i> 757.....	1241	Wharton, 12 <i>Mod.</i> 510.....	1296
Webster, 31 <i>L. J. M. C.</i> 17; 9 <i>Cox</i> ,		Whateley, 4 <i>Man. & Ry.</i> 431.....	581
13; <i>Leigh & Case</i> , 77	388	Wheateley, 2 <i>Burr.</i> 1125	614
Webster, <i>Bell</i> , 154.....	1016	Wheater, 2 <i>Moo.</i> 45	201
Webster, 1 <i>Fost. & F.</i> 518	1026	Wheatland, 8 <i>C. & P.</i> 238	1026
Webster, 3 <i>T. R.</i> 388.....	1149	Wheeldon, 7 <i>Q. B.</i> 582; 8 <i>C. & P.</i>	747
Webster v. Watts, 12 <i>Q. B.</i> 73	1248		452, 455
Wedderburn, <i>Fost.</i> 9	325	Wheeler, 3 <i>C. & P.</i> 585	451
Wedge, 5 <i>C. & P.</i> 298	841	Wheeler v. Whiting, 9 <i>C. & P.</i>	262
Weeks, 8 <i>Cox</i> , 455	736		11
Wegener, 2 <i>Stark.</i> 245.....	1154	Wheele, 8 <i>C. & P.</i> 230	198
Weir, 1 <i>B. & C.</i> 288	4	Wheelhouse, <i>Poph.</i> 208	1241
Welbourne, <i>East, P. C.</i> 358; <i>Leach</i> ,		Wheeling, <i>Leach</i> , 311	202
503	206	Whicksley, 2 <i>Ro. Rep.</i> 244.....	966
Welch, 1 <i>Moo. C. C.</i> 75	57	Whiley, 1 <i>Car. & K.</i> 150; 2 <i>Moo.</i>	186
Welch, <i>Car. Cr. L.</i> 56	181		636, 806
Welch, <i>Den.</i> 199	487	Whiley, <i>Leach</i> , 983	651
Welch, <i>Leach</i> , 364	721	Whiley, <i>Russ. & Ry.</i> 90	661
Welch, <i>Den. & P.</i> 78	728	Whiston, 5 <i>Dowl. N. S.</i> 408	101
Wellings, 1 <i>C. & P.</i> 454	486	Whiston, 6 <i>Jur.</i> 1039	102, 573
Wellings, 1 <i>C. & P.</i> 315	491	Whitbread, 1 <i>C. & P.</i> 84.....	231
Wellington, 7 <i>Jur.</i> 44	101	Whitcomb, 1 <i>C. & P.</i> 124	287
Welman, <i>Dearsl.</i> 188	536	White, q. t. v. Boot, 2 <i>T. R.</i> 274 ..	148
Wells, <i>East, P. C.</i> 414.....	80	White v. Edmunds, <i>Peake</i> , 89	11
Wells, <i>Moo. & Malk.</i> 326	182	White v. Taylor, 4 <i>Exp.</i> 80.....	8
Wells, <i>Bull. N. P.</i> 289.....	678	White, <i>Russ. & Ry.</i> 99	81
Wells, 2 <i>Ro. Rep.</i> 295	925	White, 3 <i>Cox</i> , 79	98
Weltjie, 2 <i>Camp.</i> 142	930	White, <i>In re</i> , 1 <i>New. S. C.</i> 9	108
Wenborn, 6 <i>Jur.</i> 267	245	White, <i>Car. & M.</i> 189	160
Wenman, 2 <i>Russ. C. M.</i> 110	421	White, 5 <i>Cox</i> , 562.....	167
Wenman v. Ash, 22 <i>L. J. M. C.</i>		White, 3 <i>Campb.</i> 98	170
199	1155	White, 2 <i>Cox</i> , 192.....	171
Wenmouth, 8 <i>Cox</i> , 348	472	White, <i>Leach</i> , 430.....	178
Went, <i>Russ. & Ry.</i> 359	395	White, <i>Russ. & Ry.</i> 508	202
Weshbourne, 4 <i>Leon.</i> 49	1126	White, 9 <i>C. & P.</i> 344	383
Wesley, 1 <i>Fost. & F.</i> 528.....	772	White, 22 <i>L. J. M. C.</i> 123; <i>Dearsl.</i>	203
West, 2 <i>Ph. Ev.</i> 419.....	226		390
West, <i>Dearsl.</i> 402.....	367	White, <i>Leach</i> , 282	466
West, <i>Dearsl. & B.</i> 109	420	White, <i>Moo. C. C.</i> 91; 8 <i>C. & P.</i>	742
West, <i>Dearsl. & B.</i> 578	525		489
West, <i>Dracon, Cr. L.</i> 168	577	White, 4 <i>C. & P.</i> 46	513
West, <i>Den.</i> 258	682	White, 1 <i>Fost. & F.</i> 665	541
West, 2 <i>Cox</i> , 237	731	White, <i>Den.</i> 208	660
West, 2 <i>Car. & K.</i> 784.....	751	White, 9 <i>C. & P.</i> 282.....	639
West, 1 <i>Gale & D.</i> 481.....	880	White, 29 <i>L. J. M. C.</i> 257	803
West, 1 <i>Q. B.</i> 826.....	883	White, <i>Cald.</i> 183	942
West, 2 <i>Ld. Raym.</i> 1157.....	937	White, <i>Moo. & Malk.</i> 271	980
Westbeer, <i>Leach</i> , 12	208, 285, 423	White, 2 <i>Cox</i> , 232.....	1008
Westbury, 8 <i>Mod.</i> 357.....	949		
Westley, <i>Bell</i> , 193	68, 991, 1037		
Westley, 10 <i>East</i> , 851	126		

	PAGE		PAGE
White, 1 <i>Campb.</i> 359	1091	Wilkinson, 3 <i>Burn, D'Oyly</i> , 348..	869
White, 3 <i>Campb.</i> 100	1156, 1157	Williams, 8 <i>D. P. C.</i> 301	34
White, 1 <i>Burr.</i> 333	1238	Williams, 7 <i>C. & P.</i> 321	51
White, <i>Dy.</i> 158	1307	Williams, 1 <i>Salk.</i> 304	75
Whitehead, 1 <i>C. & P.</i> 67	248, 1069	Williams, 7 <i>C. & P.</i> 298	88
Whitehead, 2 <i>Moo.</i> 181	299, 395	Williams, <i>Leach</i> , 829	93
Whitehead, 9 <i>C. & P.</i> 429	465, 472	Williams, 14 <i>L. J. M. C.</i> 164	94
Whitehead, 3 <i>Car. & K.</i> 202	781	Williams, 1 <i>Burr.</i> 386	102
Whitehead, 1 <i>Salk.</i> 371	941	Williams, 8 <i>Jur.</i> 559; 1 <i>Cox</i> , 77 ..	109
Whitehead v. <i>Reg.</i> , 9 <i>C. & P.</i> 429..	471	Williams, 1 <i>Moo & Rob.</i> 503	116
Whitehouse, <i>Deursl.</i> 1	111, 268	Williams, <i>Comb.</i> 18	135
Whitehouse, 1 <i>Cox</i> , 144	779	Williams, <i>Ex p</i> , 5 <i>Jur.</i> 1133....	140, 141
Whitehouse, 3 <i>Cox</i> , 86	1026	Williams, 1 <i>Burr.</i> 385	144
Whitehouse, 6 <i>Cox</i> , 38	1054	Williams, 1 <i>Cox</i> , 163	170
Whitely, 1 <i>Lew.</i> 173	744, 764	Williams, 7 <i>C. & P.</i> 320	177
Whiteman, 29 <i>L. J. M. C.</i> 120....	582	Williams, 1 <i>Cox</i> , 289	182
Whitfield, <i>Cun.</i> 100		Williams, 8 <i>C. & P.</i> 284	186
Whitfield, 3 <i>Car. & K.</i> 121	117	Williams, 2 <i>Russ. C. M.</i> 832	189
Whithorne, 3 <i>C. & P.</i> 394	749	Williams, <i>Den. & P.</i> 61	274
Whiting, 7 <i>C. & P.</i> 771	170	Williams, 2 <i>Moo.</i> 144	330
Whiting, 1 <i>Salk.</i> 283	1027	Williams, 1 <i>Car. & K.</i> 195	364
Whitley, 1 <i>Lew.</i> 123	795	Williams, 7 <i>Cox</i> , 355	379
Whitmore, 2 <i>Sir Wm. Bl.</i> 37	1088	Williams, 6 <i>C. & P.</i> 390	379
Whitney, 1 <i>Moo.</i> 3	595	Williams, 1 <i>Moo.</i> 107	408
Whitney, 7 <i>C. & P.</i> 208	1260	Williams, 6 <i>Cox</i> , 49	421
Whitney, 5 <i>D. P. C.</i> 728	1272	Williams, 1 <i>Cox</i> , 16	444, 445
Whitney, 3 <i>Ad. & El.</i> 69	1275	Williams, 1 <i>Hale</i> , 522	461
Whittaker, 2 <i>Fost. & F.</i> 1	3	Williams, 6 <i>C. & P.</i> 626	490
Whittaker, <i>Den.</i> 310	906	Williams, 7 <i>C. & P.</i> 354	529
Whittingham, 9 <i>C. & P.</i> 235	583, 584	Williams, 8 <i>C. & P.</i> 434	658
Whitworth, 1 <i>Fost. & F.</i> 382	205	Williams, 1 <i>Cox</i> , 234	668
Whyte, 5 <i>Cox</i> , 290	660, 664	Williams, 2 <i>Car. & K.</i> 51	672
Wiatt, 8 <i>Mod.</i> 123	1147	Williams, 1 <i>Lew.</i> 123	679
Wicker, 18 <i>Jur.</i> 252	210	Williams, 20 <i>L. J. M. C.</i> 106	687
Wickes v. <i>Clutterbuck</i> , 2 <i>Bing.</i> 483	27	Williams, <i>Car. & M.</i> 259	727
Wickham v. <i>Reg.</i> 10 <i>Ad. & El.</i> 34..	527	Williams, 7 <i>Cox</i> , 43	738
Wicks, <i>Russ. & Ry.</i> 449	665	Williams, <i>Den.</i> 39	756
Wigan, 8 <i>Jur.</i> 930	107	Williams, 1 <i>Car. & K.</i> 589; <i>Den.</i>	
Wigg, 1 <i>Salk.</i> 372	121	39	790
Wigges, 4 <i>Rep.</i> 45	129	Williams, 8 <i>C. & P.</i> 286	833, 838
Wigges, <i>Leach</i> , 378	762	Williams, 6 <i>B. & C.</i> 250	890
Wightwick, 2 <i>Burr.</i> 1703	1105	Williams, 3 <i>Burr.</i> 1317	944
Wilcock, 2 <i>Russ. C. M.</i> 498	649	Williams, <i>Den.</i> 529	950
Wilcox, <i>Russ. & Ry.</i> 50	636	Williams, 1 <i>Keb.</i> 124	1041
Wilcox, 1 <i>Salk.</i> 458	1238	Williams, 2 <i>Camp.</i> 506	1103, 1160
Wild, <i>Leach</i> , 17	183	Williams, <i>B. & C.</i> 549	1125
Wild, 1 <i>Moo.</i> 452	195	Williams, 5 <i>B. & Ald.</i> 595	1133
Wild, 2 <i>Lew.</i> 214	774	Williams, 2 <i>Show.</i> 471	1137
Wild v. <i>Copeman</i> , <i>Moo.</i> 404	974	Williams, <i>Lofft.</i> 759	1146
Wild v. <i>Cookeman</i> , <i>Noy.</i> 34	974	Williams, 2 <i>Camp.</i> 646	1161
Wildbore, <i>Comb.</i> 309	947, 950	Williams, <i>Holt, Libel</i> , 69	1173
Wilburn, <i>Noy.</i> 50	1101	Williams, 1 <i>Salk.</i> 384	1182
Wilders, 2 <i>Burr.</i> 1128	614	Williams v. <i>Lyons</i> , 8 <i>Mod.</i> 189	1076
Wilford, <i>Russ. & Ry.</i> 517	463	Williams v. <i>Protheroe</i> , 5 <i>Bing.</i>	
Wilkes, 2 <i>Wils.</i> 151	36	309	919
Wilkes, 4 <i>Burr.</i> 2527	67, 1186	Williams v. <i>Stott</i> , 1 <i>Cr. & M.</i> 675:	486
Wilkes, 4 <i>Jur.</i> 1061	102	Williams v. <i>Wilcox</i> , 3 <i>Nev. & P.</i>	
Wilkes, 25 <i>L. J. M. C.</i> 47	102	606	1294
Wilkes, <i>East</i> , 957	660	Willan, <i>East</i> , <i>P. C.</i> 186	720
Wilkes, 1 <i>Hawk. c.</i> 64, s. 9	896	Willes v. <i>Bridger</i> , 2 <i>B. & Ald.</i> 878:	898
Wilkes, 7 <i>C. & P.</i> 811	910	Willett, 6 <i>T. R.</i> 294	1104
Wilkes v. <i>Reg.</i> 4 <i>Bro. P. C.</i> 367 ..	284	Williamson, 3 <i>C. & P.</i> 365	767
Wilkins, <i>East</i> , <i>P. C.</i> 673	378	Williamson, 1 <i>Cox</i> , 975	768
Wilkins, 31 <i>L. J. M. C.</i> 72; 9 <i>Cox</i> ,		Williamson, 7 <i>T. R.</i> 32	1270
20; <i>Leigh & Cave</i> , 89	830	Willis, 1 <i>Moo.</i> 375	75, 388
Wilkins, <i>Str.</i> 624	950	Willis, <i>Den.</i> 80	88
Wilkinson, 8 <i>C. & P.</i> 662	199	Willis, 6 <i>T. R.</i> 179	941
Wilkinson, <i>East</i> , <i>P. C.</i> 556	363	Willis, 1 <i>Hawk. c.</i> 89, s. 17	1223
Wilkinson, <i>Russ. & Ry.</i> 470	387	Willoughby, <i>East</i> , <i>P. C.</i> 944	673
Wilkinson, <i>Leach</i> , 321	432	Willoughby, <i>East</i> , <i>P. C.</i> 288	749

Table of Cases.

lxvii

	PAGE		PAGE
Willoughby, <i>East</i> , P. C. 581.....	1234	Wood, 5 <i>Jur.</i> 225	57
Willoughby, <i>Cro. El.</i> 90.....	1242	Wood, 1 <i>Lew.</i> 36	62
Willmer v. Jacklin, 31 <i>L. J. Q. B.</i>		Wood, 5 <i>Jur.</i> 295	229
17	631	Wood, 1 <i>D. P. C.</i> 509	257
Wilmott, <i>Ex p.</i> , 30 <i>L. J. M. C.</i> 161 :	1222	Wood, <i>Den.</i> 387; 18 <i>L. J. M. C.</i>	
Wilshaw, <i>Car. & M.</i> 145.....	211	140	366
Wilson, 7 <i>Q. B.</i> 984	31, 32	Wood, 25 <i>L. J. M. C.</i> 96.....	413
Wilson, <i>Den.</i> 284	70	Wood, 1 <i>Lew.</i> 36	465
Wilson, 1 <i>New. S. C.</i> 190	102, 106	Wood, 1 <i>Fost. & F.</i> 497	546
Wilson, <i>Dearsi.</i> 79.....	109	Wood, 5 <i>Mod.</i> 18	614
Wilson, 6 <i>Q. B.</i> 620.....	122	Wood, 1 <i>Sess. Ca.</i> 217	615
Wilson, <i>Holt's Ca.</i> 597	201	Wood, <i>Sty.</i> 145	617
Wilson, 2 <i>Lew.</i> 78	206	Wood, <i>Ex p.</i> , 1 <i>Atk.</i> 222	625
Wilson, 8 <i>Cox</i> , 453	210	Wood, 2 <i>Russ. C. M.</i> 632	1012
Wilson, 4 <i>T. R.</i> 487	286	Wood, 3 <i>B. & Adol.</i> 617	1189
Wilson, <i>Dearsi. & B.</i> 157	368	Wood, 1 <i>Esp.</i> 359	1309
Wilson, 8 <i>C. & P.</i> 111	374	Woodcock, <i>Leach</i> , 500	205
Wilson, <i>Russ. & Ry.</i> 115.....	462	Wood Ditton, Surveyors, 18 <i>L. J.</i>	
Wilson, 9 <i>C. & P.</i> 27	484	<i>M. C.</i> 218	1143, 1161
Wilson, 8 <i>C. & P.</i> 27	493	Woodfall, <i>Lofft.</i> 780	1146
Wilson, 2 <i>Moo. C. C.</i> 52	544	Woodfall, 5 <i>Burr.</i> 2661	1161
Wilson, <i>Dearsi.</i> 558.....	635	Woodhead, 2 <i>Car. & K.</i> 520	231
Wilson, <i>Den.</i> 284; 2 <i>Car. & K.</i> 527:	667	Woodhead, 1 <i>Moo. & Rob.</i> 549..	479, 575
Wilson, <i>Leach</i> , 285	721	Woodhead, 1 <i>Lew.</i> 163	765
Wilson, 1 <i>Lew.</i> 112	743	Woodhead, 1 <i>Lew.</i> 60	804
Wilson, <i>Dearsi. & B.</i> 127	790	Woodman, <i>Leach</i> , 64	975
Wilson, 1 <i>Wils.</i> 41	1051	Woodrow, 2 <i>T. R.</i> 731.....	1312
Wilson, 5 <i>Nev. & M.</i> 164.....	1112	Woods, 7 <i>Mees. & W.</i> 571	210
Wilson, 3 <i>Nev. & M.</i> 753.....	1117	Woods, 6 <i>Cox</i> , 224	228
Wilson, 3 <i>Ad. & El.</i> 817.....	1118, 1129	Woodward, 1 <i>Moo.</i> 323.....	62, 562, 580
Wilson, 8 <i>T. R.</i> 357.....	1119, 1120	Woodward, <i>Leach</i> , 253, <i>n.</i>	70, 466
Wilson, 1 <i>Ad. & El.</i> 627.....	1128	Woodward, 5 <i>C. & P.</i> 861	72
Wilson v. Dod, 1 <i>Ro. Rep.</i> 135	826	Woodward, <i>Leigh & Cave</i> , 122	74
Wilson v. Short, 6 <i>Hare</i> , 366	916	Woodward, 11 <i>Mod.</i> 137; 6 <i>East</i> ,	
Wilts, 9 <i>D. P. C.</i> 524	105	140.....	446, 1074
Wilts, 1 <i>Salk.</i> 359.....	1281	Woodward, <i>East</i> , P. C. 53	592
Wilton, 1 <i>Fost. & F.</i> 309...211, 391,	675	Woodward, <i>Leach</i> , 782	660
Winbow, 5 <i>Cox</i> , 346.....	426	Woolcock, 5 <i>C. & P.</i> 516	1098, 1099
Winch, 6 <i>Cox</i> , 523	69	Wooler, 2 <i>Stark.</i> 111	260
Window, 3 <i>Campb.</i> 78	54, 782	Wooler, 6 <i>M. & S.</i> 366	1161
Wing, 1 <i>Sess. Ca.</i> 915	1076	Woolett, 3 <i>D. P. C.</i> 694	150
Wingfield, <i>Cro. Car.</i> 251.....	7	Woolford, 1 <i>Moo. & Rob.</i> 384	
Wingfield, 1 <i>Sir Wm. Bl.</i> 602.....	1272	396, 544, 547	
Wink, 6 <i>C. & P.</i> 397.....	233	Woolf, 2 <i>B. & Ald.</i> 609; 1 <i>Ch.</i>	
Winkworth, 4 <i>C. & P.</i> 444	434	<i>Rep.</i> 583	285
Winnall, 5 <i>Cox</i> , 316	491	Wool, 1 <i>Ch. Rep.</i> 401	260
Winshop, <i>Cald.</i> 76.....	1312	Woolley, 4 <i>Cox</i> , 255.....	488, 489
Winslow, 8 <i>Cox</i> , 397.....	781	Woolley, 19 <i>L. J. M. C.</i> 165....	520, 532
Winter, <i>Russ. & Ry.</i> 295.....	561	Woolley, <i>Den.</i> 559	532
Winter, 2 <i>Keb.</i> 74.....	632, 638	Woolmer, 1 <i>Moo.</i> 334	10
Winter, 2 <i>Salk.</i> 588.....	1124, 1126	Woolmer, 12 <i>Ad. & El.</i> 422....	140, 1157
Winter v. Charter, 3 <i>Y. & Jer.</i> 308 :	1260	Woolston, <i>Fitzg.</i> 964	1172
Winterbottom, <i>Den.</i> 41	668	Woolston, <i>Str.</i> 834	1173
Winton, 5 <i>T. R.</i> 89	37	Worker, 1 <i>Moo.</i> 165	906
Witchell, <i>East</i> , P. C. 830	520	Worley, 3 <i>Cox</i> , 535	1014
Withal, <i>Leach</i> , 88	96, 261	Wormal, 2 <i>Ro. Rep.</i> 120	749
Withers, <i>East</i> , P. C. 233.....	11, 772	Worrall, <i>Skin.</i> 198	134
Withers, 4 <i>Cox</i> , 1767, 120, 632,	1009	Worrall, 7 <i>C. & P.</i> 516.....	425, 563
Withers, <i>Leach</i> , 504.....	218	Worrell, <i>Trem.</i> 106	610
Withers, 2 <i>Camp.</i> 578	234	Wortley, <i>Den. & P.</i> 333.....	220, 496
Withers, 8 <i>T. R.</i> 432.....	287	Wortley, <i>Den.</i> 162.	451, 452
Withers, <i>East</i> , P. C. 295	757	Wren, 5 <i>D. P. C.</i> 222	28
Withers, 1 <i>Moo.</i> 294	791	Wright et ux. <i>Ca. Temp. H.</i> 233 ..	124
Withers, 3 <i>T. R.</i> 428.....	1154, 1162, 1163	Wright v. Reg. (in error), 14 <i>L. J.</i>	
Witt, 1 <i>Moo.</i> 248	462, 476	<i>Q. B.</i> 48; 16 <i>L. J. Q. B.</i> 10	
Wittenhall, 2 <i>Moo. & Rob.</i> 291	116	49, 161, 293	
Wogan, <i>Comb.</i> 288	1123	Wright v. Reg. (in error), 1 <i>Ad. & El.</i>	
Wolf, 3 <i>Cox</i> , 518	1184	434.....	292
Womersley, 2 <i>Lew.</i> 162	264	Wright v. Reg. (in error), 2 <i>Cox</i> ,	
Wood, 1 <i>Fost. & F.</i> 470	15	91	593

	PAGE		PAGE
Wright, 2 <i>Fost. & F.</i> 320.....	69	Yates, 6 <i>Cox</i> , 441 .. 95, 447, 1069, 1145	
Wright, 1 <i>Lew. C. C.</i> 135 .. 70, 238, 673		Yates, 5 <i>Jur.</i> 636.....	184
Wright, 1 <i>Lew.</i> 148	198	Yates, 1 <i>Moo.</i> 170.....	420, 526
Wright, 1 <i>Russ. & Ry.</i> 456.....	242	Yates, 1 <i>Cox</i> , 361	787
Wright, <i>Burn's Just.</i> 640	371, 383	Yates, <i>Car. & M.</i> 137... 986, 1024,	
Wright, <i>Leach</i> , 726	432	1027, 1069	
Wright, 1 <i>Lew.</i> 268	395, 676	Yates, <i>Car. & M.</i> 132	1027, 1029
Wright, 7 <i>C. & P.</i> 159.....	481	Yeadon, 31 <i>L. J. M. C.</i> 70; <i>Leigh</i>	
Wright, <i>Dearsl. & B.</i> 431	496	& <i>Cave</i> , 81	828
Wright, 9 <i>C. & P.</i> 754.....	757, 786, 869	Year Books, 27 <i>Ass.</i> 39.	362
Wright, 1 <i>Sid.</i> 148.....	1021	Yend, 6 <i>C. & P.</i> 176 ..	368
Wright, 8 <i>T. R.</i> 293.....	1138	Yewins, 2 <i>Cox</i> , 678	227
Wright, 2 <i>Ch. Rep.</i> 152.....	1149	York, 5 <i>Burr.</i> 2689	27
Wright, <i>Burr.</i> 1099	1181	York, <i>Den.</i> 335	365
Wright, 3 <i>B. & Adol.</i> 681	1251	York, <i>Fost. Cr. L.</i> 70.....	760
Wright, 1 <i>Ad. & El.</i> 434.....	1267	Yorkhill, 9 <i>C. & P.</i> 213	1269
Wright, 2 <i>Keb.</i> 439	1308	Young, 2 <i>Cox</i> , 280.	52
Wrightson, 2 <i>Salk.</i> 698	929	Young, 2 <i>T. R.</i> 472	102
Wroth v. Capel, 3 <i>Leon.</i> 102.....	1123	Young, <i>Russ. & Ry.</i> 280; <i>Peake</i> ,	
Wroughton, 3 <i>Burr.</i> 1683	1166	<i>Add. Ca.</i> 228	175, 678
Wroxton, Inhabitants, 4 <i>B. & Adol.</i>		Young, 3 <i>Car. & K.</i> 106.	212
640	852	Young, 8 <i>C. & P.</i> 644.	748
Wyatt, <i>Russ. & Ry.</i> 230	142	Young, 4 <i>Rep.</i> 40.	755
Wyatt, <i>Fost.</i> 127	947	Young, 3 <i>Cox</i> , 296	851
Wycherley, 8 <i>C. & P.</i> 262... 284, 302, 758		Young, 1 <i>Burr.</i> 557.....	945
Wyer, <i>Leach</i> , 480.....	33, 1225	Young, 1 <i>Russ. C. M.</i> 440	960
Wykes, <i>Andr.</i> 238.....	944	Young, 2 <i>Salk.</i> 417 ..,	1145
Wylde, 6 <i>C. & P.</i> 380	1030	Young, 2 <i>Salk.</i> 417	1152
Wylie, 1 <i>New Rep.</i> 92	651, 679	Young, 2 <i>East</i> , 14	1202
Wymer, 4 <i>C. & P.</i> 591.....	463	Young, <i>Den.</i> 194.....	1228
Wyndham, 1 <i>Str.</i> 2	25, 34	Young v. The King, 3 <i>T. R.</i> 98... ..	519, 532
Wyndham, <i>Russ. & Ry.</i> 197.....	54	Younger, 6 <i>T. R.</i> 449	1178
Wynne, <i>Leach</i> , 413	368	Younghusband, 4 <i>Nev. & M.</i> 850 ..	135
Wynne, <i>Den.</i> 365 .. 384, 1227, 1230, 1234		Yscuardo, 6 <i>Cox</i> , 380.....	162, 224
Wyvill, 7 <i>Mod.</i> 286.	1092		
Y.		Z.	
Yandell, 4 <i>T. R.</i> 521.....	292	Zulueta, 1 <i>Cox</i> , 20	176
Yates, <i>Leach</i> , 169	27	Zulueta, 1 <i>Car. & K.</i> 215	549

TABLE OF STATUTES.

	PAGE		PAGE
9 Hen. 3, c. 15 - -	- 1279	25 Edw. 3, c. 2 - -	307, 344
9 Hen. 3, c. 16 - -	- 1294	25 Edw. 3, c. 4, s. 4 - -	- 1294
20 Hen. 3, c. 1 - -	- 618	25 Edw. 3, c. 25 - -	- 311
31 Hen. 3, st. 4 - -	- 1080	34 Edw. 3, c. 1 - -	925, 1087
51 Hen. 3, st. 4 - -	- 948	34 Edw. 3, c. 8 - -	- 926
52 Hen. 3, cc. 1, 2, 4 - -	- 948	38 Edw. 3, c. 12 - -	- 926
52 Hen. 3, c. 23 - -	- 1305	42 Edw. 3, c. 1 - -	- 28
3 Edw. 1, c. 5 - -	- 1318	42 Edw. 3, c. 9 - -	- 1081
3 Edw. 1, c. 9 - -	917, 947	1 Ric. 2, c. 4 - -	- 921
3 Edw. 1, c. 16 - -	- 948	1 Ric. 2, c. 9 - -	- 925
3 Edw. 1, c. 19 - -	- 1080	1 Ric. 2, c. 13 - -	- 949
3 Edw. 1, c. 23 - -	- 948	2 Ric. 2, st. 1, c. 5 - -	- 1089
3 Edw. 1, c. 25 - -	- 918	5 Ric. 2, st. 1, c. 7 - -	- 187
3 Edw. 1, c. 26 - -	1076, 1080	5 Ric. 2, sess. 1, c. 8 - -	- 1127
3 Edw. 1, c. 28 - -	- 921	5 Ric. 2, st. 2, c. 4 - -	- 1318
3 Edw. 1, c. 29 - -	923, 946	5 Ric. 2, c. 8 - -	1107, 1110, 1119
3 Edw. 1, c. 30 - -	- 1077	7 Ric. 2, c. 4 - -	- 1073
3 Edw. 1, c. 33 - -	- 921	7 Ric. 2, c. 15 - -	919, 921
3 Edw. 1, c. 34 - -	- 1089	8 Ric. 2, c. 4 - -	692, 931
3 Edw. 1, c. 35 - -	- 1073	12 Ric. 2, c. 2 - -	- 1197
4 Edw. 1, st. 2 - -	- 881	12 Ric. 2, c. 11 - -	- 1089
13 Edw. 1, st. 1, c. 12 - -	- 949	13 Ric. 2, st. 2, c. 1 - -	- 127
13 Edw. 1, st. 2, c. 6 - -	- 1171	15 Ric. 2, c. 2 - -	187, 1107,
13 Edw. 1, c. 49 - -	918, 925		1108, 1110, 1116, 1119, 1125, 1127
21 Edw. 1, st. 2 - -	- 749	16 Ric. 2, c. 5 - -	339, 343
27 Edw. 1, c. 3 - -	- 21	16 Ric. 2, c. 6 - -	- 127
28 Edw. 1, c. 11 - -	- 918	17 Ric. 2, c. 8 - -	- 1097
28 Edw. 1, st. 3, c. 12 - -	948, 1081	1 Hen. 4, c. 11 - -	- 1080
33 Edw. 1, st. 2 - -	919, 1056	4 Hen. 4, c. 5 - -	- 1197
33 Edw. 1, st. 3 - -	919, 921	4 Hen. 4, c. 8 - -	- 1108
33 Edw. 1, st. 4 - -	154, 155	4 Hen. 4, c. 11 - -	- 1294
1 Edw. 2, st. 2 - -	- 956	13 Hen. 4, c. 7 - -	- 1087
1 Edw. 2, st. 2, s. 1 - -	- 961	14 Hen. 4, c. 1 - -	- 283
1 Edw. 3, c. 14 - -	- 921	1 Hen. 5, c. 2 - -	- 1294
1 Edw. 3, c. 16 - -	- 1249	1 Hen. 5, c. 5 - -	- 70
2 Edw. 3, c. 3 - -	- 1100	2 Hen. 5, st. 1, c. 8 - -	- 1097
4 Edw. 3, c. 11 - -	919, 921	2 Hen. 5, c. 8 - -	- 947
5 Edw. 3, c. 10 - -	- 926	9 Hen. 5, c. 1 - -	- 62
5 Edw. 3, c. 11 - -	- 47	6 Hen. 6, c. 1 - -	- 48
18 Edw. 3, st. 4 - -	- 931	8 Hen. 6, c. 9 - -	1108, 1112,
20 Edw. 3, c. 1 - -	- 931		1117, 1119, 1120, 1125, 1126
20 Edw. 3, cc. 4, 5 - -	919, 921	8 Hen. 6, c. 9, s. 7 - -	- 1108
25 Edw. 3, st. 5, c. 2 - -	309,	8 Hen. 6, c. 10, s. 3 - -	- 48
	317, 318, 719	8 Hen. 6, c. 12 - -	- 692

	PAGE		PAGE
10 Hen. 6, c. 6, s. 1	- 48	5 & 6 Edw. 6, c. 14	- 147
11 Hen. 6, c. 6	- 282	5 & 6 Edw. 6, c. 16 :	1197,
14 Hen. 6, c. 1	- 288		1198, 1199
27 Hen. 6, c. 5	- 1178	5 & 6 Edw. 6, c. 25	- 1074
12 Edw. 4, c. 7	- 1294	1 Mar. c. 2	- 1174
3 Hen. 7, c. 1	892, 900, 917	1 Mar. st. 2, c. 3	- 1166
4 Hen. 7, c. 20	- 150, 618	1 Mar. sess. 2, c. 3	- 1167
1 Hen. 8, c. 7, s. 2	- 881	1 & 2 Ph. & M. c. 10	- 322, 342
6 Hen. 8, c. 6	- 115	1 & 2 Ph. & M. c. 10, s. 8	- 341
21 Hen. 8, c. 7	- 489	1 & 2 Ph. & M. c. 11, s. 3	- 721
21 Hen. 8, c. 11	- 299	1 & 2 Ph. & M. c. 13	- 199
22 Hen. 8, c. 5	- 1278	2 & 3 Ph. & M. c. 10	- 199
22 Hen. 8, c. 5, s. 1	- 1277	1 Eliz. c. 1	- 343
22 Hen. 8, c. 5, s. 5	- 1286	1 Eliz. c. 1, s. 6	- 1168
22 Hen. 8, c. 9	- 1285	1 Eliz. c. 1, s. 14	- 1174
25 Hen. 8, c. 19, s. 1	- 1168	1 Eliz. c. 1, s. 29	- 343
25 Hen. 8, c. 20, s. 7	- 1168	1 Eliz. c. 1, s. 30	- 309
25 Hen. 8, c. 22, -	- 851	1 Eliz. c. 2, ss. 4, 5, 6, 7, 8	- 1175
26 Hen. 8, c. 3, s. 4	- 506	1 Eliz. c. 2, ss. 9, 12, 13 :	
26 Hen. 8, c. 3, s. 20	- 1075		1167, 1174
26 Hen. 8, c. 6	- 782	1 Eliz. c. 2, ss. 10, 11	- 1174
26 Hen. 8, c. 13	- 323	1 Eliz. c. 2, s. 20	- 1175
26 Hen. 8, c. 13, s. 4	- 323	1 Eliz. c. 4, s. 24	- 506
26 Hen. 8, c. 13, s. 5	- 338	1 Eliz. c. 12, s. 1	- 1209
28 Hen. 8, c. 7	- 851	5 Eliz. c. 1, s. 2	- 343
28 Hen. 8, c. 15	- 550, 551,	5 Eliz. c. 4	- 218, 1212
	552, 783, 1192	5 Eliz. c. 9	- 987, 990, 1038
28 Hen. 8, c. 15, s. 1	- 53	5 Eliz. c. 9, ss. 1, 2	- 988
28 Hen. 8, c. 15, ss. 2, 5, 6	- 54	5 Eliz. c. 9, s. 3	- 988, 1043
32 Hen. 8, c. 9	- 919, 921, 922,	5 Eliz. c. 9, s. 4	- 988
	925, 927	5 Eliz. c. 9, s. 5	- 988, 1045
32 Hen. 8, c. 9, s. 3	- 987	5 Eliz. c. 9, s. 6 :	988, 1043, 1045
32 Hen. 8, c. 38	- 851	5 Eliz. c. 9, s. 8	- 988
33 Hen. 8, c. 1	- 516	5 Eliz. c. 9, s. 9	- 988, 998
33 Hen. 8, c. 9	- 1190	5 Eliz. c. 9, s. 10	- 988
33 Hen. 8, c. 20, s. 2	- 338	5 Eliz. c. 9, s. 11	- 988, 999
33 Hen. 8, c. 23	- 342, 784	5 Eliz. c. 9, s. 12	- 988
35 Hen. 8, c. 2, s. 1	- 323	5 Eliz. c. 9, s. 13	- 998
1 Edw. 6, c. 1, ss. 1, 5	- 1174	5 Eliz. c. 14	- 698
1 Edw. 6, c. 7, s. 5	- 282	5 Eliz. c. 15, s. 3	- 1090
1 Edw. 6, c. 12	- 322	13 Eliz. c. 2	- 343
1 Edw. 6, c. 12, s. 13	- 281	13 Eliz. c. 2, s. 4	- 343
1 Edw. 6, c. 12, s. 22	- 321, 342	13 Eliz. c. 5, s. 3	- 1061
2 & 3 Edw. 6, c. 1	- 1175	13 Eliz. c. 5, s. 5	- 341
2 & 3 Edw. 6, c. 6	- 1080	13 Eliz. c. 6, ss. 1, 2, 3	- 622
2 & 3 Edw. 6, c. 24	- 879	13 Eliz. c. 6, s. 4	- 623
5 & 6 Edw. 6, c. 4	- 1167	18 Eliz. c. 5	- 147, 148
5 & 6 Edw. 6, c. 4, s. 3	- 1101	18 Eliz. c. 5, s. 1	- 147, 148
5 & 6 Edw. 6, c. 11	- 322	18 Eliz. c. 5, s. 3	- 915
5 & 6 Edw. 6, c. 11, s. 6	- 323	18 Eliz. c. 5, s. 4	- 1074
5 & 6 Edw. 6, c. 11, ss. 7, 8	- 336	23 Eliz. c. 1, s. 4	- 1175
5 & 6 Edw. 6, c. 11, s. 9	- 338	25 Eliz. c. 2, s. 5	- 637
5 & 6 Edw. 6, c. 11, s. 12	- 321	27 Eliz. c. 4	- 623
5 & 6 Edw. 6, c. 11, s. 13	- 338	27 Eliz. c. 10	- 915

Table of Statutes.

lxxi

	PAGE		PAGE
29 Eliz. c. 5 - - -	1043	1 Wm. & M. c. 18 - - -	1167
29 Eliz. c. 5, s. 21 - - -	148	1 Wm. & M. c. 18, s. 17 - - -	1172
31 Eliz. c. 5, s. 1 - - -	147	1 Wm. & M. c. 18, s. 18 : 1165,	
31 Eliz. c. 5, s. 4 - 148, 920,		1166, 1167	
	925, 1080	3 Wm. & M. c. 9, s. 4 : 538,	1225
31 Eliz. c. 5, s. 5 - - -	146, 147	3 & 4 Wm. & M. c. 9, s. 5 - - -	74
31 Eliz. c. 10, s. 20 - - -	148	4 & 5 Wm. & M. c. 18 - - -	143
31 Eliz. c. 11 - 1108, 1124, 1126		4 & 5 Wm. & M. c. 18, s. 3 - 1162	
43 Eliz. c. 2 - - - - -	1313	4 & 5 Wm. & M. c. 18, s. 2 :	
1 Jac. 1, c. 4 - - - - -	343	134, 142	
1 Jac. 1, c. 8 - - - - -	777	4 & 5 Wm. & M. c. 18, s. 6 :	
3 Jac. 1, c. 4 - - - - -	343	134, 142	
3 Jac. 1, c. 4, ss. 1, 23 - - -	309	4 & 5 Wm. & M. c. 18, ss. 3,	
3 Jac. 1, c. 10, s. 1 - - -	26	4, 5 - - - - -	49
3 Jac. 1, c. 21 - - - - -	1172	5 Wm. & M. c. 11 : 184, 1244,	
4 Jac. 1, c. 1 - - - - -	311	1270	
7 Jac. 1, c. 1 - - - - -	311	5 Wm. & M. c. 11, s. 2 - 99,	104
21 Jac. 1, c. 3 - - - - -	1207	5 Wm. & M. c. 11, s. 3 - - -	105
21 Jac. 1, c. 4 - - 147, 148, 149		5 Wm. & M. c. 11, s. 4 - - -	99
21 Jac. 1, c. 4, s. 1 - - 146, 148		5 Wm. & M. c. 13 - - - - -	128
21 Jac. 1, c. 4, s. 2 - - - - -	148	5 & 6 Wm. & M. c. 11 : 104,	
21 Jac. 1, c. 4, s. 3 - - 147, 148		268, 1042, 1290, 1292	
21 Jac. 1, c. 4, s. 4 - - - - -	149	5 & 6 Wm. & M. c. 11, s. 2 - - -	11
21 Jac. 1, c. 8, s. 2 - - - - -	897	5 & 6 Wm. & M. c. 11, s. 3 :	
21 Jac. 1, c. 15 - 187, 1115,		11, 109	
1117, 1120, 1122, 1125, 1126		7 Will. 3, c. 3 - - 321, 322, 326	
21 Jac. 1, c. 27 - - - - -	758	7 Will. 3, c. 3, s. 2 - - - - -	342
21 Jac. 1, c. 28, s. 3 - - - - -	1043	7 Will. 3, c. 3, s. 3 - - - - -	336
1 Car. 1, c. 1 - - - - -	1178	7 Will. 3, c. 3, s. 4 - - - - -	321
3 Car. 1, c. 2 - - - - -	1176	7 Will. 3, c. 3, ss. 5, 6 - - -	323
3 Car. 1, c. 4 - - - - -	777	7 Will. 3, c. 3, s. 8 - - - - -	324
16 Car. 1, c. 10 - - - - -	29	7 Will. 3, c. 3, s. 9 - - - - -	335
16 Car. 1, c. 10, s. 6 - - - - -	931	7 Will. 3, c. 3, ss. 11, 12 - - -	336
16 Car. 1, c. 10, s. 8 - - - - -	34	7 & 8 Will. 3, c. 3 - - 319, 330	
12 Car. 2, c. 22, s. 4 - - - - -	717	7 & 8 Will. 3, c. 3, s. 1 - - -	320
13 Car. 2, c. 5, ss. 2, 3 - - -	352	7 & 8 Will. 3, c. 3, s. 27 - - -	321
13 & 14 Car. 2, c. 4, s. 24 - - -	1174	7 & 8 Will. 3, c. 3, s. 11 - - -	342
22 Car. 2, c. 5 - - - - -	1219	7 & 8 Will. 3, c. 34, s. 3 - - -	994
22 & 23 Car. 2, c. 10, s. 1 - - -	655	8 & 9 Will. 3, c. 11, s. 6 - - -	983
22 & 23 Car. 2, c. 23 - - - - -	236	8 & 9 Will. 3, c. 20, s. 63 - - -	145
29 Car. 2, c. 7 - - - - -	1178	8 & 9 Will. 3, c. 23, s. 4 - - -	720
29 Car. 2, c. 7, s. 2 - - - - -	1177	8 & 9 Will. 3, c. 25 - - - - -	1314
29 Car. 2, c. 7, s. 6 - - - - -	5	8 & 9 Will. 3, c. 26, s. 1 - - -	737
31 Car. 2, c. 2 - - - - -	28, 36, 38	8 & 9 Will. 3, c. 26, s. 4 - - -	722
31 Car. 2, c. 2, ss. 2, 3, 4, 5 - - -	29	8 & 9 Will. 3, c. 27, s. 15 - - -	949
31 Car. 2, c. 2, s. 6 - 29, 38, 895		8 & 9 Will. 3, c. 30, s. 5 - - -	1313
31 Car. 2, c. 2, s. 7 - - - - -	29	8 & 9 Will. 3, c. 33 - - - - -	104
31 Car. 2, c. 2, ss. 9, 10, 11 - - -	30	9 & 10 Will. 3, c. 5 - - - - -	1268
31 Car. 2, c. 2, s. 12 - - 30, 127		9 & 10 Will. 3, c. 32 - - - - -	1172
31 Car. 2, c. 2, ss. 13, 14, 15, 16,		9 & 10 Will. 3, c. 41 - 506, 1219	
17, 18, 19, 20, 21 - - - - -	30	9 & 10 Will. 3, c. 41, s. 2 :	
1 Wm. & M. sess. 1, c. 21 - - -	317	1219, 1220	
1 Wm. & M. sess. 2, c. 2 : 21, 285		10 & 11 Will. 3, c. 17, ss. 1,	
1 Wm. & M. sess. 2, c. 2, s. 9 :		2, 4 - - - - -	1190
309, 340		10 & 11 Will. 3, c. 24, s. 14 - 1178	

	PAGE		PAGE
11 & 12 Will. 3, c. 7 :	549, 552, 1192	11 Geo. 1, c. 29 - -	596
11 & 12 Will. 3, c. 7, s. 8 -	548	12 Geo. 1, c. 29, s. 4 -	1045
11 & 12 Will. 3, c. 7, s. 9 -	549	2 Geo. 2, c. 24 - -	1201
11 & 12 Will. 3, c. 12, s. 1 -	55	2 Geo. 2, c. 25 - 666, 974,	988, 990, 998
11 & 12 Will. 3, c. 21, s. 13 -	1178	2 Geo. 2, c. 25, s. 2 -	419, 1044
12 & 13 Will. 3, c. 2 -	127, 340	2 Geo. 2, c. 25, s. 5 -	1044
1 Anne, st. 1, c. 18 :	1277, 1285, 1288	5 Geo. 2, c. 16 - -	1238
1 Anne, st. 1, c. 18, s. 4 -	1291	5 Geo. 2, c. 19, s. 2 -	99
1 Anne, st. 1, c. 18, s. 5 -	1290	5 Geo. 2, c. 30 - -	625, 628
1 Anne, st. 1, c. 18, s. 13 -	184	5 Geo. 2, c. 30, s. 16 -	978
1 Anne, st. 2, c. 9, s. 3 :	255, 990	7 Geo. 2, c. 19, s. 2 -	1209
1 Anne, st. 2, c. 17, s. 3 -	340	7 Geo. 2, c. 21 - -	439
2 & 3 Anne, c. 20, s. 34 -	316	8 Geo. 2, c. 6, s. 31 -	693, 698
4 Anne, c. 16 - -	149	9 Geo. 2, c. 5, s. 4 -	618
5 Anne, c. 6, s. 2 - -	939	9 Geo. 2, c. 18 - -	1044
5 Anne, c. 18 - -	693, 698	10 Geo. 2, c. 28, s. 6 -	102
6 Anne, c. 7, ss. 1, 2 -	339	12 Geo. 2, c. 13, s. 8 -	994
6 Anne, c. 31, s. 3 - -	1307	12 Geo. 2, c. 29 - -	1285
7 Anne, c. 21 - -	332	12 Geo. 2, c. 29, ss. 1, 14 -	1284
7 Anne, c. 21, s. 8 - -	317	13 Geo. 2, c. 18, s. 5 -	105
7 Anne, c. 21, s. 10 -	337	13 Geo. 2, c. 19 - -	1187, 1189
7 Anne, c. 21, s. 11 :	320, 321, 330, 331, 333	14 Geo. 2, c. 33 - -	1284
7 Anne, c. 25 - -	720	14 Geo. 2, c. 33, s. 1 -	1277
7 Anne, c. 30 - -	698	15 Geo. 2, c. 24 - -	939, 940
9 Anne, c. 14 - -	618, 1187	15 Geo. 2, c. 28 - -	726, 727
12 Anne, st. 1, c. 7 - -	474	15 Geo. 2, c. 28, ss. 2, 9 -	729
1 Geo. 1, st. 2, c. 5, s. 1 :	1098	15 Geo. 2, c. 30 - -	839
1 Geo. 1, st. 2, c. 5, s. 3 :	757, 1098	16 Geo. 2, c. 15 - -	264
1 Geo. 1, st. 2, ss. 4, 5 -	1098	16 Geo. 2, c. 31 - -	960
1 Geo. 1, st. 2, c. 25, ss. 1, 3, 4 - -	507	16 Geo. 2, c. 31, s. 1 -	960
4 Geo. 1, c. 11, s. 7 - -	532	16 Geo. 2, c. 31, s. 4 -	961
4 Geo. 1, c. 12 - -	596	17 Geo. 2, c. 5 - -	939
6 Geo. 1, c. 18 - -	1208	17 Geo. 2, c. 39, s. 3 -	337
6 Geo. 1, c. 18, s. 13 -	717	17 Geo. 2, c. 40, s. 10 -	1219
6 Geo. 1, c. 18, s. 18 -	1207	18 Geo. 2, c. 15 - -	160
6 Geo. 1, c. 19 - -	550	18 Geo. 2, c. 18, s. 1 -	990, 1044
6 Geo. 1, c. 19, s. 2 - -	899, 939	18 Geo. 2, c. 27 - -	479
8 Geo. 1, c. 6, s. 2 - -	995	18 Geo. 2, c. 30 - -	549, 552
8 Geo. 1, c. 24 - -	552	18 Geo. 2, c. 30, s. 3 -	549
9 Geo. 1, c. 8 - -	506	20 Geo. 2, c. 30 - -	336
9 Geo. 1, c. 8, ss. 3 4 -	1219	22 Geo. 2, c. 33, art. 5 -	1326
9 Geo. 1, c. 11 - -	405	22 Geo. 2, c. 33, s. 17 -	990
9 Geo. 1, c. 12 - -	152, 567	22 Geo. 2, c. 33, art. 26 -	1322
9 Geo. 1, c. 22, s. 1 :	562, 591, 753	22 Geo. 2, c. 33, arts. 34, 35 :	1326
9 Geo. 1, c. 28, s. 1 - -	962	22 Geo. 2, c. 46, s. 36 -	994
11 Geo. 1, c. 4, s. 6 - -	1316	23 Geo. 2, c. 11 - -	1012
11 Geo. 1, c. 18, s. 3 - -	990	23 Geo. 2, c. 11, s. 1 -	1000, 1004, 1034
11 Geo. 1, c. 22, ss. 2, 26 -	962	23 Geo. 2, c. 11, s. 2 -	1004
		23 Geo. 2, c. 13 - -	1212
		24 Geo. 2, c. 24, s. 8 -	4
		24 Geo. 2, c. 44 - -	4
		24 Geo. 2, c. 45 - -	481

Table of Statutes.

lxxiii

	PAGE		PAGE
25 Geo. 2, c. 29 - - -	886	32 Geo. 3, c. 60, ss. 2, 3, 4 -	1162
25 Geo. 2, c. 36, s. 2 -	150, 1184	33 Geo. 3, c. 39 - - -	639
25 Geo. 2, c. 36, s. 5 -	1182, 1183	33 Geo. 3, c. 52 : 1077, 1199, 1203	
25 Geo. 2, c. 36, ss. 6, 7, 8, 9 :	1183	33 Geo. 3, c. 54 - - -	937, 938
25 Geo. 2, c. 36, s. 10 : 99, 102, 1183		33 Geo. 3, c. 54, ss. 2, 15 -	938
25 Geo. 2, c. 37 - - -	786	33 Geo. 3, c. 64 - - -	1273
25 Geo. 2, c. 37, ss. 9, 10 -	963	34 Geo. 3, c. 61 - - -	1177, 1178
26 Geo. 2, c. 6 - - -	1300	35 Geo. 3, c. 55, s. 7 - - -	684
26 Geo. 2, c. 6, s. 1 - - -	1301	35 Geo. 3, c. 67 - - -	866
26 Geo. 2, c. 33 - - -	849, 857, 864	35 Geo. 3, c. 94 - - -	665
27 Geo. 2, c. 3, s. 1 - - -	26	36 Geo. 3, c. 7 - - -	309, 311, 314
30 Geo. 2, c. 24 - - -	516, 518, 531	36 Geo. 3, c. 7, s. 1 - - -	309
31 Geo. 2, c. 22, s. 77 - - -	642	36 Geo. 3, c. 60, s. 2 - - -	1209
32 Geo. 2, c. 25 - - -	549	37 Geo. 3, c. 70 - - -	1325, 1326
32 Geo. 2, c. 25, s. 20 - - -	550	37 Geo. 3, c. 70, s. 2 - - -	1325
32 Geo. 2, c. 28, s. 17 - - -	631	37 Geo. 3, c. 123 : 349, 1209, 1210	
2 Geo. 3, c. 15 - - -	1178	37 Geo. 3, c. 123, s. 1 - - -	347, 672
2 Geo. 3, c. 28, s. 12 - - -	1225	37 Geo. 3, c. 123, ss. 2, 3, 4,	
2 Geo. 3, c. 28, s. 13 - - -	1218	5, 6 - - -	348
2 Geo. 3, c. 28, ss. 14, 18 :	1225	38 Geo. 3, c. 52 - - -	57, 58, 60
3 Geo. 3, c. 4, s. 2 - - -	1044	38 Geo. 3, c. 52, ss. 1, 2 - - -	57
4 Geo. 3, c. 37, ss. 15, 16 -	717	38 Geo. 3, c. 52, ss. 3, 5, 6, 7,	
5 Geo. 3, c. 14 - - -	416	8, 9, 10, 11, 12 - - -	58
5 Geo. 3, c. 25 - - -	1231	38 Geo. 3, c. 78 - - -	1156, 1160
7 Geo. 3, c. 50, s. 1 - - -	1231	39 Geo. 3, c. 37 - - -	247, 551
8 Geo. 3, c. 15 - - -	264, 952	39 Geo. 3, c. 37, s. 1 - - -	54
9 Geo. 3, c. 29, s. 2 - - -	563	39 Geo. 3, c. 50 - - -	631
10 Geo. 3, c. 48 - - -	538	39 Geo. 3, c. 58 - - -	520
12 Geo. 3, c. 26, s. 7 - - -	1314	39 Geo. 3, c. 79 - - -	1084, 1210
12 Geo. 3, c. 48 - - -	703	39 Geo. 3, c. 79, s. 2 - - -	349, 1209
12 Geo. 3, c. 71 - - -	1205	39 Geo. 3, c. 79, s. 3 : 350,	
13 Geo. 3, c. 63 - - -	210	1084, 1209	
13 Geo. 3, c. 63, ss. 40, 44 :	210	39 Geo. 3, c. 79, s. 4 - - -	350, 1209
13 Geo. 3, c. 78 - - -	1286, 1292	39 Geo. 3, c. 79, s. 5 : 350,	
14 Geo. 3, c. 78, s. 84 - - -	1307	1084, 1209	
17 Geo. 3, c. 19, s. 25 - - -	672	39 Geo. 3, c. 79, ss. 6, 7 - - -	1209
17 Geo. 3, c. 56, s. 10 - - -	497	39 Geo. 3, c. 79, s. 8 - - -	350, 1209
17 Geo. 3, c. 56, s. 14 - - -	103	39 Geo. 3, c. 79, ss. 9, 10, 11 : 1209	
17 Geo. 3, c. 56, s. 22 - - -	102	39 Geo. 3, c. 79, s. 13 - - -	350
20 Geo. 3, c. 46 - - -	304	39 Geo. 3, c. 79, s. 22 - - -	1084
21 Geo. 3, c. 49 - - -	1178	39 Geo. 3, c. 93 - - -	337
21 Geo. 3, c. 53 - - -	853	39 & 40 Geo. 3, c. 56 - - -	1212
24 Geo. 3, sess. 2, c. 56, s. 17 -	304	39 & 40 Geo. 3, c. 67 - - -	311
25 Geo. 3, c. 36 - - -	1241	39 & 40 Geo. 3, c. 89 - - -	1225
26 Geo. 3, c. 71, ss. 3, 8 - - -	1237	39 & 40 Geo. 3, c. 89, s. 1 - - -	506
26 Geo. 3, c. 71, s. 9 - - -	1238	39 & 40 Geo. 3, c. 89, ss. 2, 4 : 1219	
26 Geo. 3, c. 106, s. 26 - - -	717	39 & 40 Geo. 3, c. 89, s. 5 :	
28 Geo. 3, c. 55 - - -	575	506, 1219	
28 Geo. 3, c. 55, ss. 2, 3 - - -	1219	39 & 40 Geo. 3, c. 89, s. 7 :	
30 Geo. 3, c. 47 - - -	284	506, 1219, 1220	
30 Geo. 3, c. 48, s. 1 - - -	337	39 & 40 Geo. 3, c. 89, ss. 8, 9,	
31 Geo. 3, c. 32, s. 3 - - -	1175	10, 11 - - -	1221
31 Geo. 3, c. 32, ss. 10, 14 -	1164	39 & 40 Geo. 3, c. 89, s. 12 : 1220, 1221	
32 Geo. 3, c. 56 - - -	619	39 & 40 Geo. 3, c. 89, ss. 13,	
32 Geo. 3, c. 60, s. 1 - - -	1161	14, 15, 16, 17, 18 - - -	1221

	PAGE		PAGE
39 & 40 Geo. 3, c. 89, ss. 19,		52 Geo. 3, c. 143, s. 7 -	703
20, 21, 24 -	1222	52 Geo. 3, c. 155 -	1166, 1167
39 & 40 Geo. 3, ss. 25, 26 -	1221	52 Geo. 3, c. 155, s. 12 -	1165
39 & 40 Geo. 3, s. 27 -	1222	52 Geo. 3, c. 156, ss. 1, 2, 3 :	359
39 & 40 Geo. 3, c. 93 -	231, 322	53 Geo. 3, c. 89, s. 6 -	1318
39 & 40 Geo. 3, c. 94 -	118, 249	53 Geo. 3, c. 151, s. 12 -	695
39 & 40 Geo. 3, c. 94, s. 1 -	250	53 Geo. 3, c. 160 -	1172
39 & 40 Geo. 3, c. 99 -	684	53 Geo. 3, c. 162 -	939
39 & 40 Geo. 3, c. 106 -	1210	54 Geo. 3, c. 60 -	506, 1222
41 Geo. 3, c. 109, s. 43 -	990	54 Geo. 3, c. 90 -	1278, 1285
42 Geo. 3, c. 81, s. 1 -	1231	54 Geo. 3, c. 90, s. 1 -	1277
42 Geo. 3, c. 85 -	210, 611, 1199	54 Geo. 3, c. 90, s. 2 -	1284
42 Geo. 3, c. 85, s. 1 -	55	54 Geo. 3, c. 96 -	1212
43 Geo. 3, c. 58 : 562, 664,		54 Geo. 3, c. 133, s. 10 -	717
788, 793, 869		54 Geo. 3, c. 144, s. 11 -	717
43 Geo. 3, c. 59 : 1273, 1281,		54 Geo. 3, c. 145 -	299, 300
1285, 1286		54 Geo. 3, c. 146, s. 2 -	337
43 Geo. 3, c. 59, ss. 2, 3 -	1284	55 Geo. 3, c. 50 -	278
43 Geo. 3, c. 59, s. 5 : 1277, 1292		55 Geo. 3, c. 50, s. 9 -	1077
43 Geo. 3, c. 59, s. 7 : 1278, 1284		55 Geo. 3, c. 50, s. 13 -	1078, 1080
43 Geo. 3, c. 59, ss. 98, 111 : 1292		55 Geo. 3, c. 51, s. 1 -	941
43 Geo. 3, c. 99, s. 19 -	612	55 Geo. 3, c. 56, s. 9 -	1080
43 Geo. 3, c. 99, s. 33 -	815	55 Geo. 3, c. 108, s. 127 -	1218
44 Geo. 3, c. 98 -	630	55 Geo. 3, c. 127 -	1222
45 Geo. 3, c. 10, s. 9 -	1301	55 Geo. 3, c. 137, s. 1 -	92
45 Geo. 3, c. 92, s. 3 -	254	55 Geo. 3, c. 143 -	1285
46 Geo. 3, c. 37 -	227	55 Geo. 3, c. 143, ss. 1, 2, 3,	
46 Geo. 3, c. 54 -	550, 783, 1192	4, 5 -	1284
46 Geo. 3, c. 76, s. 9 -	708	55 Geo. 3, c. 156 -	304
48 Geo. 3, c. 58, s. 4 -	47	55 Geo. 3, c. 184 -	420 703, 704
48 Geo. 3, c. 75 -	674	55 Geo. 3, c. 184, s. 7 -	703,
48 Geo. 3, c. 149, s. 16 -	649	704, 705, 706	
49 Geo. 3, c. 109 -	717	55 Geo. 3, c. 184, s. 8 -	703
49 Geo. 3, c. 123, s. 35 -	612	55 Geo. 3, c. 184, s. 23 -	649
49 Geo. 3, c. 125 -	938	55 Geo. 3, c. 185 -	704
49 Geo. 3, c. 126, ss. 1, 2, 3 -	1197	55 Geo. 3, c. 185, s. 7 -	705
49 Geo. 3, c. 126, ss. 4, 5, 7,		55 Geo. 3, c. 194 -	1132
9, 10, 11, 12, 13 -	1198	56 Geo. 3, c. 27, ss. 7, 13 -	955
49 Geo. 3, c. 126, s. 14 -	1199	56 Geo. 3, c. 100 -	28, 30, 31, 38
50 Geo. 3, c. 59, s. 2 -	618	56 Geo. 3, c. 100, ss. 1, 2 -	30
50 Geo. 3, c. 105, s. 9 -	619	56 Geo. 3, c. 100, s. 3 -	30, 897
51 Geo. 3, c. 100, s. 1 -	60, 114	56 Geo. 3, c. 100, ss. 4, 5, 6 -	31
51 Geo. 3, c. 100, s. 2 -	58	56 Geo. 3, c. 108, s. 127 -	1219
51 Geo. 3, c. 143 -	939	56 Geo. 3, c. 138 -	282
52 Geo. 3, c. 12 -	506, 1222	56 Geo. 3, c. 138, s. 2 -	506
52 Geo. 3, c. 13, s. 30 -	991	57 Geo. 3, c. 6 -	310
52 Geo. 3, c. 63 -	513	57 Geo. 3, c. 6, s. 4 -	321
52 Geo. 3, c. 104 -	350, 1210	57 Geo. 3, c. 7 -	1325
52 Geo. 3, c. 104, ss. 1, 4, 8 -	347	57 Geo. 3, c. 19 -	350
52 Geo. 3, c. 104, s. 7 -	348	57 Geo. 3, c. 19, s. 25 -	350, 1210
52 Geo. 3, c. 110 -	1278, 1285	57 Geo. 3, c. 19, ss. 26, 27 : 1084,	
52 Geo. 3, c. 110, ss. 2, 3, 4, 5 : 1284		1210	
52 Geo. 3, c. 143 -	1217, 1232	57 Geo. 3, c. 19, s. 28 -	350
52 Geo. 3, c. 143, s. 3 -	1227	57 Geo. 3, c. 53 -	783, 784
52 Geo. 3, c. 143, s. 6 -	708	57 Geo. 3, c. 90 -	909

Table of Statutes.

lxxv

	PAGE		PAGE
58 Geo. 3, c. 70, s. 4 -	265	4 Geo. 4, c. 76, s. 9 -	850
58 Geo. 3, c. 70, s. 7 -	1183	4 Geo. 4, c. 76, s. 10 -	852
59 Geo. 3, c. 12, s. 7 -	486	4 Geo. 4, c. 76, s. 11 -	853
59 Geo. 3, c. 44 -	783	4 Geo. 4, c. 76, ss. 12, 13 -	850
59 Geo. 3, c. 69, s. 2 -	356	4 Geo. 4, c. 76, ss. 14, 15 -	853
59 Geo. 3, c. 69, s. 7 -	357	4 Geo. 4, c. 76, ss. 16, 17 -	857
59 Geo. 3, c. 69, ss. 8, 9 -	358	4 Geo. 4, c. 76, ss. 18, 19, 20 -	853
60 Geo. 3, c. 1, s. 1 -	353	4 Geo. 4, c. 76, s. 21 -	1179
60 Geo. 3 & 1 Geo. 4, c. 4 -	134	4 Geo. 4, c. 76, s. 22 -	850, 858
60 Geo. 3 & 1 Geo. 4, c. 4, ss.		4 Geo. 4, c. 76, s. 26 -	850, 853
1, 2 -	116	4 Geo. 4, c. 76, ss. 30, 31 -	849
60 Geo. 3 & 1 Geo. 4, c. 4, s. 4 -	100	4 Geo. 4, c. 76, s. 33 -	853
60 Geo. 3 & 1 Geo. 4, c. 4, s. 8 -	144, 150	4 Geo. 4, c. 91 -	859
60 Geo. 3 & 1 Geo. 4, c. 4, s. 9 -	162	4 Geo. 4, c. 95 -	1284
60 Geo. 3 & 1 Geo. 4, c. 4, s.		4 Geo. 4, c. 95, s. 68 -	1255
10 -	134	4 Geo. 4, c. 95, s. 84 -	1268
60 Geo. 3 & 1 Geo. 4, c. 8 -	1174	5 Geo. 4, c. 32 -	850
60 Geo. 3 & 1 Geo. 4, c. 8, s. 5 -	122	5 Geo. 4, c. 53, s. 22 -	641
60 Geo. 3 & 1 Geo. 4, c. 9 -	1156	5 Geo. 4, c. 83, s. 4 -	1186
60 Geo. 3 & 1 Geo. 4, c. 14, ss.		5 Geo. 4, c. 84 -	265, 304, 961
1, 2, 3 -	26	5 Geo. 4, c. 84, s. 1 -	956
1 Geo. 4, c. 56 -	13	5 Geo. 4, c. 84, ss. 2, 5, 13 -	304
1 Geo. 4, c. 57 -	284	5 Geo. 4, c. 84, s. 17 -	32, 304
1 Geo. 4, c. 102 -	91	5 Geo. 4, c. 84, s. 18 -	304
1 Geo. 4, c. 117 -	287	5 Geo. 4, c. 84, s. 19 -	951
1 & 2 Geo. 4, c. 41, s. 2 -	1246	5 Geo. 4, c. 84, s. 22 -	951, 955
1 & 2 Geo. 4, c. 41, s. 3 -	1244	5 Geo. 4, c. 84, s. 23 -	952
1 & 2 Geo. 4, c. 88, s. 1 -	955	5 Geo. 4, c. 84, s. 26 -	300
3 Geo. 4, c. 10, ss. 1, 2 -	41	5 Geo. 4, c. 84, s. 29 -	264
3 Geo. 4, c. 24 -	538	5 Geo. 4, c. 97 -	1212
3 Geo. 4, c. 86 -	709	5 Geo. 4, c. 98 -	548
3 Geo. 4, c. 114 -	283, 1043,	5 Geo. 4, c. 113, ss. 2, 9, 10 -	1191
1071, 1097, 1186, 1190, 1194		5 Geo. 4, c. 113, ss. 48, 49, 50 -	1192
3 Geo. 4, c. 126 -	1284	6 Geo. 4, c. 50 -	153
3 Geo. 4, c. 126, s. 59 -	1268	6 Geo. 4, c. 50, s. 1 -	42, 159
3 Geo. 4, c. 126, ss. 97, 99 -	1298	6 Geo. 4, c. 50, s. 2 -	153
3 Geo. 4, c. 126, s. 110 -	1252	6 Geo. 4, c. 50, s. 3 -	153, 154, 160
3 Geo. 4, c. 126, s. 137 -	1268	6 Geo. 4, c. 50, ss. 4, 25 -	162
4 Geo. 4, c. 16 -	548	6 Geo. 4, c. 50, s. 21 -	321, 331
4 Geo. 4, c. 24, s. 72 -	507	6 Geo. 4, c. 50, s. 27 -	153, 159
4 Geo. 4, c. 48, ss. 1, 2 -	282	6 Geo. 4, c. 50, s. 29 -	153, 154, 335
4 Geo. 4, c. 53 -	1218	6 Geo. 4, c. 50, ss. 31, 32 -	162
4 Geo. 4, c. 54, s. 1 -	955	6 Geo. 4, c. 50, s. 34 -	163
4 Geo. 4, c. 54, s. 2 -	591	6 Geo. 4, c. 50, s. 37 -	158
4 Geo. 4, c. 64 -	26, 553,	6 Geo. 4, c. 50, ss. 47, 50 -	160
940, 960, 961		6 Geo. 4, c. 50, s. 61 -	927
4 Geo. 4, c. 64, s. 1 -	26	6 Geo. 4, c. 59, s. 29 -	155
4 Geo. 4, c. 64, s. 43 -	958, 960	6 Geo. 4, c. 78, s. 17 -	1300
4 Geo. 4, c. 64, s. 44 -	958, 961	6 Geo. 4, c. 78, s. 21 -	708, 1301
4 Geo. 4, c. 64, s. 48 -	59	6 Geo. 4, c. 78, s. 25 -	708
4 Geo. 4, c. 76 -	858, 975	6 Geo. 4, c. 92 -	864
4 Geo. 4, c. 76, ss. 3, 4, 5, 6 -	850	6 Geo. 4, c. 105 -	1197
4 Geo. 4, c. 76, s. 7 -	850, 851	6 Geo. 4, c. 108 -	1215
4 Geo. 4, c. 76, s. 8 -	858	6 Geo. 4, c. 108, s. 40 -	1217
		6 Geo. 4, c. 108, s. 52 -	85, 1213

	PAGE		PAGE
6 Geo. 4, c. 108, s. 59 -	- 813	7 & 8 Geo. 4, c. 28, s. 10 -	282
6 Geo. 4, c. 108, s. 64 -	- 1216	7 & 8 Geo. 4, c. 28, s. 11 -	244
6 Geo. 4, c. 119 -	- 704	7 & 8 Geo. 4, c. 28, s. 13 -	127
6 Geo. 4, c. 125, s. 70 -	- 150	7 & 8 Geo. 4, c. 29 -	326,
6 Geo. 4, c. 126, s. 2 -	- 807	362, 396, 481, 520, 526, 532	
6 Geo. 4, c. 129 -	- 1057	7 & 8 Geo. 4, c. 29, s. 5 -	420
6 Geo. 4, c. 129, s. 3 -	- 1049	7 & 8 Geo. 4, c. 29, s. 7 -	446
6 Geo. 4, c. 129, s. 4 -	- 1048	7 & 8 Geo. 4, c. 29, s. 12 -	475
6 Geo. 4, c. 129, s. 5 -	- 1049	7 & 8 Geo. 4, c. 29, s. 13 : 458, 559	
7 Geo. 4, c. 16, s. 25 -	- 620	7 & 8 Geo. 4, c. 29, s. 19 -	406
7 Geo. 4, c. 28, s. 6 -	- 469	7 & 8 Geo. 4, c. 29, s. 25 -	266
7 Geo. 4, c. 28, ss. 8, 9 : 708, 714		7 & 8 Geo. 4, c. 29, ss. 34-38 : 236	
7 Geo. 4, c. 38 -	- 551	7 & 8 Geo. 4, c. 29, s. 44 : 451, 563	
7 Geo. 4, c. 46 -	- 650	7 & 8 Geo. 4, c. 29, s. 47 -	547
7 Geo. 4, c. 46, s. 4 -	- 653	7 & 8 Geo. 4, c. 29, s. 48 -	95
7 Geo. 4, c. 46, s. 9 -	- 584	7 & 8 Geo. 4, c. 29, s. 53 : 102, 516, 518	
7 Geo. 4, c. 57, s. 70 -	- 968	7 & 8 Geo. 4, c. 29, s. 54 -	537
7 Geo. 4, c. 57, s. 71 - 968, 990		7 & 8 Geo. 4, c. 29, s. 57 -	299
7 Geo. 4, c. 62, s. 31 -	- 257	7 & 8 Geo. 4, c. 29, s. 60 -	538
7 Geo. 4, c. 64, s. 2 - 19, 199		7 & 8 Geo. 4, c. 29, s. 63 -	7
7 Geo. 4, c. 64, s. 3 -	- 199	7 & 8 Geo. 4, c. 29, s. 69 -	127
7 Geo. 4, c. 64, s. 4 -	- 884	7 & 8 Geo. 4, c. 31, s. 2 -	584
7 Geo. 4, c. 64, s. 9 -	- 597	7 & 8 Geo. 4, c. 31, s. 3 -	152
7 Geo. 4, c. 64, s. 11 -	- 654	7 & 8 Geo. 4, c. 33, ss. 82, 84, 85 -	100
7 Geo. 4, c. 64, s. 12 - 56, 398, 467, 536, 782		7 & 8 Geo. 4, c. 40 -	564
7 Geo. 4, c. 64, s. 13 -	- 59	7 & 8 Geo. 4, c. 53, s. 31 -	991
7 Geo. 4, c. 64, s. 14 - 91, 568		7 & 8 Geo. 4, c. 53, ss. 40, 43 -	813
7 Geo. 4, c. 64, s. 15 -	- 91	7 & 8 Geo. 4, c. 53, s. 44 -	619
7 Geo. 4, c. 64, ss. 16, 17, 18 : 92		7 & 8 Geo. 4, c. 53, ss. 82, 84 -	1073
7 Geo. 4, c. 64, s. 19 - 68, 71, 126		7 & 8 Geo. 4, c. 64 -	214
7 Geo. 4, c. 64, s. 20 : 71, 911, 1265		7 & 8 Geo. 4, c. 64, s. 15 -	426
7 Geo. 4, c. 64, s. 21 - 72, 86, 133, 163, 268, 531		7 & 8 Geo. 4, c. 64, s. 22 -	275
7 Geo. 4, c. 64, s. 22 - 52, 782		7 & 8 Geo. 4, c. 75, s. 38 -	1242
7 Geo. 4, c. 64, s. 23 - 109, 1041, 1097		7 & 8 Geo. 4, c. 85, s. 38 -	991
7 Geo. 4, c. 64, s. 28 - 264, 467		9 Geo. 4, c. 14, s. 16 -	1051
7 Geo. 4, c. 64, s. 29 -	- 264	9 Geo. 4, c. 15 - 66, 238, 1005	
7 Geo. 4, c. 64, s. 30 -	- 265	9 Geo. 4, c. 16, s. 38 -	712
7 Geo. 4, c. 64, s. 31 -	- 23	9 Geo. 4, c. 18 -	703
7 Geo. 4, c. 84, s. 29 -	- 264	9 Geo. 4, c. 18, s. 35 - 705, 706	
7 & 8 Geo. 4, c. 27, s. 1 - 1218		9 Geo. 4, c. 31 - 15, 132, 743, 784, 790, 792, 795, 832, 837, 838, 842, 1101	
7 & 8 Geo. 4, c. 27, s. 17 - 1284		9 Geo. 4, c. 31, s. 7 -	784
7 & 8 Geo. 4, c. 27, s. 27 - 955		9 Geo. 4, c. 31, s. 8 -	782
7 & 8 Geo. 4, c. 28 - 118, 717		9 Geo. 4, c. 31, s. 9 - 260, 780	
7 & 8 Geo. 4, c. 28, s. 1 : 117, 125		9 Geo. 4, c. 31, s. 11 - 787, 795	
7 & 8 Geo. 4, c. 28, s. 2 - 118		9 Geo. 4, c. 31, s. 13 -	867
7 & 8 Geo. 4, c. 28, s. 3 - 153		9 Geo. 4, c. 31, s. 16 -	831
7 & 8 Geo. 4, c. 28, s. 4 - 128		9 Geo. 4, c. 31, s. 17 -	841
7 & 8 Geo. 4, c. 28, s. 5 - 242		9 Geo. 4, c. 31, s. 27 -	829
7 & 8 Geo. 4, c. 28, s. 6 - 97		9 Geo. 4, c. 32 -	178
7 & 8 Geo. 4, c. 28, s. 7 - 281			
7 & 8 Geo. 4, c. 28, s. 9 : 710, 713, 717, 1193			

Tables of Statutes.

lxxvii

	PAGE		PAGE
9 Geo. 4, c. 32, s. 1 - -	994	1 Will. 4, c. 70, s. 1 - -	292
9 Geo. 4, c. 32, s. 2 -	184, 678	1 Will. 4, c. 70, s. 9 : 67, 267, 287	
9 Geo. 4, c. 32, s. 3 -	127	1 Will. 4, c. 70, s. 19 -	54, 782
9 Geo. 4, c. 69 : 14, 15, 907,		1 & 2 Will. 4, c. 32 -	184
908, 911		1 & 2 Will. 4, c. 32, s. 30 -	907
9 Geo. 4, c. 69, s. 1 -	14, 903	1 & 2 Will. 4, c. 32, s. 31 -	15
9 Geo. 4, c. 69, s. 2 : 14, 439,		1 & 2 Will. 4, c. 37, ss. 9, 10,	
904, 911, 912		20, 21 - - -	1211
9 Geo. 4, c. 69, ss. 3, 4, 5, 6,		1 & 2 Will. 4, c. 41 -	932, 1086
7, 8 - - -	904	1 & 2 Will. 4, c. 60, s. 11 -	1320
9 Geo. 4, c. 69, s. 9 -	14, 905	1 & 2 Will. 4, c. 75, s. 12 -	1222
9 Geo. 4, c. 69, ss. 10, 11, 12,		2 Will. 4, c. 1, s. 1 -	713
13 - - -	905	2 Will. 4, c. 4, s. 47 -	1233
9 Geo. 4, c. 74, s. 56 -	63	2 Will. 4, c. 10, s. 3 -	1301
10 Geo. 4, c. 7, s. 23 -	343	2 Will. 4, c. 16, s. 3 -	706, 707
10 Geo. 4, c. 7, ss. 29, 31, 33,		2 Will. 4, c. 16, s. 4 -	707
34, 36 - - -	1170	2 Will. 4, c. 16, s. 15 -	619
10 Geo. 4, c. 24, s. 41 -	709	2 Will. 4, c. 32, s. 42 -	236
10 Geo. 4, c. 44 -	110	2 Will. 4, c. 34 -	719, 722
10 Geo. 4, c. 50, s. 124 -	713	2 Will. 4, c. 40, s. 33 -	716
11 Geo. 4, c. 20, s. 89 -	620	2 Will. 4, c. 40, s. 35 -	709
11 Geo. 4 & 1 Will. 4, c. 20,		2 Will. 4, c. 40, ss. 45, 46 -	991
ss. 83, 84, 85, 86 -	709	2 Will. 4, c. 45, s. 58 -	1318
11 Geo. 4 & 1 Will. 4, c. 20,		2 Will. 4, c. 46, s. 33 -	657
s. 88 - - -	709, 710	2 Will. 4, c. 53, s. 49 -	710, 712
11 Geo. 4 & 1 Will. 4, c. 20,		2 Will. 4, c. 53, s. 50 -	710
ss. 89, 90 - - -	991	2 Will. 4, c. 59, s. 19 -	709
11 Geo. 4 & 1 Will. 4, c. 66 : 682		2 Will. 4, c. 106, s. 4 -	991
11 Geo. 4 & 1 Will. 4, c. 70,		2 & 3 Will. 4, c. 34, s. 2 -	733
s. 9 - - -	283	2 & 3 Will. 4, c. 34, ss. 3, 4 : 734	
11 Geo. 4 & 1 Will. 4, c. 73 : 1174		2 & 3 Will. 4, c. 34, s. 10 -	738
11 Geo. 4 & 1 Will. 4, c. 73,		2 & 3 Will. 4, c. 62, s. 2 -	284
ss. 2, 3 - - -	1156	2 & 3 Will. 4, c. 64 -	59
1 Will. 4, c. 3, s. 2 -	160	2 & 3 Will. 4, c. 75 -	1196
1 Will. 4, c. 4 -	984	2 & 3 Will. 4, c. 75, s. 16 -	289
1 Will. 4, c. 22 -	145, 210	2 & 3 Will. 4, c. 75, s. 18 -	1315
1 Will. 4, c. 25 -	210	2 & 3 Will. 4, c. 106, s. 3 -	712
1 Will. 4, c. 32 -	913	2 & 3 Will. 4, c. 125, s. 16 : 992	
1 Will. 4, c. 39 -	284	2 & 3 Will. 4, c. 125, s. 64 : 711	
1 Will. 4, c. 39, s. 7 -	304	3 Will. 4, c. 14 -	713
1 Will. 4, c. 64, s. 15 -	1012	3 Will. 4, c. 36 -	1071
1 Will. 4, c. 66 : 647, 653,		2 Will. 4, c. 41, s. 9 -	992
675, 677, 689, 702, 713		3 Will. 4, c. 42, s. 39 -	1268
1 Will. 4, c. 66, s. 1 -	717	3 Will. 4, c. 49, s. 1 -	178
1 Will. 4, c. 66, s. 2 -	637	3 Will. 4, c. 51, s. 29 -	991
1 Will. 4, c. 66, s. 3 -	671	3 Will. 4, c. 53 -	37, 908
1 Will. 4, c. 66, s. 4 : 664,		3 & 4 Will. 4, c. 53, s. 8 -	757
665, 673, 717		3 & 4 Will. 4, c. 53, ss. 38, 61 : 1217	
1 Will. 4, c. 66, s. 10 : 684,		3 & 4 Will. 4, c. 65, s. 16 -	993
685, 709, 717		3 & 4 Will. 4, c. 73, s. 12 -	1193
1 Will. 4, c. 66, s. 19 -	653	3 & 4 Will. 4, c. 73, s. 42 -	992
1 Will. 4, c. 66, s. 20 -	697	3 & 4 Will. 4, c. 75 -	1301
1 Will. 4, c. 66, s. 24 -	86	3 & 4 Will. 4, c. 82 -	178
1 Will. 4, c. 66, s. 26 -	717	3 & 4 Will. 4, c. 91 -	152
1 Will. 4, c. 70 -	783	3 & 4 Will. 4, c. 91, s. 50 -	154

	PAGE
3 & 4 Will. 4, c. 94, s. 41 -	931
3 & 4 Will. 4, c. 97, ss. 11, 15, 24 -	704
3 & 4 Will. 4, c. 97, s. 12:	704, 706
3 & 4 Will. 4, c. 106, s. 10:	300, 337
3 & 4 Will. 4, c. 106, s. 11:	338
4 & 5 Will. 4, c. 23, s. 3 -	338
4 & 5 Will. 4, c. 24 -	709
4 & 5 Will. 4, c. 35, s. 8 -	818
4 & 5 Will. 4, c. 36: 23, 40, 62, 552	
4 & 5 Will. 4, c. 36, s. 3 -	63
4 & 5 Will. 4, c. 36, s. 16:	34, 100, 102, 111, 1183
4 & 5 Will. 4, c. 36, s. 22:	550, 597, 783, 1193
4 & 5 Will. 4, c. 36, s. 28 -	60
4 & 5 Will. 4, c. 36, ss. 48, 49, 50 -	1192
4 & 5 Will. 4, c. 67 -	951, 952
4 & 5 Will. 4, c. 76 -	813
4 & 5 Will. 4, c. 76, s. 1 -	612
4 & 5 Will. 4, c. 76, s. 2 -	992
4 & 5 Will. 4, c. 76, s. 13:	992, 1316
4 & 5 Will. 4, c. 76, s. 97:	145
4 & 5 Will. 4, c. 76, s. 98:	936, 942
4 & 5 Will. 4, c. 76, s. 109:	992
5 Will. 4, c. 1, ss. 1, 2 -	304
5 Will. 4, c. 8 -	995
5 & 6 Will. 4, c. 20, s. 21:	184
5 & 6 Will. 4, c. 33 -	111, 1128
5 & 6 Will. 4, c. 33, s. 1:	99, 1166, 1270, 1290
5 & 6 Will. 4, c. 33, s. 2:	103, 104
5 & 6 Will. 4, c. 33, s. 3 -	20
5 & 6 Will. 4, c. 35, s. 7 -	707
5 & 6 Will. 4, c. 45, s. 12 -	712
5 & 6 Will. 4, c. 50 -	1285
5 & 6 Will. 4, c. 50, s. 5:	1286, 1292
5 & 6 Will. 4, c. 50, s. 20:	1259
5 & 6 Will. 4, c. 50, s. 23:	1252, 1257
5 & 6 Will. 4, c. 50, ss. 51, 52, 55 -	1298
5 & 6 Will. 4, c. 50, ss. 58, 59, 60, 61 -	1254
5 & 6 Will. 4, c. 50, s. 62 -	1255
5 & 6 Will. 4, c. 50, ss. 80, 82, 85, 86 -	1259
5 & 6 Will. 4, c. 50, s. 92:	1254, 1259

	PAGE
5 & 6 Will. 4, c. 50, s. 93 -	1255
5 & 6 Will. 4, c. 50, s. 94 -	1260
5 & 6 Will. 4, c. 50, s. 95:	1260, 1269, 1287, 1290, 1292
5 & 6 Will. 4, c. 50, s. 96 -	1272
5 & 6 Will. 4, c. 50, s. 97 -	1292
5 & 6 Will. 4, c. 50, s. 98:	163, 1268
5 & 6 Will. 4, c. 50, s. 99 -	1286
5 & 6 Will. 4, c. 50, s. 100:	184, 1268, 1290
5 & 6 Will. 4, c. 50, s. 107 -	1290
5 & 6 Will. 4, c. 51 -	712
5 & 6 Will. 4, c. 54, s. 2:	851, 859
5 & 6 Will. 4, c. 59, s. 3 -	1094
5 & 6 Will. 4, c. 62, s. 2:	991, 995
5 & 6 Will. 4, c. 62, ss. 3, 4:	995
5 & 6 Will. 4, c. 62, s. 5:	991, 997
5 & 6 Will. 4, c. 62, ss. 6, 7:	997
5 & 6 Will. 4, c. 62, s. 8 -	995
5 & 6 Will. 4, c. 62, ss. 9, 10, 11, 12 -	996
5 & 6 Will. 4, c. 62, s. 13:	933, 983, 997, 1084, 1137
5 & 6 Will. 4, c. 62, s. 14, 15, 16, 17, 18 -	996
5 & 6 Will. 4, c. 62, ss. 19, 20 -	997
5 & 6 Will. 4, c. 62, s. 21:	991, 997
5 & 6 Will. 4, c. 69 -	91
5 & 6 Will. 4, c. 69, s. 7 -	93
5 & 6 Will. 4, c. 71, ss. 10, 93 -	992
5 & 6 Will. 4, c. 76 -	26, 59
5 & 6 Will. 4, c. 76, s. 21 -	990
5 & 6 Will. 4, c. 76, s. 34 -	1320
5 & 6 Will. 4, c. 76, s. 109 -	58
5 & 6 Will. 4, c. 82, s. 1 -	695
5 & 6 Will. 4, c. 85, s. 25 -	865
6 Will. 4, c. 5, s. 8 -	992
6 Will. 4, c. 20, s. 3 -	1169
6 & 7 Will. 4, c. 11, s. 8 -	1314
6 & 7 Will. 4, c. 20, s. 3 -	620
6 & 7 Will. 4, c. 37, s. 22 -	992
6 & 7 Will. 4, c. 52, s. 8 -	610
6 & 7 Will. 4, c. 65, s. 9:	184, 1024
6 & 7 Will. 4, c. 71, s. 93:	1317
6 & 7 Will. 4, c. 76 -	1157
6 & 7 Will. 4, c. 76, s. 1 -	704
6 & 7 Will. 4, c. 76, s. 6:	1155, 1318

Table of Statutes.

lxxix

	PAGE
6 & 7 Will. 4, c. 76, s. 7	- 1156
6 & 7 Will. 4, c. 76, s. 8 :	140, 1156
6 & 7 Will. 4, ss. 9, 10, 12,	13, 21 - - - 1156
6 & 7 Will. 4, c. 85 : 849, 852,	853, 858, 864, 1305
6 & 7 Will. 4, c. 85, s. 1 : 849,	853
6 & 7 Will. 4, c. 85, s. 2	- 849
6 & 7 Will. 4, c. 85, ss. 4, 6 :	854
6 & 7 Will. 4, c. 85, s. 7 :	854, 855
6 & 7 Will. 4, c. 85, s. 9	- 855
6 & 7 Will. 4, c. 85, s. 10	- 857
6 & 7 Will. 4, c. 85, ss. 11,	12, 13 - - - 855
6 & 7 Will. 4, c. 85, s. 14 :	854, 855
6 & 7 Will. 4, c. 85, ss. 15,	16, 18 - - - 855
6 & 7 Will. 4, c. 85, ss. 19,	20, 21 - - - 856
6 & 7 Will. 4, c. 85, s. 25 :	854, 856
6 & 7 Will. 4, c. 85, s. 26 : 852,	853
6 & 7 Will. 4, c. 85, ss. 28,	29, 30, 31, 32, 33, 34 - 852
6 & 7 Will. 4, c. 85, s. 35	- 857
6 & 7 Will. 4, c. 85, s. 36	- 856
6 & 7 Will. 4, c. 85, s. 37	- 855
6 & 7 Will. 4, c. 85, s. 38	- 992
6 & 7 Will. 4, c. 85, s. 39	- 1179
6 & 7 Will. 4, c. 85, ss. 42, 43 :	858
6 & 7 Will. 4, c. 85, s. 45	- 849
6 & 7 Will. 4, c. 86, s. 20	- 1305
6 & 7 Will. 4, c. 86, s. 41 :	697, 1169
6 & 7 Will. 4, c. 86, s. 42	- 1305
6 & 7 Will. 4, c. 86, s. 43 :	697, 1305
6 & 7 Will. 4, c. 89	- 886
6 & 7 Will. 4, c. 89, s. 1	- 885
6 & 7 Will. 4, c. 89, ss. 2, 3, 4 :	886
6 & 7 Will. 4, c. 89, s. 5	- 887
6 & 7 Will. 4, c. 89, s. 6	- 886
6 & 7 Will. 4, c. 89, s. 7	- 885
6 & 7 Will. 4, c. 96, s. 6	- 107
6 & 7 Will. 4, c. 114	- 167,
	168, 214, 901
6 & 7 Will. 4, c. 114, s. 1	- 166
6 & 7 Will. 4, c. 114, s. 2	- 19
6 & 7 Will. 4, c. 114, s. 3 :	17, 166, 167, 245, 334
6 & 7 Will. 4, c. 114, s. 4 :	17, 167
7 Will. 4, c. 1	- - - 854

	PAGE
7 Will. 4, c. 5	- - - 1174
7 Will. 4 & 1 Vict. c. 88, ss. 1,	2, 3, 4 - - - 552
7 Will. 4 & 1 Vict. c. 88, ss. 5,	6, 7 - - - 553
1 Vict. c. 14	- - - 249
1 Vict. c. 22, s. 1	- - - 854
1 Vict. c. 22, s. 5	- - - 855
1 Vict. c. 22, ss. 9, 10, 11	- 857
1 Vict. c. 22, s. 23	- - - 856
1 Vict. c. 22, s. 24	- - - 854
1 Vict. c. 22, ss. 32, 33	- 852
1 Vict. c. 22, s. 35	- - - 856
1 Vict. c. 22, s. 36	- - - 849
1 Vict. c. 23	- - - 282, 1043
1 Vict. c. 26	- - - 180
1 Vict. c. 26, s. 9	- - - 657
1 Vict. c. 32	- - - 1231
1 Vict. c. 36, s. 25	- - - 1232
1 Vict. c. 36, s. 26	- 1226,
	1229, 1230, 1231, 1233, 1235
1 Vict. c. 36, ss. 27, 28, 29 :	1226, 1227, 1228, 1230
1 Vict. c. 36, ss. 30, 31	- 1233
1 Vict. c. 36, s. 32	- 507, 1232
1 Vict. c. 36, s. 33	- - - 714
1 Vict. c. 36, s. 35	- 715, 1230
1 Vict. c. 36, s. 36	- - - 1195
1 Vict. c. 36, s. 37	- 715,
	1229, 1234
1 Vict. c. 36, s. 38	- 1226, 1230
1 Vict. c. 36, s. 39	- 715,
	1229, 1234
1 Vict. c. 36, s. 40	- 1229,
	1230, 1231, 1234
1 Vict. c. 36, s. 41	- 714,
	1230, 1235
1 Vict. c. 36, s. 42	- 507,
	715, 1230, 1235
1 Vict. c. 44	- - - 871
1 Vict. c. 44, ss. 1, 2	- - - 872
1 Vict. c. 68, ss. 1, 2	- - - 886
1 Vict. c. 77, ss. 1, 2, 3, 4, 5,	6, 7, 8, 9 - - - 303
1 Vict. c. 78, s. 44	- - - 111
1 Vict. c. 80	- - - 1314
1 Vict. c. 84, s. 1	- 712, 717
1 Vict. c. 84, s. 3	- - - 717
1 Vict. c. 85	- 11, 75,
	175, 291, 798
1 Vict. c. 85, s. 1	- - - 130
1 Vict. c. 85, s. 2	- 69,
	81, 787, 788, 791, 794
1 Vict. c. 85, s. 3	- 787,
	788, 789, 790

	PAGE		PAGE
1 Vict. c. 85, ss. 4, 5 -	787	2 & 3 Vict. c. 87, s. 71	993
1 Vict. c. 85, s. 6 -	790	2 & 3 Vict. c. 93 -	492
1 Vict. c. 85, s. 10 -	552	2 & 3 Vict. c. 94, s. 50	12
1 Vict. c. 85, s. 11: 437, 441, 786, 800, 801, 831, 833, 844, 874		3 Vict. c. 5 -	1187
1 Vict. c. 86, s. 2 -	450	3 Vict. c. 9, ss. 1, 2 -	1138
1 Vict. c. 86, s. 10 -	552	3 Vict. c. 9, ss. 3, 4 -	1139
1 Vict. c. 87, s. 2 -	439	3 Vict. c. 97 -	810
1 Vict. c. 87, s. 4 -	446	3 & 4 Vict. c. 5 -	1189
1 Vict. c. 87, s. 7 -	443	3 & 4 Vict. c. 29, s. 8 -	1302
1 Vict. c. 89 -	555, 556, 557, 558, 564, 596	3 & 4 Vict. c. 47, s. 35	1239
1 Vict. c. 89, s. 2 -	568	3 & 4 Vict. c. 50, ss. 10, 11	8
1 Vict. c. 89, s. 3 -	560, 561, 563, 566, 568	3 & 4 Vict. c. 52, s. 4 -	340
1 Vict. c. 89, ss. 4, 5 -	595	3 & 4 Vict. c. 54 -	21
1 Vict. c. 89, s. 6 -	597	3 & 4 Vict. c. 54, s. 1 -	250
1 Vict. c. 89, s. 10 -	580	3 & 4 Vict. c. 54, s. 2 -	120
1 Vict. c. 90, s. 2 -	590	3 & 4 Vict. c. 54, s. 3 -	118
1 Vict. c. 90, s. 5 -	282, 1219, 1235	3 & 4 Vict. c. 64 -	695
1 Vict. c. 91 -	347	3 & 4 Vict. c. 72, ss. 2, 3, 5:	854
1 Vict. c. 91, s. 1 -	347, 777, 963, 1326	3 & 4 Vict. s. 4 -	854, 993
1 Vict. c. 91, s. 2 -	347	3 & 4 Vict. c. 87, s. 71	991
1 & 2 Vict. c. 7, s. 35 -	993	3 & 4 Vict. c. 90 -	301
1 & 2 Vict. c. 14 -	27, 120	3 & 4 Vict. c. 92 -	865
1 & 2 Vict. c. 38, s. 2 -	1186	3 & 4 Vict. c. 96 -	1229
1 & 2 Vict. c. 43, s. 73 -	993	3 & 4 Vict. c. 96, s. 22	715
1 & 2 Vict. c. 45 -	99	3 & 4 Vict. c. 97, s. 4 -	993
1 & 2 Vict. c. 45, s. 1 -	104, 115	3 & 4 Vict. c. 97, ss. 13, 14:	810, 1307
1 & 2 Vict. c. 77 -	178	3 & 4 Vict. c. 111 -	498
1 & 2 Vict. c. 82, ss. 12, 13, 14 -	962	4 Vict. c. 22 -	281
1 & 2 Vict. c. 85 -	498	4 Vict. c. 54, s. 3 -	250
1 & 2 Vict. c. 94, s. 19 -	692	4 & 5 Vict. c. 35, s. 94:	993, 1317
1 & 2 Vict. c. 105 -	178, 997	4 & 5 Vict. c. 55, s. 239	1317
1 & 2 Vict. c. 110, ss. 3, 8 -	991	4 & 5 Vict. c. 58, s. 76	993
1 & 2 Vict. c. 110, s. 100 -	993	5 & 6 Vict. c. 29, ss. 25, 28, 31:	962
2 & 3 Vict. c. 23, s. 67 -	610	5 & 6 Vict. c. 29, s. 27	993
2 & 3 Vict. c. 47, s. 26: 481, 1224, 1225		5 & 6 Vict. c. 38 -	16, 31, 998
2 & 3 Vict. c. 47, s. 27 -	482	5 & 6 Vict. c. 38, s. 1:	40, 581, 775, 799, 844, 866, 872
2 & 3 Vict. c. 47, ss. 28, 29, 30, 31, 32 -	621	5 & 6 Vict. c. 38, s. 2 -	39, 41
2 & 3 Vict. c. 47, ss. 33, 34 -	622	5 & 6 Vict. c. 38, s. 3 -	41
2 & 3 Vict. c. 47, s. 54 -	11, 1186	5 & 6 Vict. c. 38, s. 10 -	16
2 & 3 Vict. c. 47, s. 58 -	1184	5 & 6 Vict. c. 39 -	402
2 & 3 Vict. c. 47, ss. 63, 66 -	11	5 & 6 Vict. c. 40, s. 8 -	993
2 & 3 Vict. c. 51, s. 8 -	622	5 & 6 Vict. c. 42, s. 7 -	993
2 & 3 Vict. c. 51, s. 9 -	712	5 & 6 Vict. c. 50, ss. 95, 98	1270
2 & 3 Vict. c. 52, s. 29 -	715	5 & 6 Vict. c. 51 -	322
2 & 3 Vict. c. 54, s. 2 -	993	5 & 6 Vict. c. 51, s. 1 -	309
2 & 3 Vict. c. 71, s. 23 -	993	5 & 6 Vict. c. 51, ss. 2, 3	346
		5 & 6 Vict. c. 54 -	851
		5 & 6 Vict. c. 122:	548, 631, 991
		5 & 6 Vict. c. 122, s. 32	627
		6 Vict. c. 10 -	1099
		6 & 7 Vict. c. 12, ss. 1, 2, 3:	879
		6 & 7 Vict. c. 18, ss. 83, 84:	1320
		6 & 7 Vict. c. 25, s. 26	993

Table of Statutes.

lxxxi

	PAGE		PAGE
6 & 7 Vict. c. 26	- 304	8 & 9 Vict. c. 68, s. 2	- 294
6 & 7 Vict. c. 26, ss. 9, 23	- 962	8 & 9 Vict. c. 68, s. 4	- 296
6 & 7 Vict. c. 26, ss. 22, 26	- 961	8 & 9 Vict. c. 68, s. 5	- 296, 297
6 & 7 Vict. c. 34, ss. 1, 2, 3-9	16	8 & 9 Vict. c. 75, s. 2	- 1145
6 & 7 Vict. c. 58, s. 14	- 993	8 & 9 Vict. c. 84, s. 101	- 36
6 & 7 Vict. c. 73: 110, 121, 1014		8 & 9 Vict. c. 85, s. 2	- 993
6 & 7 Vict. c. 73, ss. 2, 35	- 942	8 & 9 Vict. c. 87, s. 101	- 102
6 & 7 Vict. c. 83	- 880	8 & 9 Vict. c. 93, s. 71	- 1218
6 & 7 Vict. c. 83, s. 1	- 880	8 & 9 Vict. c. 100, ss. 5, 23,	
6 & 7 Vict. c. 83, s. 2	- 887, 890	27, 44, 50	- 1315
6 & 7 Vict. c. 83, s. 3	- 888	8 & 9 Vict. c. 100, ss. 56, 59,	
6 & 7 Vict. c. 85: 180, 182,		63, 64, 78, 90, 93	- 1316
187, 230, 630, 1027, 1040		8 & 9 Vict. c. 109, s. 4	- 1188
6 & 7 Vict. c. 85, s. 1: 179,		8 & 9 Vict. c. 109, s. 17: 530,	
207, 653, 678, 721, 1045		618, 1187	
6 & 7 Vict. c. 85, s. 2	- 86	8 & 9 Vict. c. 109, s. 18	- 1189
6 & 7 Vict. c. 86, s. 41	- 993	8 & 9 Vict. c. 113	- 699, 700
6 & 7 Vict. c. 96, ss. 1, 2	- 1144	8 & 9 Vict. c. 113, s. 4	- 699
6 & 7 Vict. c. 96, ss. 3, 4, 5,		8 & 9 Vict. c. 141, s. 30	- 1248
7, 8, 10	- 1145	9 & 10 Vict. c. 10	- 620, 622
6 & 7 Vict. c. 96, s. 6	- 1145, 1147	9 & 10 Vict. c. 24	- 63
7 Vict. c. 2	- 55, 552, 782	9 & 10 Vict. c. 24, s. 1	- 304
7 Vict. c. 2, s. 1	- 54, 783, 1193	9 & 10 Vict. c. 24, s. 2	- 23
7 Vict. c. 2, s. 2	- 54, 784	9 & 10 Vict. c. 24, s. 3	- 100
7 Vict. c. 2, s. 3: 54, 550, 784, 1193		9 & 10 Vict. c. 24, s. 4	- 294
7 Vict. c. 2, s. 4	- 54, 784, 1193	9 & 10 Vict. c. 25, ss. 3, 4	- 803
7 Vict. c. 19, ss. 5, 9	- 692	9 & 10 Vict. c. 25, s. 7	- 561
7 & 8 Vict. c. 2, ss. 1, 2	- 550	9 & 10 Vict. c. 25, s. 15	- 799
7 & 8 Vict. c. 24	- 1205	9 & 10 Vict. c. 26	- 305
7 & 8 Vict. c. 24, ss. 2, 3	- 1206	9 & 10 Vict. c. 27, ss. 9, 16	- 993
7 & 8 Vict. c. 29	- 907	9 & 10 Vict. c. 28, s. 16	- 623
7 & 8 Vict. c. 56	- 859	9 & 10 Vict. c. 33	- 350
7 & 8 Vict. c. 62	- 556, 568	9 & 10 Vict. c. 36	- 993
7 & 8 Vict. c. 66	- 160	9 & 10 Vict. c. 38, s. 56	- 993
7 & 8 Vict. c. 83	- 713	9 & 10 Vict. c. 39, ss. 41, 103:	993
7 & 8 Vict. c. 87	- 1237	9 & 10 Vict. c. 39, s. 85	- 587
7 & 8 Vict. c. 92	- 893	9 & 10 Vict. c. 59	- 343
7 & 8 Vict. c. 92, s. 14	- 993	9 & 10 Vict. c. 59, s. 1	- 343, 1175
7 & 8 Vict. c. 92, s. 23	- 879	9 & 10 Vict. c. 59, ss. 2, 4	- 1165
7 & 8 Vict. c. 92, s. 29	- 880	9 & 10 Vict. c. 62	- 779, 883, 889
7 & 8 Vict. c. 96, s. 39	- 623	9 & 10 Vict. c. 66	- 210
7 & 8 Vict. c. 96, s. 40	- 993	9 & 10 Vict. c. 93	- 883
7 & 8 Vict. c. 101, s. 3	- 936	9 & 10 Vict. c. 95	- 977
7 & 8 Vict. c. 101, s. 8	- 1181	9 & 10 Vict. c. 95, s. 57	- 932
7 & 8 Vict. c. 102: 343, 1088, 1175		9 & 10 Vict. c. 95, s. 77	- 979
7 & 8 Vict. c. 110, s. 2	- 1081	9 & 10 Vict. c. 95, s. 84	- 993
7 & 8 Vict. c. 110, ss. 26, 31	- 993	9 & 10 Vict. c. 95, s. 95	- 1000
7 & 8 Vict. c. 111, s. 30	- 993	9 & 10 Vict. c. 95, s. 111:	
7 & 8 Vict. c. 112, s. 2	- 549	977, 1035	
8 Vict. c. 18, s. 149	- 993	10 & 11 Vict. c. 62, s. 8	- 962
8 Vict. c. 20, s. 160	- 993	10 & 11 Vict. c. 66, s. 1	- 445
8 Vict. c. 112, s. 22	- 993	10 & 11 Vict. c. 67, s. 2	- 304
8 Vict. c. 113, s. 18	- 993	10 & 11 Vict. c. 82	- 300, 399
8 & 9 Vict. c. 16, s. 9	- 688	11 Vict. c. 10, s. 3	- 993
8 & 9 Vict. c. 68, s. 1	- 293, 294	11 Vict. c. 12	- 309, 314

	PAGE		PAGE
11 Vict. c. 12, ss. 3, 5, 7, 10 -	344	11 & 12 Vict. c. 78, s. 5 :	291, 296
11 Vict. c. 12, s. 6 -	307, 344	11 & 12 Vict. c. 98, s. 85 -	993
11 & 12 Vict. c. 7, s. 1 -	550	12 & 13 Vict. c. 45, s. 10 -	66
11 & 12 Vict. c. 12 : 124, 161,	312, 345	12 & 13 Vict. c. 68, s. 16 -	994
11 & 12 Vict. c. 42 -	1, 200	12 & 13 Vict. c. 96 -	56, 550
11 & 12 Vict. c. 42, s. 1 -	1, 2	12 & 13 Vict. c. 106 -	548
11 & 12 Vict. c. 42, s. 2 -	16	12 & 13 Vict. c. 106, s. 117 -	201
11 & 12 Vict. c. 42, s. 3 -	47, 48	12 & 13 Vict. c. 106, ss. 239,	
11 & 12 Vict. c. 42, s. 4 -	5	252 - - - -	630
11 & 12 Vict. c. 42, s. 8 -	2, 3	12 & 13 Vict. c. 106, s. 251 :	
11 & 12 Vict. c. 42, s. 9 -	1	548, 626, 630	
11 & 12 Vict. c. 42, s. 10 -	3, 4	12 & 13 Vict. c. 106, s. 253 :	
11 & 12 Vict. c. 42, s. 11 -	5	627, 630	
11 & 12 Vict. c. 42, s. 12 -	5, 6	12 & 13 Vict. c. 106, s. 254 :	
11 & 12 Vict. c. 42, s. 13 -	6	990, 991, 994	
11 & 12 Vict. c. 42, s. 14 -	6, 20	12 & 13 Vict. c. 106, s. 255 :	
11 & 12 Vict. c. 42, s. 15 -	6	630, 991	
11 & 12 Vict. c. 42, s. 17 : 17,		12 & 13 Vict. c. 106, s. 256 -	630
210, 901		12 & 13 Vict. c. 106, s. 272 -	631
11 & 12 Vict. c. 42, s. 18 : 18,		12 & 13 Vict. c. 106, s. 273 -	699
199, 202		12 & 13 Vict. c. 109, s. 20 -	714
11 & 12 Vict. c. 42, s. 19 : 18, 19		12 & 13 Vict. c. 109, s. 39 -	297
11 & 12 Vict. c. 42, s. 20 : 17		12 & 13 Vict. c. 109, s. 45 -	994
22, 255		13 & 14 Vict. c. 21, s. 4 -	96
11 & 12 Vict. c. 42, s. 21 -	24	13 & 14 Vict. c. 23 -	1178
11 & 12 Vict. c. 42, s. 22 : 5,		13 & 14 Vict. c. 26, s. 6 -	994
19, 27		13 & 14 Vict. c. 37, s. 1 -	300
11 & 12 Vict. c. 42, ss. 23, 24 : 20		13 & 14 Vict. c. 39 -	961
11 & 12 Vict. c. 42, s. 25 : 19, 26		13 & 14 Vict. c. 101, s. 9 -	813
11 & 12 Vict. c. 42, s. 26 -	27	14 & 15 Vict. c. 19 -	20
11 & 12 Vict. c. 42, s. 27 : 17,		14 & 15 Vict. c. 19, ss. 4, 5 -	799
167, 245		14 & 15 Vict. c. 19, s. 8 : 556, 566	
11 & 12 Vict. c. 43 - 411,		14 & 15 Vict. c. 19, s. 9 -	244
605, 741, 877		14 & 15 Vict. c. 19, s. 10 : 14, 812	
11 & 12 Vict. c. 43, ss. 1, 2 - 1, 2		14 & 15 Vict. c. 19, s. 11 : 14,	
11 & 12 Vict. c. 43, s. 8 - 2		15, 812, 905	
11 & 12 Vict. c. 43, s. 10 : 2,		14 & 15 Vict. c. 19, s. 13 -	470
147, 148		14 & 15 Vict. c. 53, s. 1 -	1097
11 & 12 Vict. c. 43, s. 11 - 147		14 & 15 Vict. c. 55 -	26, 1315
11 & 12 Vict. c. 43, s. 13 - 1		14 & 15 Vict. c. 55, s. 2 -	1053
11 & 12 Vict. c. 43, s. 36 : 146, 147		14 & 15 Vict. c. 55, s. 8 -	265
11 & 12 Vict. c. 44, s. 2 - 27		14 & 15 Vict. c. 55, s. 13 -	40
11 & 12 Vict. c. 45, s. 112 - 700		14 & 15 Vict. c. 55, s. 18 -	6
11 & 12 Vict. c. 45, s. 113 - 993		14 & 15 Vict. c. 55, s. 19 : 58, 59	
11 & 12 Vict. c. 45, s. 114 - 623		14 & 15 Vict. c. 78, s. 37 -	994
11 & 12 Vict. c. 46, s. 1 - 538		14 & 15 Vict. c. 81 -	120
11 & 12 Vict. c. 46, s. 4 - 66		14 & 15 Vict. c. 92 -	399
11 & 12 Vict. c. 59 - 399		14 & 15 Vict. c. 93 : 411, 605, 877	
11 & 12 Vict. c. 63, s. 25 - 1320		14 & 15 Vict. c. 94, s. 19 -	994
11 & 12 Vict. c. 78 - 161,		14 & 15 Vict. c. 97 -	741
172, 210, 271, 272, 275, 291		14 & 15 Vict. c. 99, ss. 1, 2 :	
11 & 12 Vict. c. 78, s. 1 - 272		180, 230	
11 & 12 Vict. c. 78, s. 2 - 273		14 & 15 Vict. c. 99, ss. 3, 4 -	180
11 & 12 Vict. c. 78, ss. 3, 4 - 274		14 & 15 Vict. c. 99, ss. 7, 8,	
		9, 10, 11 - - -	220

Table of Statutes.

lxxxiii

	PAGE		PAGE
14 & 15 Vict. c. 99, ss. 12,		16 & 17 Vict. c. 30 -	838
13 - - - - -	220	16 & 17 Vict. c. 30, s. 4 -	100, 101
14 & 15 Vict. c. 99, s. 14 : 220, 1319		16 & 17 Vict. c. 30, s. 5 -	104, 105
14 & 15 Vict. c. 99, s. 15 : 220, 622		16 & 17 Vict. c. 33, s. 7 -	104
14 & 15 Vict. c. 99, s. 17 -	699	16 & 17 Vict. c. 32, s. 8 -	24, 257
14 & 15 Vict. c. 99, ss. 18, 19 : 220		16 & 17 Vict. c. 36, s. 33 -	994
14 & 15 Vict. c. 100, s. 1 : 66, 238		16 & 17 Vict. c. 42, s. 19 -	994
14 & 15 Vict. c. 100, ss. 2, 3 : 47, 66		16 & 17 Vict. c. 45, s. 31 -	713
14 & 15 Vict. c. 100, s. 7 : 96, 499		16 & 17 Vict. c. 46, s. 32 -	994
14 & 15 Vict. c. 100, s. 9 : 130,		16 & 17 Vict. c. 46, s. 14 -	587
263, 471, 1194		16 & 17 Vict. c. 48, s. 1 -	733
14 & 15 Vict. c. 100, s. 10 :		16 & 17 Vict. c. 70, s. 102 -	700
799, 800, 840, 844		16 & 17 Vict. c. 71 -	1156
14 & 15 Vict. c. 100, s. 12 :		16 & 17 Vict. c. 85, s. 2 -	187
165, 263, 841		16 & 17 Vict. c. 96, ss. 4, 5, 7 : 1315	
14 & 15 Vict. c. 100, s. 18 : 391, 421		16 & 17 Vict. c. 96, ss. 9, 13, 14 : 1316	
14 & 15 Vict. c. 100, s. 19 : 999,		16 & 17 Vict. c. 96, ss. 52, 54 : 1315	
1000		16 & 17 Vict. c. 97, ss. 73, 74,	
14 & 15 Vict. c. 100, s. 20 : 69,		93 - - - - -	1315
1004, 1007, 1012, 1014		16 & 17 Vict. c. 97, ss. 122,	
14 & 15 Vict. c. 100, s. 21 :		123 - - - - -	1316
977, 1023		16 & 17 Vict. c. 99 -	304, 305
14 & 15 Vict. c. 100, s. 22 :		16 & 17 Vict. c. 99, ss. 6, 7 -	482
1023, 1039		16 & 17 Vict. c. 99, s. 12 -	244
14 & 15 Vict. c. 100, s. 23 -	60	16 & 17 Vict. c. 107, s. 28 -	707
14 & 15 Vict. c. 100, s. 24 : 63,		16 & 17 Vict. c. 107, s. 38 -	994
71, 90, 94, 95		16 & 17 Vict. c. 107, s. 95 -	1218
14 & 15 Vict. c. 100, s. 25 : 69, 71		16 & 17 Vict. c. 107, s. 116 -	714
14 & 15 Vict. c. 100, s. 27 :		16 & 17 Vict. c. 107, s. 218 -	1216
20, 116		16 & 17 Vict. c. 107, ss. 244,	
14 & 15 Vict. c. 100, s. 28 :		245, 246 - - - - -	1213
128, 132		16 & 17 Vict. c. 107, s. 248 :	
14 & 15 Vict. c. 105, s. 18 -	813	1214, 1215	
15 Vict. c. 31 - - - - -	853	16 & 17 Vict. c. 107, s. 249 -	1214
15 & 16 Vict. c. 55, s. 8 -	301	16 & 17 Vict. c. 107, s. 250 :	
15 & 16 Vict. c. 56, ss. 15, 16 -	622	1214, 1215	
15 & 16 Vict. c. 57 - - - - -	215	16 & 17 Vict. c. 107, s. 251 :	
15 & 16 Vict. c. 57, s. 13 : 993, 994		813, 1216	
15 & 16 Vict. c. 62, s. 8 -	622	16 & 17 Vict. c. 107, s. 275 -	1218
15 & 16 Vict. c. 70, s. 57 -	994	16 & 17 Vict. c. 107, s. 303 -	1218
15 & 16 Vict. c. 80, s. 31 -	994	16 & 17 Vict. c. 107, s. 304 :	
15 & 16 Vict. c. 81, s. 1 -	941	708, 1218	
15 & 16 Vict. c. 83, s. 37 -	622	16 & 17 Vict. c. 107, ss. 305,	
15 & 16 Vict. c. 85, ss. 4, 5 -	1306	308 - - - - -	1215
15 & 16 Vict. c. 86, s. 23 -	994	16 & 17 Vict. c. 107, s. 311 -	994
15 & 16 Vict. c. 87, ss. 3, 4 -	1199	16 & 17 Vict. c. 118 - - -	16
15 & 16 Vict. c. 87, s. 33 -	700	16 & 17 Vict. c. 119, ss. 1, 2,	
16 Vict. c. 2 - - - - -	653	3, 9 - - - - -	1188
16 Vict. c. 16, s. 3 - - - - -	994	16 & 17 Vict. c. 119, s. 6 -	1189
16 Vict. c. 17, s. 4 - - - - -	994	16 & 17 Vict. c. 121 - - -	961
16 Vict. c. 30, s. 4 - - - - -	1290	16 & 17 Vict. c. 121, s. 1 -	304
16 Vict. c. 30, s. 9 - - - - -	183	16 & 17 Vict. c. 128 - - -	1240
16 Vict. c. 32, s. 1 - - - - -	294	16 & 17 Vict. c. 134, s. 3 -	1306
16 Vict. c. 32, ss. 2, 3, 4, 5, 6 : 295		17 & 18 Vict. c. 18, s. 54 -	994
16 Vict. c. 32, s. 7 - - - - -	296	17 & 18 Vict. c. 20, s. 27 -	994

	PAGE		PAGE
17 & 18 Vict. c. 23, ss. 17, 18,		19 & 20 Vict. c. 16, ss. 2, 3, 4,	
19 - - - - -	643	5, 6, 7, 8, 9, 10, 11, 12, 13,	
17 & 18 Vict. c. 26 - - - -	321	14, 15 - - - - -	113
17 & 18 Vict. c. 78, s. 9 -	924	19 & 20 Vict. c. 16, ss. 16, 17,	
17 & 18 Vict. c. 67, s. 10 -	700	18, 19, 20, 21, 22, 23, 24 -	114
17 & 18 Vict. c. 83, s. 27 : 221, 390		19 & 20 Vict. c. 16, ss. 25, 26,	
17 & 18 Vict. c. 90, ss. 1, 2, 3 : 1313		27, 28 - - - - -	115
17 & 18 Vict. c. 90, s. 4 -	1314	19 & 20 Vict. c. 20, s. 5 -	620
17 & 18 Vict. c. 102, ss. 2, 3,		19 & 20 Vict. c. 41, ss. 6, 9 -	713
5, 10, 14, 15, 36 - - -	1202	19 & 20 Vict. c. 47, s. 107 -	1081
17 & 18 Vict. c. 104, s. 101 -	714	19 & 20 Vict. c. 54, s. 1 44, 994	
17 & 18 Vict. c. 104, ss. 103,		19 & 20 Vict. c. 54, ss. 2, 3 -	44
140, 164, 176 - - - -	1317	19 & 20 Vict. c. 64 - - - -	128
17 & 18 Vict. c. 104, s. 179 -	714	19 & 20 Vict. c. 113 - - - -	210
17 & 18 Vict. c. 104, s. 200 -	1317	19 & 20 Vict. c. 113, s. 3 -	994
17 & 18 Vict. c. 104, s. 203 -	714	19 & 20 Vict. c. 119, ss. 2, 18 : 994	
17 & 18 Vict. c. 104, ss. 217,		19 & 20 Vict. c. 119, s. 24 -	1165
220 - - - - -	1317	20 & 21 Vict. c. 3 - - - -	305
17 & 18 Vict. c. 104, s. 267 -	56	20 & 21 Vict. c. 3, s. 2 : 281,	
17 & 18 Vict. c. 104, s. 284 -	1317	304, 344, 346, 347, 348, 350,	
17 & 18 Vict. c. 104, s. 320 -	1317	359, 552, 644, 692, 695, 699,	
17 & 18 Vict. c. 104, s. 365 -	1225	700, 706, 707, 708, 710, 712,	
17 & 18 Vict. c. 104, s. 366 :		714, 717, 813, 903, 951, 952,	
1225, 1318		955, 962, 1216, 1218	
17 & 18 Vict. c. 104, ss. 477,		20 & 21 Vict. c. 3, s. 3 -	305, 951
478, 479 - - - - -	482	20 & 21 Vict. c. 3, ss. 4, 5, 6 : 305	
17 & 18 Vict. c. 104, ss. 496,		20 & 21 Vict. c. 4 - - - -	403
518, 519 - - - - -	1318	20 & 21 Vict. c. 12, s. 23 -	1081
17 & 18 Vict. 114, s. 2 - - -	1316	20 & 21 Vict. c. 71, s. 28 -	700
17 & 18 Vict. c. 117, s. 64 -	994	20 & 21 Vict. c. 81, s. 15 -	697
17 & 18 Vict. c. 123, ss. 2, 4 -	1315	20 & 21 Vict. c. 83, s. 1 -	1186
17 & 18 Vict. c. 123, s. 3 :		20 & 21 Vict. c. 85, s. 50 -	994
340, 1315		21 Vict. c. 3, s. 2 - - - -	1237
17 & 18 Vict. c. 125, ss. 21,		21 Vict. c. 22 - - - - -	26
89 - - - - -	994	21 & 22 Vict. c. 25 - - - -	865
17 & 18 Vict. c. 137, s. 13 -	994	21 & 22 Vict. c. 72, s. 90 -	994
18 & 19 Vict. c. 11, s. 103 -	994	21 & 22 Vict. c. 87 - - - -	1202
18 & 19 Vict. c. 12, s. 90 -	994	21 & 22 Vict. c. 95, s. 34 -	994
18 & 19 Vict. c. 42, s. 4 -	994	21 & 22 Vict. c. 118, s. 23 -	994
18 & 19 Vict. c. 42, s. 5 -	716	22 Vict. c. 19, s. 51 - - - -	994
18 & 19 Vict. c. 46, s. 20 -	994	22 Vict. c. 20, s. 2 - - - -	994
18 & 19 Vict. c. 63, ss. 24, 29 : 939		22 Vict. c. 25 - - - - -	305
18 & 19 Vict. c. 81 - - - -	1167	22 Vict. c. 25, ss. 13, 14, 15,	
18 & 19 Vict. c. 81, s. 1 -	1165	16, 17, 18, 19 - - - -	961
18 & 19 Vict. c. 90 - - - -	144	22 & 23 Vict. c. 4, s. 4 - - -	40
18 & 19 Vict. c. 91, s. 9 -	1212	22 & 23 Vict. c. 17 - - - -	46, 1000
18 & 19 Vict. c. 91, s. 21 -	56	22 & 23 Vict. c. 21, s. 16 -	994
18 & 19 Vict. c. 96, s. 44 -	1213	22 & 23 Vict. c. 31, s. 29 -	658
18 & 19 Vict. c. 104, ss. 6, 7 : 1212		22 & 23 Vict. c. 31, s. 30 -	694
18 & 19 Vict. c. 120, s. 27 -	1320	22 & 23 Vict. c. 35, s. 24 -	656
18 & 19 Vict. c. 126 - - - -	399	23 & 24 Vict. c. 32, s. 2 : 812, 1167	
18 & 19 Vict. c. 126, ss. 1, 3 -	400	23 & 24 Vict. c. 32, ss. 3, 4,	
18 & 19 Vict. c. 126, s. 10 -	300	5, 6 - - - - -	1167
18 & 19 Vict. c. 128, s. 2 -	1306	23 & 24 Vict. c. 38, s. 8 -	656
19 & 20 Vict. c. 16, s. 1 : 112, 113		23 & 24 Vict. c. 84 - - - -	1303

Table of Statutes.

lxxxv

	PAGE		PAGE
23 & 24 Vict. c. 86, s. 9	- 994	24 & 25 Vict. c. 96, s. 5	- 173,
23 & 24 Vict. c. 92, s. 11	- 994		390, 425, 427, 428
23 & 24 Vict. c. 112, s. 15	- 994	24 & 25 Vict. c. 96, s. 6	- 173,
23 & 24 Vict. c. 115, ss. 17,			396, 425, 427, 428
18, 19, 20	- 1325	24 & 25 Vict. c. 96, ss. 7, 8, 9 :	
23 & 24 Vict. c. 116	- 881		244, 399
23 & 24 Vict. c. 116, ss.		24 & 25 Vict. c. 96, ss. 10, 11 :	407
2, 3	- 886	24 & 25 Vict. c. 96, ss. 12, 13,	
23 & 24 Vict. c. 116, s. 5 :	878, 1075	14	- 411
23 & 24 Vict. c. 116, s. 6	- 880	24 & 25 Vict. c. 96, ss. 15, 16 :	412
23 & 24 Vict. c. 123, s. 57	- 994	24 & 25 Vict. c. 96, s. 17	- 413
23 & 24 Vict. c. 139	- 602	24 & 25 Vict. c. 96, ss. 18, 19 :	
23 & 24 Vict. c. 139, s. 25	- 875		389, 417
24 Vict. c. 7, s. 15	- 1321	24 & 25 Vict. c. 96, s. 20	- 389,
24 Vict. c. 7, s. 16	- 1323		418, 717
24 Vict. c. 7, s. 17	- 506, 1323	24 & 25 Vict. c. 96, s. 21	- 414
24 Vict. c. 7, ss. 18, 19, 20 :		24 & 25 Vict. c. 96, s. 22	- 415
	952, 1323	24 & 25 Vict. c. 96, s. 23 :	414, 717
24 Vict. c. 7, ss. 21, 22, 39,		24 & 25 Vict. c. 96, s. 24	236, 415
51, 81	- 1323	24 & 25 Vict. c. 96, s. 25	- 416
24 Vict. c. 7, s. 96	- 994	24 & 25 Vict. c. 96, s. 26	- 417
24 Vict. c. 8, s. 22	- 506	24 & 25 Vict. c. 96, s. 27	- 419
24 Vict. c. 8, ss. 23, 24, 28	- 952	24 & 25 Vict. c. 96, ss. 28, 29 :	422
24 Vict. c. 132, ss. 54, 145	- 994	24 & 25 Vict. c. 96, s. 30	- 423
24 & 25 Vict. c. 5, ss. 13, 19	- 644	24 & 25 Vict. c. 96, s. 31 :	425, 451
24 & 25 Vict. c. 7, ss. 37, 48	- 529	24 & 25 Vict. c. 96, s. 32	- 427
24 & 25 Vict. c. 8, ss. 20, 21,		24 & 25 Vict. c. 96, s. 33 :	236, 427
22, 23, 24, 25, 26, 27, 29	- 1322	24 & 25 Vict. c. 96, s. 34	- 427
24 & 25 Vict. c. 8, ss. 54, 66	- 529	24 & 25 Vict. c. 96, s. 35	- 428
24 & 25 Vict. c. 25, s. 13	- 642	24 & 25 Vict. c. 96, s. 36 :	428, 429
24 & 25 Vict. c. 53, s. 5	- 1320	24 & 25 Vict. c. 96, s. 37	- 428
24 & 25 Vict. c. 66, ss. 1, 2	- 179	24 & 25 Vict. c. 96, ss. 38, 39 :	430
24 & 25 Vict. c. 75	- 120	24 & 25 Vict. c. 96, s. 40	- 431
24 & 25 Vict. c. 84, s. 1	- 609	24 & 25 Vict. c. 96, s. 41 :	431, 441
24 & 25 Vict. c. 94	- 77,	24 & 25 Vict. c. 96, s. 42	- 431
	79, 542, 701, 751	24 & 25 Vict. c. 96, s. 43	- 439
24 & 25 Vict. c. 94, s. 1	- 77	24 & 25 Vict. c. 96, s. 44	- 442,
24 & 25 Vict. c. 94, s. 2	- 77, 538		445, 802
24 & 25 Vict. c. 94, s. 3	- 77, 83	24 & 25 Vict. c. 96, s. 45 :	436, 442
24 & 25 Vict. c. 94, s. 4	- 78, 83	24 & 25 Vict. c. 96, s. 46 :	442, 802
24 & 25 Vict. c. 94, ss. 5, 6	- 78	24 & 25 Vict. c. 96, s. 47	- 443
24 & 25 Vict. c. 94, s. 7	- 78, 79	24 & 25 Vict. c. 96, s. 48 :	437, 443
24 & 25 Vict. c. 94, s. 9	- 54	24 & 25 Vict. c. 96, s. 49	- 443
24 & 25 Vict. c. 95 :	282, 450, 529	24 & 25 Vict. c. 96, ss. 50, 51,	
24 & 25 Vict. c. 95, s. 48	- 707	52	- 450
24 & 25 Vict. c. 96	- 79, 381,	24 & 25 Vict. c. 96, s. 53 :	450, 458
	386, 399, 400, 613, 616, 1194	24 & 25 Vict. c. 96, s. 54	- 450
24 & 25 Vict. c. 96, s. 1	- 361,	24 & 25 Vict. c. 96, s. 55 :	468, 559
	381, 402, 419, 431, 470, 474,	24 & 25 Vict. c. 96, s. 56	- 470
	511, 516, 537, 546	24 & 25 Vict. c. 96, ss. 57, 58 :	
24 & 25 Vict. c. 96, s. 2	- 361, 396		470, 473
24 & 25 Vict. c. 96, s. 3	- 381,	24 & 25 Vict. c. 96, s. 59	- 470
	402, 481	24 & 25 Vict. c. 96, s. 60	- 474, 475
24 & 25 Vict. c. 96, s. 4	- 399,	24 & 25 Vict. c. 96, s. 61	- 474
	419, 425, 427, 428	24 & 25 Vict. c. 96, s. 62	- 479

	PAGE		PAGE
24 & 25 Vict. c. 96, s. 63 -	480, 481	24 & 25 Vict. c. 97 :	79, 399,
24 & 25 Vict. c. 96, s. 64 :	413,		556, 558, 562, 564, 602
	480, 481	24 & 25 Vict. c. 97, s. 1	- 556
24 & 25 Vict. c. 96, ss. 65, 66 :	480	24 & 25 Vict. c. 97, s. 2 :	556,
24 & 25 Vict. c. 96, s. 67	- 482		559, 568, 572
24 & 25 Vict. c. 96, s. 68	- 485	24 & 25 Vict. c. 97, s. 3 :	556,
24 & 25 Vict. c. 96, ss. 69, 70	502		559, 560, 561, 562, 563, 564, 567
24 & 25 Vict. c. 96, s. 71	- 498	24 & 25 Vict. c. 97, ss. 4, 5,	
24 & 25 Vict. c. 96, s. 72	- 500	6	- - - - 556
24 & 25 Vict. c. 96, s. 73	- 504	24 & 25 Vict. c. 97, ss. 7, 8	- 557
24 & 25 Vict. c. 96, s. 74 :	74, 508	24 & 25 Vict. c. 97, ss. 9, 10 :	
24 & 25 Vict. c. 96, s. 75 :	509,		569, 875
	511, 514, 515	24 & 25 Vict. c. 97, s. 11	- 570
24 & 25 Vict. c. 96, ss. 76, 77,		24 & 25 Vict. c. 97, s. 12	- 571
78 - - - -	511	24 & 25 Vict. c. 97, s. 13	- 574
24 & 25 Vict. c. 96, s. 79	- 512	24 & 25 Vict. c. 97, s. 14 :	574, 475
24 & 25 Vict. c. 96, ss. 80, 81,		24 & 25 Vict. c. 97, s. 15	- 575
82, 83 - - - -	514	24 & 25 Vict. c. 97, s. 16	- 577
24 & 25 Vict. c. 96, ss. 84, 85,		24 & 25 Vict. c. 97, ss. 17, 18,	
86, 87 - - - -	515	19, 20, 21	- - - 578
24 & 25 Vict. c. 96, s. 88	- 516	24 & 25 Vict. c. 97, s. 22 :	578, 581
24 & 25 Vict. c. 96, ss. 89, 90 :	517	24 & 25 Vict. c. 97, ss. 23, 24 -	579
24 & 25 Vict. c. 96, s. 90	- 529	24 & 25 Vict. c. 97, ss. 25, 26,	
24 & 25 Vict. c. 96, s. 91	- 537	27, 28 - - - -	582
24 & 25 Vict. c. 96, s. 92 :	97, 542	24 & 25 Vict. c. 97, s. 29 :	583, 584
24 & 25 Vict. c. 96, s. 93	- 542	24 & 25 Vict. c. 97, ss. 30, 31,	
24 & 25 Vict. c. 96, s. 94	- 543	32 - - - -	585, 586
24 & 25 Vict. c. 96, s. 95 :	537, 543	24 & 25 Vict. c. 97, ss. 33, 34 :	586
24 & 25 Vict. c. 96, s. 96	- 546	24 & 25 Vict. c. 97, ss. 35, 36,	
24 & 25 Vict. c. 96, s. 97	- 538	37 - - - -	587
24 & 25 Vict. c. 96, s. 98 :	81, 541	24 & 25 Vict. c. 97, s. 38	- 588
24 & 25 Vict. c. 96, s. 99	- 542	24 & 25 Vict. c. 97, s. 39	- 589
24 & 25 Vict. c. 96, s. 100 :		24 & 25 Vict. c. 97, ss. 40, 41 -	590
	266, 400, 536	24 & 25 Vict. c. 97, ss. 42, 43 -	593
24 & 25 Vict. c. 96, s. 101	- 405	24 & 25 Vict. c. 97, s. 44	- 594
24 & 25 Vict. c. 96, s. 102	- 406	24 & 25 Vict. c. 97, s. 45 :	594, 808
24 & 25 Vict. c. 96, s. 103	- 3, 13	24 & 25 Vict. c. 97, ss. 46, 47 -	594
24 & 25 Vict. c. 96, s. 104	- 13	24 & 25 Vict. c. 97, ss. 48, 49 -	595
24 & 25 Vict. c. 96, s. 105 :	411, 429	24 & 25 Vict. c. 97, s. 50 -	599, 802
24 & 25 Vict. c. 96, s. 106	- 411	24 & 25 Vict. c. 97, ss. 51, 52 -	600
24 & 25 Vict. c. 96, s. 107 :		24 & 25 Vict. c. 97, s. 53 -	581, 601
	411, 413	24 & 25 Vict. c. 97, ss. 54, 55 -	601
24 & 25 Vict. c. 96, s. 108,		24 & 25 Vict. c. 97, s. 56 -	81, 602
109, 110 - - - -	411	24 & 25 Vict. c. 97, ss. 57, 58 -	602
24 & 25 Vict. c. 96, s. 111 :	27, 411	24 & 25 Vict. c. 97, ss. 59, 60,	
24 & 25 Vict. c. 96, s. 112	- 411	61, 62, 63 - - - -	603
24 & 25 Vict. c. 96, s. 113	- 396	24 & 25 Vict. c. 97, ss. 64, 65,	
24 & 25 Vict. c. 96, s. 114	- 397	66, 67 - - - -	604
24 & 25 Vict. c. 96, s. 115	- 398	24 & 25 Vict. c. 97, s. 68	- 605
24 & 25 Vict. c. 96, s. 116 :	242, 244	24 & 25 Vict. c. 97, s. 69 -	27, 605
24 & 25 Vict. c. 96, s. 117	- 399	24 & 25 Vict. c. 97, ss. 70, 73,	
24 & 25 Vict. c. 96, ss. 118,		74, 75, 76 - - - -	605
119 - - - -	400	24 & 25 Vict. c. 97, ss. 71, 72 -	555
24 & 25 Vict. c. 96, s. 120	- 411	24 & 25 Vict. c. 97, s. 77	- 606
24 & 25 Vict. c. 96, s. 121	- 400	24 & 25 Vict. c. 97, ss. 78, 79 -	555

Table of Statutes.

lxxxvii

	PAGE		PAGE
24 & 25 Vict. c. 98 -	702	24 & 25 Vict. c. 99, s. 6 :	732, 734
24 & 25 Vict. c. 98, s. 1 -	637	24 & 25 Vict. c. 99, ss. 7, 8 :	733, 734
24 & 25 Vict. c. 98, ss. 2, 3 -	639	24 & 25 Vict. c. 99, ss. 9, 10,	
24 & 25 Vict. c. 98, ss. 4, 5, 6 -	640	11 -	725
24 & 25 Vict. c. 98, s. 7 -	642	24 & 25 Vict. c. 99, s. 12 :	725, 726
24 & 25 Vict. c. 98, s. 8 -	643, 644	24 & 25 Vict. c. 99, s. 13 -	731
24 & 25 Vict. c. 98, ss. 9, 10,		24 & 25 Vict. c. 99, s. 14 -	723
11 -	643	24 & 25 Vict. c. 99, s. 15 -	726
24 & 25 Vict. c. 98, ss. 12, 13,		24 & 25 Vict. c. 99, s. 16, 17 :	723
14, 15 -	645	24 & 25 Vict. c. 99, s. 18 -	724
24 & 25 Vict. c. 98, ss. 16, 17,		24 & 25 Vict. c. 99, s. 19 -	733
18 -	646	24 & 25 Vict. c. 99, ss. 20, 21 :	731
24 & 25 Vict. c. 98, s. 19 :	646, 669	24 & 25 Vict. c. 99, s. 22 :	724, 732
24 & 25 Vict. c. 98, s. 20 :	654, 717	24 & 25 Vict. c. 99, s. 23 -	731
24 & 25 Vict. c. 98, s. 21 -	656	24 & 25 Vict. c. 99, s. 24 :	734, 737
24 & 25 Vict. c. 98, s. 22 :	659, 717	24 & 25 Vict. c. 99, s. 25 -	735
24 & 25 Vict. c. 98, ss. 23, 24 :	659, 670	24 & 25 Vict. c. 99, s. 26 -	739
24 & 25 Vict. c. 98, s. 25 :	659, 669	24 & 25 Vict. c. 99, s. 27 -	735
24 & 25 Vict. c. 98, s. 26 -	670	24 & 25 Vict. c. 99, s. 28 -	739
24 & 25 Vict. c. 98, s. 27 :	691, 692	24 & 25 Vict. c. 99, s. 29 :	721, 739
24 & 25 Vict. c. 98, s. 28 -	691	24 & 25 Vict. c. 99, ss. 30, 31,	
24 & 25 Vict. c. 98, s. 29 -	692	32, 33 -	740
24 & 25 Vict. c. 98, ss. 30, 31 :	693	24 & 25 Vict. c. 99, ss. 34, 35,	
24 & 25 Vict. c. 98, s. 32 -	694	36, 38, 39, 40, 41, 42 -	741
24 & 25 Vict. c. 98, s. 33 -	695	24 & 25 Vict. c. 99, s. 43 -	720
24 & 25 Vict. c. 98, s. 34 :	694, 933	24 & 25 Vict. c. 100 -	815, 843
24 & 25 Vict. c. 98, ss. 35, 36,		24 & 25 Vict. c. 100, ss. 1, 2 -	760
37 -	696	24 & 25 Vict. c. 100, s. 3 -	761
24 & 25 Vict. c. 98, s. 38 -	698	24 & 25 Vict. c. 100, s. 4 -	347
24 & 25 Vict. c. 98, s. 39 :	659,	24 & 25 Vict. c. 100, s. 5 :	260, 772
664, 668, 670		24 & 25 Vict. c. 100, s. 6 -	778
24 & 25 Vict. c. 98, s. 40 -	700	24 & 25 Vict. c. 100, s. 7 -	773
24 & 25 Vict. c. 98, s. 41 :	635,	24 & 25 Vict. c. 100, s. 8 -	743
636, 701		24 & 25 Vict. c. 100, s. 9 -	783
24 & 25 Vict. c. 98, s. 42 :	641,	24 & 25 Vict. c. 100, s. 10 -	785
655, 676		24 & 25 Vict. c. 100, s. 11 :	788, 790
24 & 25 Vict. c. 98, s. 43 -	644	24 & 25 Vict. c. 100, ss. 12,	
24 & 25 Vict. c. 98, s. 44 :	641, 681	13 -	788
24 & 25 Vict. c. 98, s. 45 :	637, 644	24 & 25 Vict. c. 100, s. 14 -	789
24 & 25 Vict. c. 98, s. 46 -	646	24 & 25 Vict. c. 100, s. 15 :	789, 794
24 & 25 Vict. c. 98, s. 47 -	698	24 & 25 Vict. c. 100, s. 16 -	802
24 & 25 Vict. c. 98, s. 48 :	702,	24 & 25 Vict. c. 100, ss. 17,	
707, 708, 709, 711, 712, 713, 717		18 -	803
24 & 25 Vict. c. 98, s. 49 -	701	24 & 25 Vict. c. 100, ss. 20 :	791, 793, 804, 821
24 & 25 Vict. c. 98, ss. 50, 51 :	702	24 & 25 Vict. c. 100, ss. 21,	
24 & 25 Vict. c. 98, ss. 52, 53 :	703	22 -	805
24 & 25 Vict. c. 98, s. 54 -	702	24 & 25 Vict. c. 100, s. 23 :	805, 806
24 & 25 Vict. c. 98, ss. 55, 56 :	637		h
24 & 25 Vict. c. 99, s. 1 -	719		
24 & 25 Vict. c. 99, s. 2 :	719, 722		
24 & 25 Vict. c. 99, s. 3 :	720, 722		
24 & 25 Vict. c. 99, s. 4 -	723		
24 & 25 Vict. c. 99, s. 5 -	732		

	PAGE		PAGE
24 & 25 Vict. c. 100, ss. 24,		24 & 25 Vict. c. 100, s. 67 :	
25 - - - - -	806		837, 875
24 & 25 Vict. c. 100, s. 26 :		24 & 25 Vict. c. 100, s. 68 :	
	806, 818, 876		787, 799, 876
24 & 25 Vict. c. 100, s. 27 :		24 & 25 Vict. c. 100, ss. 69,	
	794, 807, 818	70, 71, 72 - - -	876
24 & 25 Vict. c. 100, ss. 28,		24 & 25 Vict. c. 100, ss. 74,	
29 - - - - -	803, 807	75, 76, 77 - - -	877
24 & 25 Vict. c. 100, ss. 30,		24 & 25 Vict. c. 100, s. 78 :	
31 - - - - -	808		743, 783
24 & 25 Vict. c. 100, ss. 32,		24 & 25 Vict. c. 100, s. 79 -	743
33 - - - - -	809	24 & 25 Vict. c. 101 : 91, 179,	
24 & 25 Vict. c. 100, s. 34 -	810	304, 425, 430, 442, 482, 537,	
24 & 25 Vict. c. 100, s. 35 :		639, 659, 671, 787, 883, 1213	
	811, 1242	24 & 25 Vict. c. 110, s. 4 -	538
24 & 25 Vict. c. 100, s. 36 -	811	24 & 25 Vict. c. 113, s. 9 -	301
24 & 25 Vict. c. 100, s. 37 -	812	24 & 25 Vict. c. 115, s. 2 -	1322
24 & 25 Vict. c. 100, s. 38 -	813	24 & 25 Vict. c. 115, ss. 3, 4,	
24 & 25 Vict. c. 100, ss. 39,		5, 6, 7 - - - - -	1323
40 - - - - -	816	24 & 25 Vict. c. 115, ss. 8, 9,	
24 & 25 Vict. c. 100, ss. 41,		10, 11, 12, 13, 14, 15, 16 -	1324
42 - - - - -	817	24 & 25 Vict. c. 115, ss. 23,	
24 & 25 Vict. c. 100, s. 43 -	828	24, 25, 26, 27, 28, 29 -	1327
24 & 25 Vict. c. 100, ss. 44, 45 :	829	24 & 25 Vict. c. 115, s. 30 :	
24 & 25 Vict. c. 100, s. 46 :			597, 1327
	813, 828	24 & 25 Vict. c. 115, s. 31,	
24 & 25 Vict. c. 100, ss. 47,		32, 37 - - - - -	1327
48 - - - - -	830	24 & 25 Vict. c. 115, s. 38 :	
24 & 25 Vict. c. 100, s. 49 :			786, 874, 1327
	830, 838	24 & 25 Vict. c. 115, s. 39,	
24 & 25 Vict. c. 100, s. 51 -	841	40, 41 - - - - -	1327
24 & 25 Vict. c. 100, s. 52 -	842	24 & 25 Vict. c. 115, ss. 42,	
24 & 25 Vict. c. 100, s. 53 :		43 - - - - -	597
	842, 844	24 & 25 Vict. c. 115, s. 44 -	598
24 & 25 Vict. c. 100, s. 54 -	844	24 & 25 Vict. c. 115, s. 45 :	
24 & 25 Vict. c. 100, s. 55 -	845		598, 786, 1327
24 & 25 Vict. c. 100, s. 56 -	847	24 & 25 Vict. c. 115, s. 46 :	
24 & 25 Vict. c. 100, s. 57 -	848		598, 786, 874, 1328
24 & 25 Vict. c. 100, ss. 58,		24 & 25 Vict. c. 115, ss. 47,	
59 - - - - -	867	48, 49 - - - - -	598, 1329
24 & 25 Vict. c. 100, s. 60 -	868	24 & 25 Vict. c. 115, ss. 50,	
24 & 25 Vict. c. 100, ss. 61,		51, 60, 61, 63 - - -	1329
62 - - - - -	872	24 & 25 Vict. c. 132, s. 9 -	301
24 & 25 Vict. c. 100, s. 63 :		24 & 25 Vict. c. 134, s. 43 -	931
	831, 872	24 & 25 Vict. c. 134, s. 159 -	625
24 & 25 Vict. c. 100, ss. 64,		24 & 25 Vict. c. 134, s. 189 -	978
65 - - - - -	874	24 & 25 Vict. c. 134, s. 205 -	699
24 & 25 Vict. c. 100, s. 66 -	875	24 & 25 Vict. c. 134, s. 221 -	623

THE
CRIMINAL LAW,
AS
AMENDED
BY
THE STATUTES OF 1861.

PART I.

Of Procedure in Criminal Trials.

CHAPTER I.

PROCESS.

Process.] Offences are punishable by indictment or information, or upon summary conviction.¹ The mode of compelling appearance is by summons or warrant.² A summons is usually employed upon summary investigations, although it is used occasionally upon other cases; but, in felony, and many kinds of misdemeanors, a warrant is commonly granted in the first instance. And a warrant is often issued where there are grounds to suspect that the party will not appear.³ This remark applies chiefly to indictable or other misdemeanors, because the rule in felony, subject to exceptions, is to apprehend the offender. It follows that, unless good ground be shown for absence, a warrant will issue upon non-appearance to a summons.⁴ The summons should be delivered personally by the constable, or left at the most usual abode of the accused.⁵ There is a clause in various statutes which enables the magistrate, sitting summarily, to proceed in the absence of the party summoned, and the rule was made general by 11 & 12 Vict. c. 43, s. 13.

We will advert presently to the law of arrest in criminal cases.

Summons.] Before the passing of 11 & 12 Vict. cc. 42, 43, it was necessary to send a notice to the accused, unless any par-

¹ Sometimes by one justice, sometimes by more than one, as the law of the subject requires.

² 11 & 12 Vict. c. 42, ss. 1, 9; c. 43, s. 1.

³ 11 & 12 Vict. c. 42, ss. 1, 9.

⁴ 11 & 12 Vict. c. 43, s. 2; 11 & 12 Vict. c. 42, s. 1.

⁵ 11 & 12 Vict. c. 42, ss. 1, 9; c. 43, s. 1. See 11 Mod. 345; 14 East, 267.

ticular statute permitted a warrant in the first instance. Process without such summons would have been a misdemeanor.¹ But the law is now altered, and either a summons or a warrant may be granted.² In the case of a summons the information need not be upon oath, nor in writing; in the case of a warrant, both are required,³ unless in the case of an order.⁴ Our business is not with summary convictions, but as a summons is legal, even in cases of felony, we refer to a case under 11 & 12 Vict. c. 43, s. 2. A summons was served at 9 A. M. to appear on the next day at 11 A. M. at eight miles distant. This was considered reasonable, although the defendant did not return home till 11 P. M. The justices are the judges of the reasonableness of the time, under 11 & 12 Vict. c. 43, s. 2.⁵

A summons should contain the substance of the charge, the day and place of appearance, the signature of the justice, and a direction to the person accused.⁶

Arrest under warrant.] The warrant to arrest must be in writing, and under the hand of the justice, and it is usual to add the seal, although, perhaps, a seal is not essential, unless when expressly required by statute.⁷ Blank warrants are to be avoided, although where a justice kept some signed, and, in a case of murder, delivered one to the constable, who was killed in executing it, it was held that the case amounted to felonious homicide.⁸ The under-sheriff of Staffordshire was accustomed to deliver blank warrants, and an assistant was killed in executing one of them. The judges certified, upon a special verdict, that the offence was manslaughter.

Warrants are granted likewise by secretaries of state,⁹ the privy council, the speakers of both houses of parliament, justices of gaol delivery and oyer and terminer, justices at sessions, and judges of the Queen's Bench.¹⁰ A judge of the Queen's Bench may cause an apprehension for any offence punishable in that court, not being treason nor felony. The warrant may be made returnable before himself or any other justice, in order to procure sureties for the defendant's appearance.¹¹

It is also the practice for a magistrate to sign a warrant upon a certificate of the clerk of the peace that an indictment has been

¹ *R. v. Venables*, 2 Str. 630; 2 Lord Raym. 1407; 7 Dowl. & Ry. 663; Steph. Sum. 234; see Andr. 238.

² 11 & 12 Vict. c. 42, s. 1; c. 43, ss. 1, 10.

³ 11 & 12 Vict. c. 42, s. 8.

⁴ 11 & 12 Vict. c. 43, s. 8.

⁵ *R. v. Williams*, 21 L. J. M. C. 46.

⁶ Steph. Sum. 234, 235.

⁷ *Id.* 240.

⁸ 8 T. R. 455. He folded up the warrant, signed and delivered it.

Qu. ? as to "signed," for it was signed before. It is so in the report.—A conviction and commitment had been duly signed, but a blank was left for the amount of costs. The court held the omission a mere irregularity, not an excess of jurisdiction. *Bott v. Ackroyd*, 28 L. J. M. C. 207.

⁹ *R. v. Stockley*, East, P. C. 310. *R. v. Stevenson*, 10 St. Tr. 462.

¹⁰ Steph. 239.

¹¹ 2 Hawk. c. 13, s. 16.

found.¹ So, at sessions, a bench warrant issues if it be necessary to take the party into custody immediately, or if he be about to leave the country, but not otherwise.²

Information.] The information upon which the warrant issues must be upon oath or affirmation, and in writing, and it must show the specific offence. It must describe the offender, and direct his apprehension.³ A warrant to apprehend A., "and in safe custody him keep, so as to have his body before Her Majesty's justices of the peace at the next sessions," is ill and the custody illegal.⁴ Some person in particular must be designated,⁵ for general warrants have long since been condemned, either in respect of individuals to be arrested under them, or of houses to be searched for stolen goods.⁶ Of course, a warrant to apprehend all persons is bad.⁷ So a bench warrant, calling upon a defendant to find sureties, without mentioning before what judge or justice he is to be bound to appear, is wrong.⁸ It makes no difference that there is only a case of suspicion if probable grounds for the arrest be shown,⁹ or that no indictment has been found,¹⁰ although the ancient doctrine, backed by Lord Coke, was clear to the contrary.¹¹ And the instrument will not be invalidated by the addition of a direction to search the prisoner's premises for stolen goods.¹²

The warrant must contain the prisoner's christian name, or state specifically who he is, or assign some reason for omitting it, so that a warrant to take the body of, "Hood, of, &c. by whatsoever name he may be called or known, the son of Samuel Hood," to answer, &c. was held bad, and a count for malicious stabbing founded on it wrong.¹³

The word "feloniously" should be used, although, perhaps, not always indispensable. But the offence must be so clearly charged as to admit of no doubt of its being felony. A warrant stated that the prisoner had set fire to a parcel of wheat unthrashed, not saying "feloniously:" the parcel might have been dropt by accident, and the prisoner was bailed.¹⁴

¹ *R. v. Stokes*, 5 C. & P. 148.

² *R. v. Whittaker*, 2 Fost. & F. 1.

³ 11 & 12 Vict. c. 42, ss. 8, 10; *Caudle v. Seymour*, 5 Jur. 1196; 1 Gale & D. 145. If a warrant directs an apprehension "to answer all such matters and things as in Her Majesty's behalf shall be objected against him by A. B. for an assault committed on," &c., no information being recited, whether such warrant be void.

⁴ 8 Jur. 107; *Ex parte Nisbett*.

⁵ Steph. 240.

⁶ 2 Hawk. c. 13, ss. 10, 17; 4 Com. 291. *Money v. Leach*, 1 Sir W. Bl. 555.

⁷ *Supra*, n. 6.

⁸ *R. v. Downey*, 7 Q. B. 281. The court would not impose a condition that no action should be brought.

⁹ 4 Com. 290.

¹⁰ 1 Hawk. c. 28, s. 12; 5 Mod. 80, Holt, C. J.

¹¹ 4 Inst. 177.

¹² Steph. 241; 24 & 25 Vict. c. 96, s. 103.

¹³ *R. v. Hood*, 1 Moo. C. C. 281.

¹⁴ *R. v. Judd*, Leach, 484; 2 T. R. 255. Whether stealing, without saying "feloniously," would suffice. *Semble* not. See 1 Leach, 162. By counsel arg^o.

The warrant being completed, is delivered to the officer, commonly the constable, who is the proper person, and indictable for disobedience.¹ He must execute the warrant himself, so that where he delivered it to his son, the arrest was illegal, although he was in sight of the arrest. The prisoner was acquitted on a charge of stabbing.² So, where a warrant was directed to J. A. and W. S., B., the assistant of W. S., was held incompetent to execute it in the absence of J. A. or W. S.³

By 11 & 12 Vict. c. 42, s. 10, a warrant may be directed, 1, to any constable or other person by name, or, 2, generally, to the constable of the parish or district where it is to be executed, or, 3, to such constable and all other constables, &c., or, 4, generally, to all constables within the district. It may be executed at any time and at any place within the justice's jurisdiction, or, in case of fresh pursuit, at any place in the next adjoining county or place within seven miles of the border of the first county, and without backing it. Moreover, when the warrant is directed to all constables, any constable may execute it within the jurisdiction of the justice, although he be not named, and although the place of arrest may not be within the parish for which he is constable, &c.⁴ A warrant ran thus:—"To the constable of D. in the county of W." A county constable who executed it was held liable, for none other than the constable of D. could act, but the action having been delayed for more than six months, the county constable was held to come within the protection of 24 Geo. 2, c. 24, s. 8.⁵ In general, therefore, the Acts concerning constables have not been deemed compulsory upon them out of their districts.⁶ Nor is the warrant of a judge of the Queen's Bench included.⁷ The officer, unless armed with due power, is liable to a double hazard; to a civil action, and to violence, which, if ending in death, would be but manslaughter.⁸ And if he should kill the person destined to be arrested, in the act of resistance, the homicide would not be justifiable. This, however, is where the illegality is apparent on the face of a warrant, as in the case of a warrant for the nonpayment of wages;⁹ for the officer must presume that the justice has the power which he assumes.¹⁰ If the warrant be illegal, the justice, not the constable, is punishable.¹¹ And by 24 Geo. 2, c. 44, a warrant properly penned will indemnify the constable, (and police constables are within its provisions,) although, on the part of the magistrate, there has been an excess of jurisdiction. Nevertheless, an arrest without a warrant cannot be made valid by

¹ 2 Hawk. c. 10, s. 35.

² *R. v. Patience*, 7 C. & P. 795. Had he prepared his weapon for resistance, the case might have been altered.

³ *R. v. Whalley*, 7 C. & P. 245.

⁴ See the case of the constables of Woolwich. The warrant was directed to them generally, naming them. It was held, that they could not execute it out of their district.

R. v. Weir and others, 1 B. & C. 288; 2 Dowl. & Ry. 444.

⁵ *Freegard v. Barnes*, 21 L. J. Ex. 320.

⁶ *Gombert v. Coyney*, M^cCl. 469.

⁷ *Gladwell v. Blake*, 4 Tyr. 166.

⁸ 1 Hawk. c. 31, ss. 63, 64.

⁹ *Shergold v. Holloway*, 2 Str. 1002.

¹⁰ 2 Hawk. c. 13, s. 10.

¹¹ *Id.* s. 11.

a subsequent warrant.¹ And, without a warrant, the constable is not entitled to the protection of the statute.² So it is in the case of a warrant to search disorderly houses.³ And a warrant to apprehend A. is not good against B., although B. be the person against whom the information was sworn, and whom it was intended to apprehend.⁴

Time for Arrest.] It is said that an arrest may be made in the night.⁵ But it is not usual to execute a search warrant in the night; unless, indeed, there be positive proof and not a probable suspicion.⁶ So, again, an arrest may be made on a Sunday for treason, felony, or a breach of the peace if an indictable misdemeanor.⁷ And a search warrant may also be executed on that day. And this expression, "breach of the peace," extends to all indictable misdemeanors, and was not limited to actual breaches of the peace.⁸ And a subsequent detainer on a Sunday, without collusion, will not be illegal, although the arrest be so.⁹

A warrant to arrest A., that he may appear at the next sessions, means the next sessions after the arrest, not those after the date of the warrant.¹⁰

Place.] As soon as the limit of the jurisdiction is passed, application must be made to another justice of the county or place where the offender is supposed to be, and, after he has backed the warrant, the constable originally intrusted with it is empowered to make the arrest.¹¹ By 11 & 12 Vict. c. 42, s. 11, warrants may be backed as heretofore in England or Wales. The person charged may be taken before the justice who issued the warrant, or before any other justice of the county, &c. whence the warrant issued, or before any justice of the county, &c. where the offence appears to have been committed. However, if the prosecutor or any of the witnesses for the prosecution should be in the county or place where the offender was apprehended, such offender may, if the justice shall so direct, be taken before such last-mentioned justice, or before any other justice of the same county, &c., and be by him dealt with according to law.¹² By sect. 12 an English warrant may be backed in Ireland, or *vice versa*, but the offender must be brought before the justice who granted the warrant, or before some other justice of the same county. The warrant may be executed by the

¹ 2 Hawk. c. 13, s. 9.

² *Postlethwaite v. Gibson*, 3 Esp. 226.

³ *R. v. Adey*, Leach, 209. See 3 Burr. 1768; 6 B. & C. 351.

⁴ *Hoyle v. Bush*, 1 Man. & Gr. 775.

⁵ 1 Hawk. c. 31, s. 62.

⁶ Burn. Tit. "Search Warrant." See 2 Hale, P. C. 150.

⁷ 29 Car. 2, c. 7, s. 6; 11 & 12

Vict. c. 42, s. 4; East, P. C. 324.

R. v. Chandler, 1 Ld. R. 545.

⁸ *Rawlins v. Ellis*, 16 Mees. & W. 172; 2 Cox, C. C. 96.

⁹ *Re Ramsden*, 15 L. J. M. C. 113.

¹⁰ *Mayhew v. Parker*, 8 T. R. 110; 2 Esp. 683, S. C.

¹¹ East, P. C. 324.

¹² See 11 & 12 Vict. c. 42, s. 22.

person producing it, or by any person to whom it may be directed, or by any constable or peace officer within the jurisdiction of the justice who indorses it. Similar powers to those in sect. 12 are given with reference to the Isle of Man, Guernsey or Jersey, Alderney or Sark, and *vice versa*.¹ So, as to Scotland,² and *vice versa* with regard to Scotch warrants backed in England or Ireland.³ But a warrant from a judge of the Queen's Bench extends over England and Wales.⁴ A party may be taken in his own house, and not only so, the constable is justified in breaking open doors, after a demand of admittance and a statement of his warrant, the intended apprehension being for treason, felony, or a breach of the peace.⁵ Although doors may be broken open upon other occasions mentioned by Hawkins. As upon an affray in a house or elsewhere in the presence of the constable. In the first case the officer may break the house for the purpose of suppressing the affray; in the second, where the party escapes and flies into a house where the constable is denied admittance. So, where a person is lawfully arrested for any cause and takes shelter in a house. But doors may not be broken open upon a warrant to require persons to come forward and take certain oaths prescribed by statute. Although, if an officer be locked in under such circumstances, his friends may break doors to set him at liberty.⁶ And in cases of misdemeanor admittance must, in general, be demanded.⁷

Manner.] The arrest must be made without unnecessary force. The handcuff should not be used unless resistance be obvious, or an attempt to escape ensue. This is the rule in felony, *à fortiori*, in misdemeanor.⁸ A misdemeanant should not, without strong reason, be handcuffed to a felon. Even to search a drunk and disorderly person, without a strong necessity, is not allowable.⁹ Still, the taking, when lawful, may be accomplished, although the life of the accused be put in peril by it. For his name appears in the warrant, and, innocent or not, he must answer the charge.¹⁰ Hence, if the capture cannot be reasonably executed without bloodshed, the homicide by the officer is justifiable.¹¹ Again, the officer must not, on any pretence, let his prisoner go at large, because he cannot take him again, nor can the person be arrested again upon the same warrant.¹²

Putting aside the question of force, it may be added, that laying hold of a person,¹³ and pronouncing words of arrest, will suffice.

¹ 11 & 12 Vict. c. 42, s. 13; 14 & 15 Vict. c. 55, s. 18.

² 11 & 12 Vict. c. 42, s. 14.

³ *Id.* s. 15. See *R. v. Kynaston*, 1 East, 217; *Clerk v. Woods*, 2 Ex. 395.

⁴ 4 Com. 291.

⁵ *Id.* 293; 2 Hawk. c. 14, ss. 3, 7.

⁶ 2 Hawk. c. 14, s. 11.

⁷ *Launock v. Brown*, 2 B. & Ald. 592.

⁸ 6 Dowl. & Ry. 623.

⁹ *Leigh v. Cole*, 6 Cox, C. C. 329. But, verdict for the defendant.

¹⁰ Steph. 241.

¹¹ 1 Hawk. c. 28, s. 11.

¹² 2 Hawk. c. 13, s. 9.

¹³ Steph. 244.

Indeed, if the prisoner has previously submitted to the constable, the actual touch by the hand seems not to be essential.¹ Bare words are certainly insufficient.² Although, if a constable should order a private person to arrest a man running away, the arrest is not the less valid if the constable happens to be out of sight at the actual taking.³

With respect to the showing of the warrant, it is held, that where the officer is known, as where, being duly sworn, he acts within his own district, he is not under an obligation to exhibit his authority, but that where he is not known, or if he should act out of his precinct, he must, if required, do so.⁴ And a private person must, under any circumstances, produce his warrant.⁵ Yet the constable must state the substance of the warrant. The showing of the staff is a sufficient notification of his being a constable.⁶ So where the prisoner said to a bailiff, "Stand off, come not near me, *I know you well enough*, come at your peril," and then killed him as soon as he had laid hold; this act was held to be murder.⁷

In surety of the peace there is a distinction, for the officer who has the warrant ought to require the party to go with him before he arrests. Upon refusal, the apprehension may follow.⁸

The arrest being made, the person must not be removed out of the jurisdiction of the magistrate, for instance, out of the county.⁹ Nor out of the way, nor detained unnecessarily, as for three days till evidence could be collected,¹⁰ for a constable is not even to hear a case.¹¹ A man was apprehended under 7 & 8 Geo. 4, c. 29, s. 63, with turnips in his possession. He was conducted first to the house of the farmer who had been robbed, and thence to the constable's house. It was held, that a wound with a knife given by the prisoner would, in case of death, have amounted to manslaughter only, and an acquittal took place.¹²

The arrest being made, the warrant continues in force. A

¹ 1 East, P. C. 300. *Williams v. Jones*, Ca. Temp. Hardw. 301, where the person arrested was merely locked up in a room. *Horne v. Battyn*, Bull. N. P. 62. *Arrowsmith v. Le Mesurier*, 2 New Rep. 211, where the plaintiff went voluntarily before the magistrate and was not touched. See also *Berry v. Adamson*, 6 B. & C. 528.

² *Genner v. Sparks*, 1 Salk. 79. Notwithstanding *R. v. Wingfield*, cited, Dalt. ed. 1792, c. 170, reported, Cro. Car. 251. But this point is not mentioned there.

³ See *Blatch v. Archer*, Cowp. 64.

⁴ 2 Hawk. c. 13, s. 28.

⁵ 2 Hawk. c. 13, s. 28. Of course when necessary.

⁶ *R. v. Gordon*, 1 East, P. C. 315.

⁷ *R. v. Pew*, Cro. Car. 183.

⁸ 1 Hawk. c. 60, s. 12.

⁹ *Bint v. Lavender*, 1 C. & P. 659.

¹⁰ *Watson v. Carr*, 1 Lew. C. C. 52.

¹¹ *R. v. Curran*, 3 C. & P. 297. See *Hall v. Booth*, 3 Nev. & M. 315.

¹² *R. v. Curran*, supra. The word "forthwith" appears, moreover, in the section. So *Morris and ux. v. Wise*, 2 Fost. & F. 51. Damages 40s., and 10l. for false imprisonment.

person was ordered to find bail for an assault, upon which he ran away, and, on pursuit, cut the constable with a knife. His conviction for resisting lawful apprehension was held right. The warrant was not *functus officio*.¹

Arrest in foreign countries.] The rule in all civilized countries is that the government may deliver the accused subject of another state to his own tribunal, in order to a trial.² As where the crew of a Dutch ship mastered the vessel and brought her into Deal, the English authorities sent the mutineers into Holland.³ If an arrest be made in a foreign country for a felony in England, the court will not inquire into the circumstances of the case so as to discharge the prisoner, although he has been taken in opposition to the law of that country.⁴ And the same rule extends to misdemeanors.⁵ And there are conventions reciprocally between this country and foreign states for the same purpose under special Acts.

Arrest without warrant.] There may be arrests without warrant. As where a felony or misdemeanor is committed in the presence of a justice, he may take the offender.⁶ And he may give parol orders to arrest persons charged with riot in his absence,⁷ though not in the case of an affray.⁸ The sheriff and the coroner may apprehend in like manner any felon in the county.⁹

We come next to constables,¹⁰ and other such officers, and private persons. Whenever an arrest may be justified by a private person, it is a rule that an officer can justify it.¹¹ Therefore, where a private person can act with or without a warrant, a constable may. On the other hand, it is said to be difficult to find a case where a constable may arrest, but in which a private person may not.¹² As far as the mere arrest is concerned this may be true; but it is observable that a constable is not liable for an apprehension upon reasonable grounds of suspicion,¹³ though it should turn out that there was no real cause for it, whereas a private person cannot avail himself of any such justification.¹⁴ 1. There must be a felony.

¹ *R. v. Williams*, 1 Moo. C. C. 387.

² 4 Taunt. 44, Heath, J.

³ *Id.* 43.

⁴ See *R. v. Krans*, 1 B. & C. 258; 3 East, 157.

⁵ *Ex parte Scott*, 9 B. & C. 446; 4 Man. & Ry. 361.

⁶ 4 Com. 292.

⁷ 2 Hawk. 133.

⁸ 1 Hawk. 491.

⁹ 4 Com. 292.

¹⁰ See 3 & 4 Vict. c. 50, ss. 10, 11, &c., Canal Police Act.

¹¹ 2 Hawk. c. 13, s. 1.

¹² *Id.* s. 7.

¹³ *Samuel v. Payne*, 1 Dougl. 359; *M'Cloughan v. Clayton*, Holt, N. P. C. 478; *Beckwith v. Philby*, 6 B. & C. 635; *Cowles v. Dunbar*, 2 C. & P. 565; *Hobbs v. Branseomb*, 3 Camp. 420; *Nicholson v. Hardwicke*, 5 C. & P. 495.

¹⁴ Steph. 242, 243; 4 Com. 293; Cald. 291; *White v. Taylor*, 4 Esp. 80; *Stonehouse v. Elliott*, 6 T. R. 315.

2. Suspicion upon probable cause. 3. The arrest by the person suspecting. And suspicion cannot be transferred, so that A., who suspects, cannot command B. to arrest.¹ And the assertion of the principal felon will not justify the constable, without more, in apprehending the supposed receiver.² He must suffer for his error in acting upon foreign information unless he has a reasonable ground.³ The following are said to be reasonable grounds of arrest: common fame; vagrancy; suffering pursuit upon hue and cry.⁴ The constable may demand from others, and must hand over his prisoner, to a justice. The private person cannot require aid, and he must surrender his captive to a constable.⁵ Nevertheless, a bystander must be cautious. A man travelling on the highway complained to the constable of the prisoner for ill-using him. The constable tapped the prisoner on the shoulder, and ordered him to stop, for insulting a man on the road. He then desired assistance from A. The prisoner submitted; but afterwards, having previously struck the man who had charged him with ill-usage, ran away. A. pursued him, and was stabbed by him. The judges held the conviction for a capital felony wrong. A. had been present during the whole time, and ought to have known that the original taking was illegal, in consequence of which the re-capture was also illegal, for the blow given by the prisoner was referred to the influence of provocation. A detainer could not be justified unless dangerous consequences were likely to ensue.⁶ So, again, the private person can merely stay an affray and deliver the affrayers to the officer, but the latter can detain the affrayers, in order to find sureties.⁷

Then, with respect to an arrest by a constable without warrant, as all persons are bound to apprehend an offender when they witness a felony, the officer is of course included in the rule.⁸ The penalty for neglect is fine and imprisonment.⁹ So he may arrest without warrant upon a reasonable charge of felony. The constable was told by a woman that the plaintiff had robbed her, and was shown a supposed intercepted letter, upon which he took the plaintiff out of bed at night, and conveyed him to prison. This was deemed a reasonable suspicion, and a verdict against the constable was set aside.¹⁰ All the particulars of the charge need not be related. The prisoner was delivered to the constable for having a forged note in his possession. He shot the constable. It was objected upon the trial for maliciously shooting, that the charge had not been properly made, and that it imputed no legal offence; but the judges said that the charge need not be so accurate as an

¹ 12 Rep. 92.

² *Isaacs v. Brand*, 2 Stark. 167.

³ *Hogg v. Ward*, 27 L. J. Ex. 443.

⁴ 2 Hawk. c. 12, ss. 9, 10, 14.

⁵ *Id.* c. 13, ss. 7, 8.

⁶ *R. v. Curvan*, 1 Moo. C. C. 132.

⁷ 2 Hawk. c. 13, s. 8; 1 Hawk.

c. 63, ss. 14, 15.

⁸ 2 Hawk. c. 12, s. 1.

⁹ *Id.*

¹⁰ *Davis v. Russell and others*,

5 Bing. 354; Steph. 242; and see

Lawrence v. Hedger, 3 Taunt. 14.

indictment, and that a *guilty* possession must be presumed.¹ Yet the following mode of making a charge was held too general. The prisoner's master said to the constable, "That is the man; I give you in charge of him." The constable said, "My good fellow, your master gives me in charge of you: you must go with me." The prisoner then cut the constable. The jury did not find that the prisoner knew the person who took him to be an officer. The majority of the judges held the arrest illegal, supposing it to have taken place, and they laid a stress upon the prisoner's inability to escape, and they said, that if the prisoner had waited to give notice of his intention, the constable might have completed his capture.² And in many misdemeanors there is no pretence for an arrest, as where there was a mere threat to break windows without a violation of the public peace.³ So it was where the prisoners were suspected of having stolen apples, found in their possession, unless there had been a disposition on their parts to use extreme violence.⁴ So it was where the constable apprehended the prisoner with some potatoes under his shirt. A rescue being attempted, a man aiding the constable was killed. Here the offence was manslaughter, and a verdict, "Guilty of assault," having been recorded, the conviction was holden wrong.⁵ So upon a charge of indecently bathing, which was abandoned, the constable was cast in damages for his illegal imprisonment of the plaintiff.⁶

The production of the staff is a sufficient notice of authority.⁷ Harrison, a watchman, sought to apprehend a man without any specific charge. There was, however, some ground for suspicion. The watchman had his coat and lantern, and he pulled out his staff, and was stabbed. The jury found Harrison to have been a watchman; but it was clear that no offence had been committed in his presence, and at most there had been only a common assault. It was held that the arrest would have been legal; that if death had ensued the crime would have been murder, and that the conviction was right.⁸ So where one of the police was called in to clear a house of public entertainment at a late hour, the stabbing of him would have been murder had death ensued.⁹ So it is if a policeman should push a person slightly in the street to

¹ *R. v. Ford*, Russ. & Ry. 329.

² *R. v. Thompson*, 1 Moo. C. C. 80. By 8 judges; 2 diss. 2 absent.

³ *R. v. Bright*, 4 C. & P. 387; *Cook v. Nethercote*, 6 C. & P. 741.

⁴ *R. v. Collison*, 4 C. & P. 465.

⁵ *R. v. Phelps*, Car. & M. 180; 2 Moo. C. C. 240. See 2 Russ. C. M. by Greaves, 534. Although the deceased might not have been aiding the constable at the time of his death, he was still entitled to protection, *eundo, morando, et redeundo*, per Coltman, J.

⁶ *Griffin*, appellant, *Colman*, respondent, 28 L. J. Ex. 134.

⁷ *R. v. Gordon*, ante.

⁸ *R. v. Woolmer and another*, 1 Moo. C. C. 334. By 9 judges; 4 contra, 2 absent. Bayley, B., who tried the case, and was one of the dissentients, doubted the power of the watchman out of his limits, and thought he should first have stated to the prisoners why he proposed to arrest.

⁹ *R. v. Hems*, 7 C. & P. 312.

make him go on, with the view of dispersing a crowd. But if the officer knock the prisoner down, the latter is only guilty of manslaughter should death ensue.¹ This principle, however, does not apply to the army, unless, indeed, evidence of usage or authority be given. As where a serjeant arrested a fifer, who killed him. The judges were unanimous that, as the articles of war were not produced, nor any warrant for the arrest, the conviction for murder was wrong.²

It is clear that a constable cannot arrest for an assault not committed in his presence.³ Nor in his presence unless he immediately secures the offender. So in cases of misdemeanor. The constable saw a person engaged in thimblérig. He escaped, but in the evening the constable met with him, and induced a private individual to attempt his capture. The judges held a conviction for stabbing, with intent to prevent lawful apprehension, wrong.⁴ Such, also, was the case of the policeman, who, being assaulted, went away, and sought to make the arrest in the evening. A count for wounding could not be sustained.⁵ Nor, if the policeman be absent, does the Metropolis Police Act make any difference.⁶ Nor under the 66th section of that Act, unless the offender be caught in the fact.⁷ *A fortiori*, there can be no arrest upon suspicion that the party has committed a former misdemeanor,⁸ nor for an affray in like manner;⁹ but if persons present at an affray deliver the affrayer to the constable, it seems that a detainer, in order to take him before a justice, would be lawful.¹⁰ And an exhortation to resist would justify a taking by the officer witnessing it, for that is inciting a breach of the peace.¹¹ Loud words in the street will not serve for this purpose.¹² Nor if a man be noisy in a public house, without more, can the constable turn him out as a constable, yet he may, on request, aid the landlord in doing so.¹³ If the noise were to disturb the neighbourhood, the constable would be right in interfering at once, for that would be an offence.¹⁴

The rule in *Gardener's case*¹⁵ becomes varied if there be one continuing transaction. As where a policeman followed a man

¹ *R. v. Hagan*, 8 C. & P. 167. B. 524; 2 & 3 Vict. c. 47, ss. 54, 63. The indictment was under 1 Vict. c. 85, for cutting and wounding.

Verdict, guilty of a common assault: three years' imprisonment. *Levi v. Edwards*, 1 C. & P. 40. ⁷ S. C., *Bowditch v. Balchin*, 19 L. J. Ex. 327; 5 Ex. 378.

² *R. v. Withers*, 1 East, P. C. 233; 1 Russ. C. M. 581. ⁸ *Fox v. Gaunt*, 3 B. & Adol. 798.

³ *Coupey v. Henley*, 1 Esp. 540; Steph. 242. See also *R. v. Brown*, Car. & M. 314. ⁹ 1 Hawk. c. 63, s. 17; East, P. C. 305.

⁴ *R. v. Gardener*, 1 Moo. C. C. 390. ¹⁰ East, P. C. 305. *Derrecourt v. Corbishley*, 24 L. J. Q. B. 313.

⁵ *R. v. Walker*, 23 L. J. M. C. 123; Dears. 358. ¹¹ *White v. Edmunds*, Peake, 89.

⁶ *Simmons v. Millengen*, 2 C. ¹² *Hardy v. Murphy*, 1 Esp. 294. ¹³ *Wheeler v. Whiting*, 9 C. & P. 262.

¹⁴ *Howell v. Jackson*, 6 C. & P. 723.

¹⁵ *Ante*.

who had been beating his wife, and arrested him, on request, seventy yards from his own door, for there was ground to fear that he might return and injure the woman.¹ And a policeman at the station may detain a person brought in charge without reference at all to the arrest.² If A. turn aside in the street for a moment, the constable cannot legally collar him.³

Breaking doors without warrant.] To justify the breach of a house without a warrant, there must be a felony, or an affray, or breaking of the peace, so as to make it of necessity to enter; also there must be a statement of the matter, and reasonable cause. In such a case, killing by the person would be murder, but justifiable homicide in the officer.⁴ *Mere suspicion will not suffice, it must be reasonable,* and the defendant must plead it specially.⁵

Excess of violence.] A reasonable degree of resistance or force on attempting to apprehend, must be preserved. The prisoner got into an empty third-class carriage; when asked for a ticket, he had none, and was locked up in a second-class till he came to S. There a policeman collared him, as he did not pay the full fare demanded. S. was the head quarters, and the prisoner could not have been dealt with at the place where he wished to alight. A struggle took place, and the prisoner used the knife. Wightman, J., allowed a verdict of "Guilty," on the ground of excess, although he would not give any opinion as to the right of conveying a passenger against his will from one station to another.⁶

Arrest by private persons.] Any private person present at a felony may arrest without warrant.⁷ Indeed, he is liable to fine and imprisonment in case of an escape, unless he be under age.⁸ Or if he refuse to assist an officer.⁹ And he may interfere to prevent a felony, as where a husband might, but for the interference of a private person, have murdered his wife whom he was threatening.¹⁰ Under such circumstances, doors may be broken in pursuit.¹¹ And the same tests, whether murder or justifiable homicide, apply, as in the constable's case.¹²

Herein is a distinction. If there be no warrant, the private person becomes liable to an action if no felony nor offence be

¹ *R. v. Light*, Dears. & B. 332; 27 L. J. M. C. 1.

² *Bowditch v. Fosberry, and others*, 19 L. J. Ex. 339. Whether the defendant was within the protection of 2 & 3 Vict. c. 94, s. 50. Qu.?

³ *Booth v. Hanley*, 2 C. & P. 288.

⁴ Steph. 242; 2 Hawk. c. 14, ss. 7, 8.

⁵ 4 Com. 293; Steph. 243. *Ledwith v. Catchpole*, Cald. 291. *Mure v. Kaye*, 4 Taunt. 34. *Price v. Seeley*, 10 Cl. & F. 28.

⁶ *R. v. Mann*, 6 Cox, 451.

⁷ 1 Hawk. c. 63, s. 16; 2 Hawk. c. 12, s. 1. *R. v. Price*, 8 C. & P. 282; 4 Com. 293.

⁸ 4 Com. 293; 2 Hawk. c. 12, s. 1.

⁹ 1 Hawk. c. 63, s. 13; 2 Hawk. c. 12, s. 7.

¹⁰ *Handcock v. Baker and others*, 2 B. & P. 260.

¹¹ 4 Com. 293.

¹² Id.

proved, whereas the constable is discharged in such a case.¹ Yet suspicious conduct at the time of arrest will afford a ground for mitigation of damages.² Although suspicion will not admit of taking a man to the place where a theft has been committed in order to ascertain whether he be the thief.³

Moreover, although an attempt to commit felony is only a misdemeanor, a private person may arrest upon witnessing the attempt. A stable having been recently attempted, the prisoner was found concealed in the yard, and was apprehended by a servant. The prisoner soon afterwards stabbed the servant, being detained by the master. The judges held the detainer lawful, and that the conviction was proper.⁴ And, in this case, the apprehension, without warrant, being on violent suspicion, was lawful. So where a person was seen in a board-house, upon which he ran away, but was captured on fresh pursuit, it was held, that his apprehension and detention were legal, and that his conviction for wounding a private person was right.⁵ It mattered not that the prisoner had abandoned his purpose before the arrest. Some real mischief, however, must evidently be in view. The jury are not to presume it.⁶ But the taking must be in the fact, or on fresh pursuit.⁷

Likewise, by 24 & 25 Vict. c. 96, s. 103, any person found committing any offence, either upon indictment or summary conviction under this Act, except angling in the day time, may be immediately apprehended without warrant by any person, and taken before a neighbouring justice, with such property, if any. The justice may grant a search warrant upon reasonable grounds of suspicion; and also any person to whom any property shall be offered to be sold, pawned, or delivered, upon reasonable suspicion, may take the person so offering before a justice, together with the property. By sect. 104, any constable or peace officer may take any person without warrant, when he shall be found lying or loitering in any highway, yard, or other place, having reasonable grounds to suspect that the person has committed, or is about to commit a felony against the Act, and shall bring him before a justice as soon as may be.⁸ The owner of property, or his servant, or any person authorized by him, may apprehend any offender without warrant if found in the act.⁹ Under those statutes, a conviction for stabbing a police constable, who caught the prisoner damaging roots and plants in a garden, was supported.¹⁰

¹ *Samuel v. Payne*, 1 Dougl. 359. *Adams v. Moore*, Selw. N. P. 910.

² *Cowles v. Dunbar*, 2 C. & P. 565.

³ *Hall v. Booth*, 3 Nev. & M. 116.

⁴ *R. v. Hunt*, 1 Moo. C. C. 93.

⁵ *R. v. Howarth*, Id. 207.

⁶ *Butler v. Turley*, Moo. & M. 54; 2 C. & P. 585; under 1 Geo. 4, c. 56.

⁷ *Hanway v. Boulton*, 4 C. & P. 350.

⁸ The person apprehending is entitled to notice of action, sect. 113; and see *Beechey v. Sides*, 9 B. & C. 806; 4 Man. & Ry. 334. *Bulling v. Ferris*, 1 Mees. & W. 628. *Reed v. Cowmeadow*, 7 C. & P. 821; 6 Ad. & E. 661.

⁹ *R. v. Curran*, 3 C. & P. 397.

¹⁰ *R. v. Fraser*, 1 Moo. C. C. 419.

And if a person in his own dwelling-house be disturbed, he may arrest the disturber,¹ that is to say, if there be a continuing, not a momentary affray, or if there be reasonable ground for supposing that the affray will be renewed.²

It is a mistaken notion to suppose that a soldier ceases to be a citizen. This error was very mischievous in 1780,³ and not only was the law misunderstood in that year as to soldiers, but likewise as to private persons. Soldiers can suppress riots in their private character as well as others.⁴

Some notification of the arrest should be made by the private person. The staff of the constable is sufficient in *his* case, but a private person must desire the party to surrender, or state the reason of the arrest. For want of attending to these observances, a conviction for maliciously cutting was holden wrong, although the prisoner was detected in the act of stealing wheat.⁵ However, if a man be seen breaking in or out of a house, the circumstances themselves are sufficient, and the private person need not give any warning.⁶ So where the owner cried "Stop thief," the notification was sufficient.⁷

By 14 & 15 Vict. c. 19, s. 10, any person may apprehend and deliver to a constable a person found committing any offence against the Act, so that the latter may, as soon as may be, be taken before a justice. And by sect. 11, any person may apprehend another committing any indictable offence in the night, and deliver him to a constable. Doubts had been entertained as to the power according to the preamble of the Act.⁸

[*Arrest under 9 Geo. 4, c. 69.*] By 9 Geo. 4, c. 69, s. 2, powers to arrest are given to owners and occupiers of land.⁹ Under sect. 9, however, nothing is said on the subject of arrest. Therefore, upon an indictment for shooting at a keeper, it was objected, that as sect. 2 only authorised the taking of offenders against sect. 1, there could be no ground for a capture in respect of an offence under sect. 9. But the judges held, that the prisoners had been guilty of an offence under both sects. 1 and 9. And Bayley, B., had intimated the same opinion at the trial, observing, that although from circumstances of aggravation, the offence was punishable under the 9th section, it was still an offence within the 1st section.¹⁰ As to notification, the principles above mentioned apply. A gamekeeper found the prisoners upon his master's land: they ran away, being armed with guns, obviously for the purpose

¹ *Timothy v. Simpson*, 1 Cr. M. & R. 757; see also *Ingle v. Bell*, 1 Mees. & W. 516.

² *Price v. Selby*, 10 Cl. & Fin. 28.

³ 4 Taunt. 449.

⁴ 2 B. & P. 264.

⁵ *R. v. Ricketts*, 3 Camp. 68. See *R. v. Payne*, post.

⁶ *R. v. Howarth*, 1 Moo. C. C. 207.

⁷ *R. v. Robinson*, 2 Starkie on Ev. 693, note (k). The prisoner was executed.

⁸ See *R. v. Davis*, 7 C. & P. 783. *R. v. Jones*, 9 C. & P. 258.

⁹ See hereafter, "Game."

¹⁰ *R. v. Ball*, 1 Moo. C. C. 330.

of destroying game. No notice of arrest was necessary.¹ A gamekeeper interfered off his own manor on the manor of another lord, but did not offer forcibly to apprehend the poachers. A wounding under these circumstances was held to be within 9 Geo. 4, c. 31, although the brother of the prosecutor had gently laid hold of a gun in the hands of one of the prisoners in order to see him sufficiently for the purpose of identification.²

A bare right of shooting which negatives ownership and occupation, confers no protection on a person acting as gamekeeper.³

Again, by 1 & 2 Will. 4, c. 32, s. 31, trespassers in the day-time in search of game may be required to quit the land where they are found, and to tell their names and places of abode. In cases of refusal or evasion, or of wilfully continuing or returning upon the land, the offenders may be arrested. It has been held, that the party must not only have been required to quit the land, but also to tell his name, and that the wilful return must be applied to the same land for the purpose of pursuing game there.⁴ Damage was done to a fence by a poacher's dog. This was not a malicious injury within 7 & 8 Geo. 4, c. 30, s. 24. The gamekeeper was, therefore, not justified in arresting the poacher. But, having arrested him, he might ask him to tell his name, and, on his refusing, might detain him. An indictment, therefore, for wounding the keeper was sustained, the jury having found that the name and place of abode had been asked. In this case likewise it seems to have been considered that both requirements to quit the land *and* tell the name and abode need not co-exist, that one would suffice. In this respect *Long's case* does not agree.⁵ It is observable, that the statute 14 & 15 Vict. c. 19, s. 11, extends to all indictable offences committed in the night. It consequently includes all cases of night poaching which may be the subjects of an indictment. So that although evidence was wanting to prove ownership or occupation so as to warrant an arrest under 9 Geo. 4, c. 69, Willes, J., had no doubt as to the application of the Act of Victoria.⁶

Hue and cry.] Hue and cry, a mode of pursuit now little in use, and of a much more extensive character than the cry of "Stop thief,"⁷ is so far connected with the criminal law of arrest as that

¹ *R. v. Payne and others*, 1 Moo. C. C. 378; 7 C. & P. 785.

² *R. v. Warner and others*, 1 Moo. C. C. 380; 5 C. & P. 525. *R. v. Addis*, 6 C. & P. 388. See *R. v. Taylor and another*, 7 C. & P. 266. The fact of shooting as a gamekeeper over a manor for seven years is evidence of the right. *R. v. Wall*, 2 Cox, 288.

³ *R. v. Price*, 5 Cox, 277, and *R. v. Addis* was cited. *R. v. Wood*, 1 Fost. & F. 470.

⁴ *R. v. Long*, 7 C. & P. 314.

⁵ *R. v. Prestney*, 3 Cox, 505.

⁶ *R. v. Sanderson and others*, 1 Fost. & F. 598.

⁷ In hue and cry the party is described and followed. The constable of the parish gives notice to the adjoining constable if the offender be not found, and so on till he be taken or driven to the seaside.

private persons are bound to take the offender, and, as it seems, without notice. A house may be broken for the purpose of this taking, if the party be there, after a demand of admittance, and should no felony have been committed, if the pursuers have abided by the customary process, it will make no difference. Should the constable be absent, hue and cry may be made without him; and it may be added, that in case of a warrant to apprehend a particular individual, there is no necessity, upon hue and cry made, to have it backed upon entering a strange county. And if a thief turns round upon hue and cry and slay one of his pursuers, he and all his company will be guilty of murder, except such as have been taken, or have quietly submitted.¹

Arrest.—Colonies.] By 6 & 7 Vict. c. 34, ss. 1 and 2, persons having committed offences in the colonies and escaping into the United Kingdom, or *vice versa*, may be apprehended.² But the offences must have been treason, or such felonies as the justices of the peace cannot try at their quarter sessions under 5 & 6 Vict. c. 38.³ But now by 16 & 17 Vict. c. 118, this provision is extended to every felony.

Arrest.—High seas.] By 11 & 12 Vict. c. 42, s. 2, in all cases of indictable offences committed on the high seas, or in any creek or other place where the admiralty of England claims jurisdiction, and in cases of crimes or offences committed on land beyond the seas, for which an indictment may be preferred in England or Wales, any justice of England or Wales may issue a warrant to apprehend the offender, and cause him to be brought before such justice, or some other justice or justices. And there may be a joint warrant of two or more justices by virtue of the same clause.

¹ *R. v. Jackson and others*, 1 Hale, P. C. 464. See further on this subject, 2 Hawk. c. 12, s. 5, &c.; 4 Com. 293, 294; and as to the evidence necessary to justify an

arrest in the county court, see *R. v. Davies*, 30 L. J. M. C. 159; 8 Cox, 486.

² See sects. 3—9.

³ Sect. 10.

CHAPTER II.

THE DEPOSITIONS.

Depositions.] The next steps are to take the depositions of the witnesses, and the examination of the prisoner,¹ and to return them to the court.² All the depositions must go, not merely those of the witnesses whom the justice binds over.³ Moreover, since the Prisoner's Counsel Bill, all that the witnesses have said should be returned,⁴ for the object of the legislature was to acquaint prisoners with the evidence likely to be brought against them. But it is, of course, no objection that the witness adds to his evidence at the trial.⁵ If the prisoner interposes a material observation, it should be taken down in the depositions;⁶ and if not so taken down, the judge will not allow any evidence of it to be given.⁷ And it is no excuse for a magistrate to urge, in withholding a confession, that it was wanted for the grand jury.⁸ Although, if the magistrate neglect his duty by not returning a confession, such a statement is not, on that account to be excluded.⁹ There is this distinction; the justice must *return* everything, but it seems that he need not bind over every witness.¹⁰

Copies of the depositions must, on demand, be furnished¹¹ to the accused, and if he wishes to inspect them at his trial, he may do so without fee or reward.¹² But the prisoner is not entitled to a copy of his own statement.¹³

The depositions and examination must be in writing,¹⁴ the former upon oath, the latter without oath. The prisoner must be present when the evidence is given; and if absent, the witnesses must be resworn, and their statements carefully read over to him. He is thus enabled to cross-examine, or put any questions he may think proper or necessary.¹⁵ The depositions are then signed by the justice and by the witnesses, although it is not indispensable that the latter should sign, but it is almost the universal custom for

¹ 11 & 12 Vict. c. 42, s. 17.

² Sect. 20.

³ *R. v. Fuller*, 7 C. & P. 269.

⁴ *A fortiori*, what is material. *R. v. Weller*, 2 Car. & K. 223.

⁵ *R. v. Grady and another*, 7 C. & P. 650. *R. v. Coveney*, *Id.* 667.

⁶ *R. v. Weller*, *ut supra*.

⁷ S. C.

⁸ *R. v. Fallows and another*, 5 C. & P. 508.

⁹ *R. v. Wilkinson*, 8 C. & P. 662.

¹⁰ *R. v. Smith*, 2 Car. & K. 207.

¹¹ At a reasonable rate, not exceeding three halfpence for a folio

of ninety words; 11 & 12 Vict. c. 42, s. 27. But the section does not include surety of the peace. *Humphreys, ex parte*, 19 L. J. M. C. 189; 1 Pr. Rep. 323; 4 New. S. C. 179. S. C. nom. *R. v. Justices of Hereford*.

¹² 6 & 7 Will. 4, c. 114, s. 4; s. 3 is repealed.

¹³ *R. v. Aylett*, 8 C. & P. 669.

¹⁴ 11 & 12 Vict. c. 42, s. 17.

¹⁵ See *R. v. Arnold*, 8 C. & P. 621. *R. v. Johnson*, 2 Car. & K. 354; 2 Russ. C. M. 875; 2 Hawk. c. 16, s. 8.

them to do so. The justice should subscribe the examination of the prisoner,¹ but the prisoner may object to sign it, although it should be tendered to him.²

Before the prisoner's statement is received, the whole of the evidence for the prosecution should be gone through. Garrow, B., once admitted a statement made before, but expressed doubts as to the legality of admitting it.³

The evidence being completed, the statute⁴ directs that, without requiring the attendance of the witnesses, the justice shall have the depositions read over to the prisoner.⁵ It is also ordained⁶ that

¹ 11 & 12 Vict. c. 42, s. 18.

² See 2 Russ. C. M. 881.

³ *R. v. Fagg*, 4 C. & P. 566.

⁴ 11 & 12 Vict. c. 42, s. 18.

⁵ This being done, these words are to be said by the justice to the prisoner: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you at your trial." Then the prisoner's statement, if any, should be written down and read to him; it should be signed by the justice and kept with the depositions, and it may be given in evidence without further proof, unless it be shown that the justice did not sign the statement.

There is a further caution. The justice may give the prisoner to understand that he has nothing to fear from any threat, nor to hope from any promise or favour. A proviso then follows enabling the prosecutor to give in evidence any admission, confession, or other statement which may, by law, be admissible. This proviso was introduced lest, in the absence of the cautions, it might be inferred that the prisoner's confession would not be admissible. Proof of the caution must be given *déhors* any declaration to that effect contained in the caption of the statement. *R. v. Higson*, 2 Car. & K. 769.

It would seem that the framer of the clause intended to make both the cautions contemporaneous. But

the judges seem to think that if there is no evidence of a threat or promise, the *first* caution is sufficient. They have considered that the first proviso containing the second caution is directory. The deposition in the schedule contains only the first caution. If a threat or promise appears in the evidence, a second caution comes into action. *R. v. Bond*, 19 L. J. M. C. 138; Den. 517; 3 Car. & K. 337. *R. v. Sansome*, 19 L. J. M. C. 143; 3 Car. & K. 332; Den. 545.

By Parke, B., 19 L. J. M. C. 147, "The last proviso appears to me to extend to both parts of the previous clause." So that, in the absence of a threat or promise, the examination, according to the opinion of Parke, B., would be admissible without either caution, if it were admissible by law independently of the statute.

However, in *R. v. Sansome*, Erle, J., said that it would be prudent to give both cautions, and the court agreed; Den. 548, 549. Instead of putting questions the prisoner made a statement, and the statement was written down without a caution. It was held, that this was not evidence *per se*, but that any one who heard the prisoner speak might refresh his memory from the written document and give evidence. But in such a case the prisoner should be told by the justice that it was not the time for him to make a statement. *R. v. Watson*, 3 Car. & K. 111.

⁶ Sect. 19.

the place of examination shall not be deemed an open court, but the justice may debar all access if he shall think that the ends of justice will be thereby promoted.¹ By another clause,² if the offence has been committed out of the jurisdiction of the justice before whom the prisoner appears, then if no witnesses come forward, and no witnesses reside within the jurisdiction, the prisoner may be taken before a justice of the county, &c. where the offence was committed. But should a witness appear against him, and the justice be not satisfied of his guilt, the depositions are to be sent with a warrant to a justice where the offence happened. If a case be made out, the prisoner may be dealt with before the first justice. Should the second justice discharge the prisoner, all recognizances entered into before the first become void.

It has been said that should the slightest case be made out, the justice ought to call upon the accused for his defence.³ But there are judicial opinions to the contrary.

By 11 & 12 Vict. c. 42, s. 25, after the evidence for the prosecution, the justice is either to discharge or commit the prisoner, and if the evidence should raise a strong or probable presumption of guilt, he is to be committed.

It should be observed, that the prisoner is not, of right, entitled to the assistance of an attorney, but he is never refused. In summary proceedings the accused can claim both counsel and attorney.⁴ Otherwise, it lies in the discretion of the magistrate to allow their presence.⁵ The prisoner may then call witnesses, who are to be examined upon oath;⁶ and, possibly, it may be discretionary with the justice to hear them or not, although the judges are inclined to consider the hearing more obligatory upon the justice since the repeal of 7 Geo. 4, c. 64, s. 2.⁷

Depositions are not merely evidence in the particular case. Upon all subsequent inquiries, civil or criminal, they are so. For such purposes, it is no objection that they are not signed by the authorities.⁸ And they must not be so framed as to follow the clause of a particular statute.⁹

¹ 11 & 12 Vict. c. 42, s. 19.

² Sect. 22.

³ Steph. 251.

⁴ 6 & 7 Will. 4, c. 114, s. 2.

⁵ Steph. 251.

⁶ Id.

⁷ Which seemed to confine the examination to the prosecution.

⁸ *Leach v. Simpson*, 7 D. P. C. 513.

⁹ *Miles v. Collett*, 3 M. & P. 242.

CHAPTER III.

BAIL AND HABEAS CORPUS.

Bail.] By 11 & 12 Vict. c. 42, s. 23, justices may bail in felony and certain misdemeanors¹ at discretion, with one or more sureties.² The magistrate may bail after commitment; or he may certify on the back of the commitment warrant that he consents to bail, upon which any justice attending at the gaol may, on production of the certificate, admit the prisoner to bail. If the sureties cannot conveniently attend there, a duplicate of the certificate may be signed by the justice committing, and any justice may then take the bail of the sureties, and, on the recognizance being forwarded to the gaol with the certificate, a justice may bail the accused at the gaol. By sect. 24, a warrant of deliverance shall be lodged by the justice with the keeper of the gaol, unless there be a detainer for some other offence.

Upon a committal, however, for other misdemeanors than those mentioned in the note, the justice must accept bail if the accused require it.³ On the other hand, the justice need not offer bail; the prisoner must tender it.⁴ The prisoner may likewise apply at the gaol to a visiting justice. And in all cases where another than the committing justice takes bail, the last-mentioned justice shall transmit the recognizances to the committing justice, who shall transmit them to the proper officer. But no person charged with treason shall be bailed otherwise than by a secretary of state, or by the court of Queen's Bench, or by a judge thereof in vacation.⁵ The right of traverse is abolished, and, in lieu of it, the court may adjourn the trial and impose such terms as to bail as they may think fit, and respite the respective *recognizances*.⁶

The power to accept bail is a judicial duty, and, without proof of

¹ Assault with intent to commit felony; attempt to commit felony; obtaining property by false pretences, or an attempt at it; receiving property stolen or detained by false pretences; perjury and subornation; concealment of birth; wilful or indecent exposure of the person; riot; assault in pursuance of a conspiracy to raise wages; assault on a peace officer in the execution of his duty, or upon any person acting in his aid; neglect or breach of duty as a peace officer; any misdemeanor the costs of which may be allowed out of the county

rate; for instance, the misdemeanors created by 14 & 15 Vict. c. 19. See sect. 14.

² It was customary before the passing of the 5 & 6 Will. 4, c. 33, s. 3 (now repealed), and it is still usual, to require two bail in felony. Although one bail may certainly be taken if thought fit. The prisoner himself should be bound over. See 2 Hawk. c. 15, s. 4.

³ 11 & 12 Vict. c. 42, s. 23.

⁴ 2 Hawk. c. 15, s. 4.

⁵ Sect. 23, (n. 3,) *sup.*

⁶ 14 & 15 Vict. c. 100, s. 27.

express malice, no action will lie against the justice, even although the sureties tendered are sufficient.¹ The decision applies to cases where the defendant is entitled to bail.

The absence of a witness for the prosecution will not entitle the party to bail, especially in a case of murder, the bill having been found, and it will not help the prisoner that the coroner's inquisition is evidently faulty.² But the attorney-general may enter his *noli prosequi*. However, when the trial had stood over for two assizes in consequence of the absence of a material witness, believed to have gone abroad as a soldier (and it was so stated upon affidavit), and that there was no prospect of his return for some time, the judge ordered the discharge of the prisoners, without calling upon them to enter into recognizances at a future day, and he discharged the recognizance of the prosecutor,³ although it is customary not to discharge but respite the recognizance.⁴ So upon a charge of murder, the prisoner being confined as a lunatic under 3 & 4 Vict. c. 54, the recognizances were respited.⁵

Sureties.] The justice must see to the sufficiency of the sureties, and he may examine them upon oath.⁶ If through fraud or mistake inadequate bail should have been accepted, the justice may require a better security and a new recognizance, or commit the prisoner in default.⁷ Strictly speaking, he is liable to a fine for neglect in the matter,⁸ and, at common law, the bailing of persons not bailable is punishable, as it seems for an escape,⁹ and it is not an excuse to plead ignorance of the prisoner's commitment.¹⁰ Nevertheless, if the bail surrender their principal, the justice will be safe.¹¹ Excessive bail must be carefully foreborne. It is complained of as a great grievance by stat. 1 Wm. & M. sess. 2, c. 2,¹² and it is a misdemeanor to deny, delay, or obstruct bail when allowable.¹³ Still, the custom of requiring 24 or 48 hours' notice is not a contravention of this rule, for the magistrate must ascertain, and especially in serious cases, the solvency and respectability of the bail.¹⁴

Fresh bail.] An indictment for conspiracy having been removed

¹ *Linford v. Fitzroy*, 18 L. J. M. C. 108; 13 Q. B. 240.

² *Ex parte Andrews*, 1 New. S. C. 199; 2 Dowl. & L. 10.

³ *R. v. Bridgeman*, Car. & M. 271.

⁴ *R. v. Lord Drummond*, 11 Mod. 200.

⁵ *R. v. Cobus*, 1 Cox, 207.

⁶ 2 Hawk. c. 15, s. 4.

⁷ *Id.*

⁸ 27 Ed. 1, c. 3; 2 Hawk. c. 15, ss. 5, 6.

⁹ 2 Hawk. c. 15, s. 7.

¹⁰ *Id.* s. 12.

¹¹ *Id.* ss. 5, 6.

¹² No. 10.

¹³ 2 Hawk. c. 15, s. 13.

¹⁴ 2 Hawk. *ut sup.* See *R. v. Badger*, post. An application for bail was made on Friday, but an intention appeared to keep the prisoner in custody till Monday. Bail was accepted. *R. v. Carlile*, 6 C. & P. 628.

by *certiorari*, and bail given, it was moved after conviction, but before judgment, to quash the indictment for insufficiency. Pending the motion, one of the bail became insolvent and offered a composition to his creditors, and it was sought to charge the defendant with fresh bail, but the court would not accede to the demand.¹

Recognizance.] The prosecutor² and witnesses are bound over by recognizance to appear at the trial and give evidence.³ When the recognizances are subscribed by the justice, they must be delivered to the officer of the court.⁴

A recognizance to appear at the next assizes and general gaol delivery does not apply to a special commission as the winter assize, so that upon default, such a recognizance was not estreated.⁵

The binding over must be done by a justice, not by the court, and it was so held in a case under the Act for establishing the Central Criminal Court,⁶ but it may be done at any time during the session.⁷ So where an escaped prisoner was retaken, the judge refused to bind over the constable to the next assizes. He thought that application should be made to a magistrate.⁸

If a witness will not enter into the recognizance, a committal may be made out,⁹ and under such circumstances, it is competent to commit a *feme covert*,¹⁰ whose husband is the proper person to be bound for her. In the case of a child, the constable or police officer usually enters into the recognizance, and the travelling or other expenses are allowed. In such a case where the child was taken away, the judge respited the recognizance to the next assizes.¹¹ So the recognizances of commoners were respited from session to session until the trial of an indictment against a peer was disposed of.¹²

¹ 3 Dowl. (N. S.), 132, Wightman, J. This motion should be made at chambers.

² Whenever a prosecutor shall have preferred a bill of indictment, and shall move the court for process to issue thereon, the person so applying shall, before the issuing of the process, enter into such recognizances as the court shall direct to prosecute the law with effect. Reg. Gen. C. C. C. Jan. sess. 1842; Car. & M. 254.

³ 11 & 12 Vict. c. 42, s. 20.

⁴ Id.

⁵ *R. v. Walker*, 1 Cox, 14.

⁶ *R. v. Carlton*, 7 C. & P. 151.

⁷ *R. v. Carlton*, ut sup. *R. v. Gregory*, 1 Cox, 198.

⁸ *R. v. Dade*, 1 Lew. 196. But

it may be questioned whether the justice would have the power.

⁹ 11 & 12 Vict. c. 42, s. 20. By this Act the party refusing may be imprisoned till the trial, unless he enters into the recognizances. Should the accused be discharged, the justice may issue his order for the discharge of the witness so imprisoned.

¹⁰ *Bennet and ux. v. Watson*, 3 M. & S. 1.

¹¹ Harrison, Dig. p. 833.

¹² *R. v. Douglas*, Car. & M. 193. The indictment was against Lord Cardigan and others. The houses of parliament were not sitting, and the indictment was formed at the Central Criminal Court.

The initials of the names of the magistrates were inserted on a writ of *scire facias* upon a recognizance of bail. The court held the writ good on demurrer. A consonant, as D., is a good christian name as well as a vowel.¹

By 4 & 5 Will. 4, c. 36, (the Central Criminal Court Act,) no indictment could be presented before the grand jury of that court for misdemeanor, except perjury and subornation, unless the prosecutors were previously bound over by recognizance. But by 9 & 10 Vict. c. 24, s. 2, that provision is repealed, and bills of indictment may be preferred by any person before the grand jury of that court for any offence alleged to have been committed within its jurisdiction as before any other grand jury. Indeed, the provision had been held directory only, and the court was considered to have jurisdiction to try an indictment, although in the absence of recognizances.² And the court would not arrest the judgment because in the caption of the indictment there was no mention of the finding of recognizances.³ The defendant need not have been in custody, nor have been bound to appear.⁴

Estreats.] It is said, that if the party surrenders and takes his trial at the next sessions, the fault of non-appearance is compounded in the Exchequer for a small matter.⁵ An estreat may be with the desire of the King.⁶ The court will exercise their discretion as to estreats.

By 7 Geo. 4, c. 64, s. 31, where any person bound by recognizance for his appearance, or where any other person shall be bound for him to prosecute or give evidence in felony or misdemeanor, or to answer for any common assault, or to articles of the peace, or to abide an order in bastardy, shall make default, the officer of estreats shall prepare a list in writing, specifying the name of the defaulter, and the nature of the offence, and the residence, trade, profession, or calling of such person and surety, and shall distinguish the principals from the sureties, and state the cause of non-appearance, if known, and whether the ends of justice have been defeated or delayed thereby; and the officer shall, before the recognizance shall be estreated, lay such list, if at a court of oyer and terminer or gaol delivery in any county besides Middlesex and London, [or at a court of great sessions, or at one of the superior courts of the counties palatine,] before one of the justices of those courts, if at a court wherein a recorder [or other corporate officer] is the judge, before such recorder, &c.; and if at a session of the peace, before the chairman or two other justices who shall have attended such court; who are respectively authorized and required to examine such list, and to make such order touching the estreating or putting in process of any such recognizance, as

¹ *R. v. Dale*, 5 Cox, 171.

² *R. v. Gregory*, 14 L. J. M. C. 82.

³ S. C. So was *Day v. Reg.* 2 Cox, 178.

⁴ *R. v. Gregory*, 7 Q. B. 274.

⁵ *R. v. Tomb*, 10 Mod. 278.

⁶ *R. v. Baily*, Comb. 10.

shall appear just; and it shall not be lawful for the officer of any court to estreat or put in process any such recognizance without the written order of the justice, recorder, [corporate officer,] chairman, or justices of the peace before whom such list shall have been laid.¹

By 16 & 17 Vict. c. 32, s. 8, in every case where default shall be made by any person in performing the condition of any recognizance into which he may have entered to proceed to the trial of any issue joined upon any indictment in Her Majesty's Court of Queen's Bench, the said court, or any judge of the common-law courts at Westminster, may call upon any party who has entered into such recognizance, by rule or order, to show cause why such recognizance should not be estreated, and unless cause shall be shown, such court or judge may order such estreat into the Exchequer.

Discharge of recognizances.] The recognizance of a defendant bailed for libel is not discharged by a *nolle prosequi* entered as to the information under which he has appeared, if, in the same term, another information for the same offence be filed against him.² It is no ground for a discharge that a parish is threatened with the wife and family.³

Remand.] By 11 & 12 Vict. c. 42, s. 21, if from the absence of witnesses or any other reasonable cause, it becomes necessary to defer the examination, the justice may, by warrant, remand the accused, for a time not exceeding eight clear days,⁴ to the common gaol, &c., or if the remand do not exceed three clear days, it may be verbal. The party is then to be brought before the same or another justice acting in the same place. But he may be brought up before the expiration of the remand, and bailed with or without sureties. The justice may certify any default of appearance upon the recognizance, which may then be put in suit, and such certificate shall be deemed *prima facie* evidence of such non-appearance.⁵ But some charge must be made to warrant a remand. It is not sufficient to allege that a charge is about to be made.⁶

Commitment.] The commitment must be made with convenient

¹ This section does not appear to have been repealed.

² *R. v. Ridpath*, 10 Mod. 152; Fort. 338.

³ *R. v. Stancher*, 3 Price, 261. This was the case of a bail whose recognizances had been estreated. He had been surety for a person charged with perjury and compounding of felony. See also *R. v. Paul*, 6 C. & P. 323. *R. v. Adams*, Id. 324, n.

⁴ As to clear days, see Woolrych, of Legal Time, p. 150.

⁵ See under the old law, *Scavage v. Tatcham*, Cro. El. 829. *R. v. Gooding*, cited, 10 B. & C. 33, 35. *Davis v. Capper*, 10 B. & C. 28. *Cave v. Mountain*, 1 M. & Gr. 257; 1 Scott, 132.

⁶ *R. v. Birnie*, 1 Moo. & Rob. 160. Under a Railway Act there was no power to remand, but the court held, that the justice had power to adjourn the hearing, and to commit in the meantime. *Gellan v. Hall*, 27 L. J. M. C. 78.

certainty. If it does not show upon the face of it that an offence (as felony) has been committed, it will not be good.¹ But it is said, that the authority to commit need not appear,² and that a commitment for high treason and felony in general will be sufficient,³ for this is not a general warrant as to persons or goods, although it is certainly the practice to specify the particular offence. Again, a commitment for treasonable practices, without more, has been sustained.⁴

The privy council may commit for treason,⁵ and a secretary of state.⁶

In commitments a statute must be pursued with tolerable exactness, although there is not so great a precision in them as there is in indictments.⁷ Still the *conclusions* prescribed should be followed.⁸ A commitment for high treason at Savannah, in the colony of Georgia, in North America, was held sufficient to show that the offence had been committed *without* the realm of England, for no place *within* the realm could be intended by that description.⁹ And it is not necessary to allege that the charge was made upon oath.¹⁰

The commitment must be in writing, and under the hand and seal of the justice. It must express his office and authority, and the time and place where the warrant is made; and it must be directed to the gaoler or keeper of the prison.¹¹ The conclusion is, that the party be duly kept till delivered by due course of law, or, in default of bail, till he find bail, but "not until the justice shall make further order."¹² And a commitment by a *special* authority concluding "till he shall be discharged by due course of law," would be invalid.¹³

To what gaol.] The common gaol is the proper place for the commitment;¹⁴ although, under various statutes, the commitment may be to the house of correction.¹⁵ And the party may be sent to the next gaol, whether it be in the same county or not.¹⁶ Should the

¹ *R. v. Judd*, Leach, 484.

² *R. v. Goodall*, 1 Ld. K. 122; Say. Rep. 129.

³ 2 Hawk. c. 16, s. 16. *R. v. Sir W. Wyndham*, 1 Str. 2. *R. v. Harvey of Comb*, 10 Mod. 334.

⁴ *R. v. Despard*, 7 T. R. 736, where the authority of *R. v. Wilkes* was rather impeached by Lord Kenyon. See Id. 739, 740, further cases. See, however, *R. v. Sayer*, cited, Leach, 162.

⁵ See 2 Hawk. c. 16, s. 4.

⁶ Id. But see the arguments and illustration respecting the secretary of state in 2 Hawk. by Curwood, 175, n.

⁷ *R. v. Remnant*, Leach, 583.

R. v. Brown, 8 T. R. 26.

⁸ 2 Hawk. c. 16, s. 18. *R. v. Hall*, 5 Burr. 2684; 3 Burr. 1636.

R. v. Judd, 2 T. R. 255.

⁹ *R. v. Platt*, Leach, 157, 167.

¹⁰ Id. citing several authorities.

¹¹ 2 Hawk. c. 16, s. 13. See 2 Str. 934.

¹² 2 Hawk. c. 16, s. 18. See also *R. v. Rhodes*, 4 T. R. 220.

¹³ *R. v. Marsh*, 2 Sir Wm. Bl. 806.

¹⁴ 2 Hawk. c. 16, s. 4.

¹⁵ Id. s. 7.

¹⁶ Id. s. 8.

gaoler refuse to receive the prisoner, the town to which the constable belongs must keep him till the next gaol delivery.¹ By 60 Geo. 3 and 1 Geo. 4, c. 14, s. 1, justices having an exclusive jurisdiction, may commit persons charged with capital offences to the county gaol. By sect. 2, witnesses may be bound over to appear against such persons. And by sect. 3, the expenses are to be paid by the town or place where the offence has been committed.

But the statute 21 Vict. c. 22 abolishes the power of committing to the franchise prisons mentioned in the schedule of the Act, although, to prevent mistake, it should be remarked, that this Act respects the confinement of debtors, not of felons or misdemeanants. The 4 Geo. 4, c. 64, contains the principal regulations concerning our gaols and prisons. In each county, and in some other places, there shall, by sect. 1, be one gaol and one house of correction.

Notwithstanding the Act, the Middlesex magistrates were held justified in committing prisoners to Newgate, which is the county gaol of Middlesex.²

We may add here, that the constable is not the only officer who can execute these warrants of commitment, for constant practice has authorized a messenger to take charge of a prisoner for the purpose of carrying him to gaol.³

By 11 & 12 Vict. c. 42, s. 25, the prisoner is to be committed to the gaol where, by law, he may now be committed, and, in the cases of offences done on the high seas, or on land beyond the sea, to the gaol of the county, &c. within which the committing justice has jurisdiction.

Expenses.] The expenses of a commitment are most commonly borne by the county, except in Middlesex, where the overseers of the poor are, by statute,⁴ made liable. But if the prisoner has sufficient goods or money within the county where he has been taken, he must bear his own reasonable charges,⁵ which are to be levied upon his chattels, in default of payment, by warrant under the hand and seal of the magistrate.⁶ It seems, therefore, that, in strictness, money found upon a prisoner may be applied to defray the costs of his transport to gaol, although, from motives of humanity, it is frequently returned to him in order to enable him to meet the costs of the defence, and, provided also, that the money be not material to the charge in question.⁷ And, before trial, he may execute

¹ 2 Hawk. c. 16, s. 9.

² *R. v. Cope*, 6 Ad. & El. 226, 1 Nev. & P. 515; 7 C. & P. 720. See also *R. v. Governor of Middlesex House of Correction*, 2 Nev. & M. 138; and *R. v. Holden*, 8 C. & P. 606, where it was held, that since the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, all offences

committed in Bristol should be tried in Gloucestershire.

³ 2 Hawk. c. 16, s. 9.

⁴ 27 Geo. 2, c. 3, s. 1; 14 & 15 Vict. c. 55.

⁵ 3 Jac. 1, c. 10, s. 1; 27 Geo. 2, c. 3, s. 1.

⁶ 3 Jac. 1, c. 10, s. 1.

⁷ *R. v. Barnett*, 3 C. & P. 600. *R. v. Bass*, 2 Car. & K. 822.

a power of attorney for the purpose of his defence, or, indeed, to satisfy a *bonâ fide* creditor.¹ Even upon a charge of stealing monies, the judge directed that the prisoner should have 5*l.* of the money found on him for his defence, none of the coin so found being identified.² Still, where there are good grounds for supposing that the money found has been the proceeds of the offence, as in forgery, the judge will not order the return of the property.³ The judge has the power, not the justice.⁴

By 11 & 12 Vict. c. 42, s. 22, the costs and expenses of carrying a prisoner from one jurisdiction to another, together with the expenses of the constable, are to be repaid by the county into which the prisoner is last taken.⁵ And by sect. 26, general provisions are ordained with respect to the payment of expenses of this nature in a great measure agreeing with the old law.

By the Larceny and Malicious Injuries Acts it is provided,⁶ that no commitment shall be held void by reason of any defect therein, if it be therein alleged that the party has been convicted, and if there be a good and valid conviction.⁷ This enactment cures formal but not substantial errors; therefore, a commitment without jurisdiction will be invalid, and the justice liable to an action.⁸ But by 11 & 12 Vict. c. 44, s. 2, no action shall be brought against a justice for any act done under a conviction or order, until the same shall have been quashed.

Commitment under 1 & 2 Vict. c. 14.] The commitment of an insane person not being a commitment in execution, needs not so strict a construction; therefore, in a case of assault, it was held immaterial that the name of the person whom the prisoner intended to assault was not mentioned, nor that it did not appear that evidence had been taken on oath.⁹

Bail by the Court of Queen's Bench and the judges.] The magistrate refuses bail not unfrequently; perhaps it is not applied for. The Court of Queen's Bench, or a judge of a superior court, may then take bail.¹⁰ In term it is usual to apply to the court, but in vacation to a judge.¹¹ And during the term the courts of Common Pleas and Exchequer may be moved; so also the courts of Chancery either in term or vacation.¹²

¹ *R. v. Coxon*, 7 C. & P. 651.

² *R. v. Rooney*, Id. 515, Little-dale, J.

³ *R. v. Burgiss*, Id. 488, Little-dale, J. In this case 2*l.* were returned, being no part of the proceeds.

⁴ *R. v. Pierce*, 6 Cox, 117.

⁵ See *Le Verick v. Mercer*, 22 L. J. M. C. 81.

⁶ 24 & 25 Vict. c. 96, s. 111;

24 & 25 Vict. c. 97, s. 69.

⁷ *R. v. York*, 5 Burr. 2684.

⁸ *Wickes v. Clutterbuck*, 2 Bing. 483; 11 Moore, 83.

⁹ *R. v. Gourlay*, 7 B. & C. 669; 1 Man. & R. 619.

¹⁰ 2 Hawk. c. 15, s. 77. See *R. v. Yates*, Leach, 169.

¹¹ 4 Com. 299.

¹² 2 Hawk. c. 16, s. 81.

One indicted at York may put in bail in London.¹ But a judge of gaol delivery cannot bail a person not in gaol.² Nor can a person out of custody be bailed before a magistrate in the country. He must surrender for that purpose.³ But if, being in custody, he plead his poverty, the court will allow of his being bailed in the country,⁴ with the sanction of an affidavit.⁵

The principle adopted in considering the subject of bail is, whether the prisoner is likely to appear, not the question of his guilt or innocence. If a bill has been found, the prospect of his appearance is lessened, and that circumstance will weigh with the court.⁶

The courts or the judge have required four bail in felony,⁷ but where the commitment had omitted the word "feloniously," two were accepted.⁸

It must be remembered, that, throughout these remarks, we are dealing with criminal apart from civil cases.

Habeas corpus.] The course to pursue when it is desired to obtain bail in the last resort is to sue out a writ of *hab. corp.* The writ, however, is grantable of right in all cases except treason or felony.⁹ In treason or felony, the Court of Queen's Bench or a judge can bail by common law.

The old writ was mainprise. It commanded the sheriff to take sureties for the prisoner's appearance. The differences between mainprise and bail were that the mainpernor could not surrender his principal: the mainprenor was bound to produce him to answer *all* charges, whereas bail can surrender, and are only tied to the special charge. As to the writ *de odio et atia*, it was confined to murder, and at one time abolished, but revived, according to the opinion of Coke, C. J., by 42 Ed. 3, c. 1. But the great writ at common law was *de homine replegiando*. It went to the sheriff, who, upon receiving security that the prisoner should be forthcoming to answer any charge which might be made against him, was bound to deliver him out of prison.¹⁰ When the person was conveyed out of the sheriff's jurisdiction, the return was "*elongatus est*," and then the "*capias in withernam*" issued to imprison the defendant himself, *i. e.*, the defendant in the *hom. repl.* without bail or mainprise till he should produce his prisoner.¹¹ The writ *de hom. repl.* lay upon a *ne exeat regno*.¹²

¹ *R. v. Swailes*, 1 Lew. C. C. 19.

² *Anon. Id.* 20.

³ *R. v. Wren*, 5 Dowl. N. P. C. 222.

⁴ *R. v. Massey*, 6 M. & S. 108. *R. v. Jones*, 1 B. & Ald. 209. *R. v. Booker*, 2 Dowl. N. P. C. 446; 5 Dowl. N. P. C. 129.

⁵ *R. v. Gregory*, 5 Dowl. *ut sup.*

⁶ *R. v. Scaife*, 9 Dowl. N. P. C. 553.

⁷ *R. v. Shaw*, 6 Dowl. & R. 154.

⁸ *R. v. Dowling*, 10 Jur. 1056.

⁹ 31 Car. 2, c. 2; 2 Hawk. c. 15, s. 15. See 56 Geo. 3, c. 100.

¹⁰ 3 Com. 128.

¹¹ *R. v. Designy*, Tho. Raym. 474. See *R. v. Spence*, 2 Phil. 253.

¹² *Anon.* 7 Mod. 9.

But several exceptions were attached to it,¹ and hence it did not maintain its rank amongst the charters of British liberty, although an instance of its use may be found as late as the time of Atkins.²

We next find the writ of *hab. corp. ad subjiciendum* at common law. This is said to be a high prerogative writ, issuing out of the Queen's Bench, both in term and vacation, by a fiat from the lord chief justice, or any other judge.³ For it was long considered that the Court of Common Pleas had no jurisdiction in this matter, and, therefore, notwithstanding the Petition of Right, 3 Car. 1,⁴ which forbade the imprisonment or detention of a freeman without cause, that court, for some time, discountenanced applications of this nature.⁵ Upon this, the Act 16 Car. 1, c. 10, gave a co-ordinate jurisdiction to these courts, so that every subject is entitled, at his option, to the benefit of the common-law writ in both courts.⁶ Still the lord chancellor did not feel himself justified in granting the writ in vacation,⁷ and a practice crept in of delaying obedience to the first writ, the prisoner thus requiring an alias, or even a pluries writ, and other vexatious shifts were resorted to for the purpose of retaining the custody of an obnoxious person.⁸ The well-known Habeas Corpus Act was, consequently, pressed upon the legislature after a lapse of years, and it was hoped that a final stop had been put to the long catalogue of grievances which had occurred and still threatened the subject.

By that statute,⁹ when the writ is brought to the sheriff, &c., the officer, upon payment or tender of the charges, and security by the prisoner's bond for the charges of return in case of recommitment, shall, except the case be treason or felony, produce the prisoner within three days if the distance be within 20 miles, within ten days if within 100 miles, or twenty days if beyond, and shall certify the true cause of the detainer. By sect. 3, the writ may be had in vacation, unless¹⁰ the party has neglected his application for two terms. The 5th section prescribes, that in default of making true returns, or of producing the prisoner, or of delivering to him or his agent, within six hours after demand, a copy of the warrant of commitment, the gaoler, &c. shall forfeit 100l.; for the second offence 200l., and be disabled from holding his office. By sect. 6, if the prisoner be recommitted without the order of the court the penalty is increased to 500l. The 7th section ordains that persons indicted for treason or felony shall be indicted in the next term or sessions, or be bailed, and if not tried in the second term or sessions, shall be discharged. A prisoner was brought up under this section, and it appeared that before the spring assizes of 1840 he had been committed for shooting at A. Then, on account of A.'s illness, he was

¹ 3 Com. 129, note 2.

² *R. v. Treblecock*, 1 Atk. 633.

³ 3 Com. 131.

⁴ *Id.* 134.

⁵ *Id.* 131.

⁶ 3 Com. 132, 135.

⁷ *Id.* 132.

⁸ *Id.* 135.

⁹ 31 Car. 2, c. 2, s. 2.

¹⁰ Sect. 4.

remanded till the next assizes. A. died before the summer, and a bill for murder was then found, and the trial was again postponed on account of the absence of a material witness. The prisoner was held not to be entitled to his discharge under this section.¹ The 8th clause excepts civil suits. By sect. 9, the original custody of the prisoner is preserved, unless, indeed, it be altered by another writ, or the prisoner be sent by the judge to a workhouse or house of correction, or unless he be removed from one prison to another in order to his discharge. By sect. 10, the *habeas* may be had out of all courts of law and equity at Westminster, and, if the judge refuse it, he shall forfeit 500*l.* to the prisoner or party grieved. By sect. 11, the writ shall run in counties palatine and privileged places. By sect. 12, no subject of the King shall be sent to Scotland, Ireland, Jersey, Guernsey, or places beyond sea, except persons contracting or convicts praying to be transported, or persons committing a capital offence in the place whither they are sent, on pain of forfeiting 500*l.* to the party grieved, with treble costs, and of disability to hold any office of trust or profit, likewise of *præmunire*, and incapacity to receive the King's pardon. But this clause has, of course, no reference to persons transported under particular statutes.² The 13th, 14th, and 15th sections relate to exceptions now of no moment. Sect. 16 empowers the crown to send persons charged with capital offences in Scotland, Ireland, &c., to such places respectively for trial. Sect. 17 appoints two years as the limit for prosecutions where the party is out of prison, or, if in prison, after the decease of the person imprisoned,³ or of his delivery out of prison. Sect. 18 allows of no removal, except it be before the judge of assize, after the assizes have commenced. By sect. 19, after the assizes, the writ of *habeas* shall enure as usual. By sect. 20, the defendant may plead the general issue, and give the special matter in evidence. Sect. 21 excepts persons charged with petty treason or felony, or as accessories before the fact, or upon suspicion.

The next and last statute is the 56 Geo. 3, c. 100, "An Act for more effectually securing the Liberty of the Subject."⁴ By sect. 1, the Habeas Corpus Act is extended to all cases other than imprisonment for some criminal or supposed criminal matter,⁵ or debt, or process in a civil suit. Any offence created by statute is a criminal matter.⁶ Informations at the suit of the attorney-general are generally criminal charges, and a *capias* under them is original process.⁷ By sect. 2, non-obedience to the writ is a contempt of court. The writs issued in vacation are returnable in the next term. By sect. 3, the judge shall in-

¹ *R. v. Bowen*, 9 C. & P. 509.

² And see sect. 21.

³ *Sic.*

⁴ A.D. 1816.

⁵ Whether a commitment in execution by a justice under the excise laws is a criminal matter, so as to

entitle the prisoner to his writ, has been made a question. *Huntley v. Luscombe*, 2 Bos. & P. 530.

⁶ *Easton, ex parte*, 9 D. P. C. 207; 12 Ad. & E. 645; 4 Per. & D. 558.

⁷ *Douglas, in re*, 12 L. J. 49.

quire into the truth of the facts alleged in the return, and he may, if he think fit, bail the party with one or more sureties to appear in the term following. And by sect. 4, the court may controvert the truth of the return, although it has awarded the writ. By sect. 5, the writ shall run into counties palatine, the Cinque Ports, and privileged places,—into Berwick-upon-Tweed, Jersey,¹—into any port, harbour, &c., whether in the body of a county or not, and into any port of Ireland where the writ is issued, whether it be or not in the body of any county there. The writ runs into the Isle of Man at common law, not under 31 Car. 2.² By sect. 6, process of contempt may issue in vacation against any person disobeying the writ of *hab. corp.*, grantable under 31 Car. 2, c. 2. The writ runs, in fact, into every part of the Queen's dominions. No independent jurisdiction can oust her jurisdiction, if the statute, at all events, granting that jurisdiction, be silent. Therefore, the writ went to the gaolers in Upper Canada for the slave Anderson.³ These statutes, however, are not universal in their operation. For instance, the defendant was committed under a commission of rebellion, and Pollock, C. B., said, "The meaning of a supposed criminal charge is a charge which may in law, or in fact, turn out not to be criminal. This is in the nature of civil process." Judgment was given for the defendant in an action for penalties, upon general demurrer to the replication.⁴ Other defendants have unsuccessfully sued out the writ upon commitments by the House of Commons.⁵ So, again, for contempt of court, there is no *hab. corp.*⁶ So where a commitment for contempt took place in the Chancery Court of the Isle of Man, the court held, that they could not, on *habeas corp.* brought, review the adjudication.⁷ It has been determined, that service of a demand of a copy of a warrant of commitment upon a turnkey, is not sufficient to support an action against the gaoler for false imprisonment, if the gaoler be in the prison at the time.⁸ Under the Mutiny Act, as for assisting at the concealment of a deserter, the notice should be served upon the secretary-at-war.⁹

It is not difficult to see that the framers of the 56 Geo. 3, c. 100, expected that the returns to writs would be controvertible under

¹ That it will run into Jersey, see *Belson, in re*, 14 Jur. 631; 7 E. F. Moore, 114.

² *Crawford, in re*, 13 Q. B. 613; 18 L. J. Q. B. 225.

³ In the matter of *Anderson*, 30 L. J. Q. B. 129.

⁴ *Cobbett v. Slowman*, 4 Ex. 747; 19 L. J. Ex. 270; affirmed in error, 9 Ex. 633; 23 L. J. Ex. 144. See *Cobbett, in re*, 7 Q. B. 187.

⁵ *R. v. Brass Crosby*, 3 Wils. 188. *Hobhouse, in re*, 3 B. & Ald. 420. *R. v. Evans*, 8 D. P. C. 454.

R. v. Gossett, 3 Per. & D. 349. *Sheriff of Middlesex, in re*, 11 Adol. & E. 273. No direction nor advice will be given by the court to the gaoler as to his return. *Fletcher, in re*, 13 L. J. M. C. 16.

⁶ *Re Carus Wilson*, 7 Q. B. 984; 14 L. J. Q. B. 105, 201.

⁷ *Crawford, in re*, 13 Q. B. 613; 18 L. J. Q. B. 225.

⁸ *Huntley v. Luscombe*, 2 Bos. & P. 530.

⁹ *Gale, ex parte*, 3 Dowl. & L. 114; 14 L. J. Q. B. 316.

that statute. It was not so much an addition to or extension of the 31 Car. 2, as an Act for enabling persons to deny the validity of a return in certain cases. As, on the one hand, the power of bailing at common law and by statute must be kept quite separate, so the right to be brought up and to controvert a return must be viewed as distinct.

The courts will not allow the prisoner to controvert the validity of a sentence pronounced by a competent jurisdiction, as where a sentence for contempt had been passed at Jersey; here, although the court might have allowed affidavits to impeach the fact of any sentence having been pronounced, it would not otherwise interfere.¹ So where it was sought to deny the fact of not answering satisfactorily in bankruptcy, and the *habeas* was applied for on that ground upon committal.² So where a committal took place for want of sureties, affidavits controverting the facts of the sureties were not allowed.³ The court would not even allow the prisoner, who had been committed for contempt by the master of the rolls, to controvert the fact stated in the return, that he had been brought to the bar of the court.⁴ Indeed, upon declining to interfere with a supposed irregularity in a commitment by the Court of Chancery, the Court of Common Pleas have declared their want of power to discharge a prisoner upon a *habeas*.⁵ The same rule was followed in perjury. The court would not review the legality of the judgment related in the warrant of commitment. The comity of courts would not allow the review of a judgment in a superior court. The remedy is by writ of error.⁶ So where a commitment was made by the vice-chancellor in a matter within his jurisdiction, the courts refused the allowance of affidavits to show that the order was made for the breach of an injunction by the lord chancellor, and that the lord chancellor was interested in the cause as a member of the Grand Junction Canal Company.⁷ So where a return stated a sentence of transportation by the Royal Court of Jersey, the Court of Queen's Bench assumed the judgment to be valid, and would not require the authority of the court to be set out in order to substantiate the return.⁸ And a *habeas*

¹ *Re Carus Wilson*, 7 Q. B. 984; 14 L. J. Q. B. 105, 204. Fine for contempt and refusal to pay. *R. v. Lees*, 27 L. J. Q. B. 403.

² *Ex parte Knight*, 2 Mees. & W. 106.

³ *R. v. Dunn*, 12 Ad. & E. 599; 4 Per. & D. 415. See *R. v. Batcheldor, Re Canadian Prisoners*, 1 Per. & D. 516. Notwithstanding this last case, the courts must not be too much relied upon as to their allowance of affidavits in contradiction of a return.

⁴ *Clarke, in re*, 2 Q. B. 619;

2 Gale & D. 780. *Crawford, in re*, 13 Q. B. 613; 18 L. J. Q. B. 225, to the same effect.

⁵ *Andrews, ex parte*, 4 C. B. 226.

⁶ *Dunn, in re*, 17 L. J. C. P. 105; 2 Hawk. c. 15, s. 17.

⁷ *Dimes, in re*, 19 L. J. Q. B. 158.

⁸ *R. v. Brennan*, 16 L. J. Q. B. 289. The 5 Geo. 4, c. 84, s. 17, is directory only, and the fact of a convict not being detained in a prison appointed under that statute will not entitle him to his discharge.

will not in general be granted where the party is in execution on a criminal charge after judgment upon an indictment at common law.¹ In fact, the particular circumstances necessary to warrant the conviction need not be set out in the return;² nor would the court allow of affidavits to show that the particular sentence, transportation, could not be passed.³ And so it was where a pardon was alleged without sufficient certainty.⁴ It makes no difference that a writ of error might be brought on the judgment if erroneous.⁵ And there is one further step to the disadvantage of the *habeas*. Admitting that there is no repugnancy in the affidavit to the return, it is, nevertheless, incompetent to show that the custody is illegal.⁶

This writ may be granted in vacation by a judge at chambers *at common law*, and it may be returnable immediately before him. And, of course, by the Court of Chancery in like manner.⁷

Nevertheless, it must be observed, that the Court of Queen's Bench may bail independently of the writ, although justices of gaol delivery cannot.⁸ Indeed, this court may bail when the *habeas corpus* is suspended. The object is to ascertain the legal or illegal custody of the prisoner.⁹ And if he stands charged with treason or felony, he must move the court, or apply, in vacation, to a judge. And it seems to be settled, that the writ can only be granted upon affidavit.¹⁰ Unless, indeed, it can be shown that the prisoner was so coerced as to be unable to make an affidavit.¹¹ And the court will look into the depositions.¹²

A *certiorari* issues to remove depositions made before the coroner or a magistrate, and it is the proper course to produce copies.¹³ And the affidavits of defendants in denial of a felony were allowed upon one occasion.¹⁴ But the Central Criminal Court cannot bring up a party in custody of the sheriff upon civil process to be tried

¹ *Douglas, in re*, 12 L. J. Q. B. 49.

² *R. v. Suddos*, 1 East, 306.

³ *R. v. Brenan*, *supra*.

⁴ *Parker, in re*, 5 Mees. & W. 32.

⁵ *Dunn, ex parte*, 5 Dowl. & L. 345; 5 C. B. 215.

⁶ *R. v. Batcheldor, Re Canadian Prisoners*. S. C. nom. *R. v. Leonard Watson*, 9 Ad. & E. 731; 1 Per. & D. 516. *R. v. Lees*, 27 L. J. Q. B. 403, from St. Helena.

⁷ *Belson, in re*, 7 E. F. Moore, 114.

⁸ *R. v. The Apprentices*, Leach, 203. See *Id.* 117, by Lord Mansfield, *Id.* 168, 204, *n.*

⁹ 2 Curw. Hawk. 142, *n.* *R. v. Lord Montgomery*, cited, 10 Mod.

334. *R. v. Earl of Ailesbury*, 12 Mod. 117. But see *R. v. Lord Orrery*, 8 Mod. 96.

¹⁰ *Glover, ex parte*, 4 D. P. C. 291, 293, Littledale, J. *Hobhouse, ex parte*, 3 B. & Ald. 420; 2 Ch. Rep. 207. See *R. v. Farington*, Sir T. Jones, 222. *R. v. Barney*, 5 Mod. 323. See *Blisset, in re*, 14 L. J. M. C. 17; 1 New. S. C. 337.

¹¹ *Parker, in re Canadian Prisoners*, 7 D. P. C. 208.

¹² *R. v. Horner*, Leach, 270.

¹³ *B. v. Barthelemy and another*, Dears. 60. See *R. v. Acton*, Str. 851, where the court were pressed with *R. v. Lord Mohun*, 1 Salk. 104; Skin. 603. See also *R. v. Wyer*, Leach, 480.

¹⁴ *R. v. Bell and ux. Andr.* 64.

for a misdemeanor.¹ The statute² does not apply. Nor, whatever the chancellor may do, will the Court of Queen's Bench grant the writ to remove a defendant in custody on a writ *de contumace capiendo*, in order that he may do penance.³ And, notwithstanding the dictum in *R. v. Flower*,⁴ the courts maintain their right to refuse or accede to the writ.⁵

We will now mention some of the cases in which bail has been granted. In outlawry;⁶ commitments by the privy council;⁷ commitments on impeachment, unless parliament be sitting;⁸ accomplices who have made honest disclosures;⁹ or when the principal has not been taken;¹⁰ commitments on bare suspicion;¹¹ perhaps for treason, after a year's imprisonment, without prosecution;¹² and, in treason, where ill health and delay were combined;¹³ or where the species of treason is not expressed in the warrant of commitment;¹⁴ and where two sessions and an assize had elapsed.¹⁵ So, where a person had been imprisoned without prosecution for two years;¹⁶ so, where error appears upon outlawry.¹⁷

On the other hand, although the court is not fettered by examples, the following refusals may be mentioned. Where the warrant of commitment appeared informal, and yet the offence was clear under the depositions returned.¹⁸ Where the grand jury had returned a true bill for murder,¹⁹ without, at least, an affidavit of what passed before the coroner;²⁰ and where the facts upon the coroner's inquisition appeared to amount to murder, although the verdict was manslaughter.²¹ And service of notice may be made upon the coroner where, in a case of killing, neither the husband of a *feme covert*, nor her next of kin, can be discovered.²² So, under a special commission, the justices of gaol delivery held themselves incompetent.²³ Nor can a person be bailed who has been committed by a rule of court;²⁴ nor a prisoner of war;²⁵ nor a person charged

¹ *R. v. Morgan*, 7 C. & P. 642.

² 4 & 5 Will. 4, c. 36, s. 16.

³ *R. v. Strong*, 5 D. P. C. 213.

⁴ 8 T. R. 324.

⁵ *R. v. Hobhouse*, 3 B. & Ald. 420.

⁶ 2 Hawk. c. 18, s. 40.

⁷ *Id.* s. 66; and see 16 Car. 1, c. 10, s. 8; 2 Hawk. c. 15, s. 7; 2 Curw. Hawk. 165, 166.

⁸ 2 Hawk. c. 73, &c.

⁹ 1 Cowp. 334.

¹⁰ Lofft. 334.

¹¹ *R. v. Gregory*, Leach, 98, n.; see other cases, 2 Curw. Hawk. 70, n.; Lofft. 281.

¹² Str. 2; *R. v. Sir W. Wyndham*.

¹³ *R. v. Lord Montgomery*, cited, 10 Mod. 334. *R. v. Earl of Ailesbury*, 12 Mod. 117.

¹⁴ *R. v. Row and another*, 12 Mod. 82. *R. v. Kendal and another*, Comb. 343; 5 Mod. 78; 1 Salk. 347.

¹⁵ *R. v. Bell and ux.* And. 64. *R. v. Barney*, 5 Mod. 323.

¹⁶ *R. v. Fitzgerald*, 1 Wils. 254.

¹⁷ *R. v. Erbury*, 8 Mod. 177.

¹⁸ *R. v. Marks*, 3 East, 157.

¹⁹ *R. v. Chapman*, 8 C. & P. 558.

²⁰ *R. v. Mills*, 4 Nev. & M. 6.

²¹ *R. v. Carter*, 7 Mod. 172. *R. v. Dalton*, Str. 911. *R. v. Pepper*, Comb. 298.

²² *R. v. Williams*, 8 D. P. C. 301.

²³ *R. v. Platt*, Leach, 157. See *R. v. Kimberley*, Str. 848.

²⁴ *R. v. Leonard*, 10 Mod. 429.

²⁵ *R. v. Schiever*, 2 Burr. 765; *Case of Spanish Sailors*, 2 Sir W. Bl. 1324.

with robbery, if the prosecutor swear to the prisoner, although many counter affidavits may be produced;¹ nor, in larceny, the prisoner being sworn to;² nor in a case of forgery on the eve of the sessions;³ nor in the case of a notorious breach of the peace, the parties being in execution for a fine for forcible detainer upon view;⁴ nor a lunatic;⁵ nor on the score of ill health simply,⁶ unless the illness arise from the confinement;⁷ nor an accomplice who failed to reveal all that she knew;⁸ nor one fined by the House of Lords for a libel;⁹ nor on a conviction for libel on the ground that only one commissioner was present, for the record is an estoppel;¹⁰ nor in cases of breach of privilege;¹¹ nor is bail to be claimed as of right in the case of resisting custom-house officers;¹² and where the prisoners themselves have delayed the trial they are not in general bailable.¹³ And in case of a postponement by reason of the absence of the witnesses for the prosecution, the court would not bail a prisoner charged on the coroner's inquisition for murder, and against whom a bill of indictment had been found for the same crime, although it was alleged that the indictment would fail as far as the depositions before the coroner were concerned.¹⁴ Where three justices after hearing evidence admitted a person to bail, and then, after the production of additional evidence, committed him, bail was refused;¹⁵ nor would bail be allowed, where there was an acquittal for rape, important evidence being expected at the next assizes upon a charge of murder;¹⁶ nor upon the discharge of a jury in a criminal case, at all events, not until two assizes have elapsed.¹⁷ Where the seconds admitted that they had been engaged in what they called a fair duel, the court would not bail.¹⁸ The defendant being in legal custody, it is no objection to urge that the apprehension was illegal.¹⁹ Where a party was in gaol undergoing a sentence of

¹ *R. v. Greenwood*, Str. 1138. But this would not now be decided in the same way.

² *R. v. Mickal*, 11 Mod. 261. This case also would now be one for bail.

³ *R. v. Rudd*, 117.

⁴ *R. v. Layton*, 1 Salk. 106.

⁵ *R. v. Clarke*, 3 Burr. 1362.

⁶ Leach, 117, *ut sup.*

⁷ 2 Curw. Hawk. 171, *n.*

⁸ *R. v. Mrs. Rudd*, *ut sup.*

⁹ *R. v. Flower*, 8 T. R. 314.

¹⁰ *R. v. Carlisle*, 4 C. & P. 415. *Newton, ex parte*, 24 L. J. C. P. 148; 16 C. B. 97. The attorney-general should be applied to for his fiat in order to bring error.

¹¹ *R. v. Paty and others*, 2 Ld. Raym. 1105. *Burdett v. Abbott*, 14 East, 1.

¹² *R. v. Dunn*, 5 Burr. 2640.

¹³ *R. v. Rebord*, 3 Burr. 1569.

¹⁴ *R. v. Andrews*, 2 Dowl. & L. 10; 1 New. S. C. 199.

¹⁵ *Allen, ex parte*, 3 Nev. & M. 35.

¹⁶ *R. v. Owen*, 9 C. & P. 83.

¹⁷ *R. v. Newton*, 18 L. J. M. C. 201. As to the right way of raising the question, *qu.?* The warrant of commitment is a justification of the detention.

¹⁸ *R. v. Barronet and another*, Dears. 51; 1 El. & Bl. 1; 22 L. J. M. C. 25. *R. v. Barthelemy and another*, Dears. 60; 22 L. J. M. C. 28; 1 El. & Bl. 1.

¹⁹ *Sharpe, ex parte*, 9 D. P. C. 513. See other cases, 2 Curw. Hawk. 170, *n.*

imprisonment, he was not allowed this writ in order to show cause in person against a rule obtained against him and others;¹ nor will bail be allowed upon a charge of concealing effects in bankruptcy;² nor upon a committal for not answering satisfactorily, upon the ground that the bankrupt *has* so answered;³ nor *ad testificandum*, if collusion appears.⁴ And treason in Scotland is not within the 31 Car. 2, c. 2.⁵ By 8 & 9 Vict. c. 84, s. 101, no writ of *habeas corpus* shall be granted under any Act relating to the customs, unless the ground of objection to the proceedings be stated by affidavit in writing.

With respect to the Central Criminal Court, where the ground of application was, that the offence had been committed out of the jurisdiction of that court, the attorney-general refused his fiat for a writ of error, because of the record of sentence of imprisonment, according to *R. v. Carlisle*,⁶ and the court refused a *mandamus* to compel him.⁷ Where the secretary of state committed for libel, it was once a question whether the court would not require recognizance for good behaviour as well as common bail,⁸ but in *R. v. Wilkes*, Pratt, C. J., said, that it was absurd to require surety of the peace, or bail in the case of a libeller.⁹ It may be remarked here, that under any circumstances private opinions, political for instance, ought never to weigh with the court, nor with magistrates. The fact of a county having been the scene of illegal meetings and riots affords no ground for withholding bail in misdemeanor. Therefore, where justices entered into a resolution not to bail certain persons called chartists, and refused bail in a case of sedition, the court compelled them to pay all the costs of a motion for a criminal information, although the information itself was refused in the absence of any corrupt or malicious motive, and although the persons applying for bail were very prominent parties in the violence of the times.¹⁰

Although the penalty for refusing the writ in vacation is 500*l.*, it is not so in term; because the law will not suffer a judge to be liable to an action for what he does as a judge. Writs of *habeas corpus* granted in vacation do not expire at the commencement of term.¹¹

Return.] The forms of the writ having been complied with,¹²

¹ *R. v. Hunt*, 3 B. & Ald. 679, n. a.

² *Robinson, in re*, 23 L. J. Q. B. 286, Coleridge, J.

³ *Knight, ex parte*, 2 Mees. & W. 106.

⁴ *R. v. Burbage*, 3 Burr. 1440.

⁵ *R. v. Mackintosh*, Str. 308.

⁶ 4 C. & P. 415.

⁷ *R. v. Newton*, 24 L. J. Q. B. 246; 4 El. & Bl. 869.

⁸ *R. v. Shuckburgh*, 1 Wils. 29.

⁹ *R. v. Wilkes*, 2 Wils. 151.

¹⁰ *R. v. Badger*, 4 Q. B. 468; Dav. & M. 375.

¹¹ *R. v. Shebbeare*, 1 Burr. 460. *R. v. Mead*, Id. 542; 2 Curw. Hawk. 194.

¹² As by an attestation in writing by two witnesses, &c. when it is demandable in vacation. See 2 Curw. Hawk. 143.

a return *must* be made.¹ No privilege will excuse disobedience, not even peerage, from obeying the writ.²

The return being made, it is difficult to controvert it, when it makes against the prisoner,³ a circumstance capable of producing occasionally great hardship. Although the court will examine minutely into the facts upon affidavit, and will even commit the prosecutor if justice requires it.⁴ Should the person, as in insanity,⁵ be incapable of being brought up, the court will direct that he shall be attended,⁶ but poverty is not a sufficient excuse.⁷

A return stated that the prisoner had been received by the gaoler under a warrant, which recited a conviction under 3 & 4 Will. 4, c. 53,⁸ that afterwards, some one came to the gaol, took away the warrant, and left another of the same date, under the hands and seal of the same justices, and without adding that it was a substituted warrant, and that the prisoner was detained by virtue thereof. The court discharged the prisoner.⁹ And where there is an uncertainty as to the jurisdiction, the court will not allow the return.¹⁰ So where the return stated that the commitment was made upon due proof, as by the statute made and provided, it was held insufficient, for want of referring more particularly to the proof.¹¹ So where the conviction was not brought up, and the court found a mistake in the commitment, they presumed that the conviction had the same fault, and ordered the prisoner's discharge.¹² However, a legal warrant of detainer will be sufficient, although granted subsequently to the writ of *habeas corpus*.¹³

A *habeas corpus* at common law is different from that of 31 Car. 2, since the defendant may controvert the facts of the

¹ Certifying the day and cause of the caption. Vaugh. 137. Under heavy penalties, 2 Hawk. c. 15, s. 19. And attachment, Id. ss. 28, 31. And it is no excuse that the gaoler has not been paid his fees. Id. The following return was held bad, and an attachment issued. "I had not at the time of receiving this writ, nor have I since had, the body of (A.) detained in my custody, so that I could not have him," &c. It did not state: "I have not." *R. v. Winton*, 5 T. R. 89. Although the court will not advise the gaoler how to make his return, the return needs not to be supported by affidavits. *Fletcher, in re*, 1 Dowl. & L. 726; 13 L. J. 16; 1 Per. & D. 516.

² 2 Hawk. c. 15, ss. 17, 19.

³ 2 Hawk. c. 12, s. 78.

⁴ *R. v. Jackson*, 2 Hawk. c. 15, s. 79.

⁵ 3 Burr. 1363.

⁶ 3 Curw. Hawk. 143.

⁷ *Martins, ex parte*, 9 D. P. C. 194.

⁸ A Smuggling Act, which authorized magistrates to amend their warrants.

⁹ *R. v. Elmy*, 3 Nev. & M. 733. *R. v. Clerke*, 3 Salk. 2.

¹⁰ *R. v. Deybel*, 4 B. & Ald. 243. *R. v. Souden*, Id. 294.

¹¹ *R. v. Nash*, Id. 295; "upon proof of the matters before mentioned," would have been enough.

¹² *Reynolds, in re*, 1 New. S. C. 51.

¹³ *R. v. Gordon*, 1 B. & Ald. 5 n. 72. *Dauncey, ex parte*, 8 Jur. 829.

return under 56 Geo. 3, c. 100, in the common-law case.¹ The case cited was, however, not a criminal matter.

Costs.] Where the plaintiff successfully opposed the prisoner's discharge upon the *habeas corpus*, the court said, that they had no power to allow the costs of the opposition.²

Return amendable.] In order to avoid a false statement, the return is amendable, as where one of the names of a prisoner was accidentally omitted.³

Form of bailment.] The Court of Queen's Bench is said to require four sureties in 40*l.* each, and that sum is mentioned as the minimum in the case of a capital crime, but more may be required according to the ability or quality of the prisoner, and the nature of the offence.⁴ As where an indictment for conspiracy was removed by *certiorari*, and it appeared that the defendants had influenced the magistrate to take a less amount than the nature of the crime warranted.⁵ Less than four sureties will, however, be accepted; three, for instance, in a case of rape.⁶ The bail are to be examined on oath as to their sufficiency, and it was considered a fair question to ask whether any of them had stood in the pillory for perjury.⁷ The writs, being properly directed,⁸ are to be marked with the date of the statute of Charles, and to be signed by the person awarding them,⁹ without which signature the gaoler need not obey the mandate.¹⁰ And it may be added, that in drawing up the rule for a *habeas corpus* on the ground of an illegal commitment, the judge will not make it part of the rule that the party shall not bring an action against the magistrate.¹¹

By a clause of this Act, 31 Car. 2, c. 2, no person set at large by virtue of the writ shall be again imprisoned for the same offence other than by the legal order and process of the court where he shall be bound by recognizance to appear, or other court having jurisdiction of the cause, under a penalty of 500*l.*¹²

Habeas corpus ad respondendum.] An application for the writ *ad respondendum* in order to take a prisoner in custody on a charge of felony before justices to answer another charge of felony, must be made to a judge at chambers, not to the court.¹³ If the judge entertains doubts, he will refer the matter to the court. The Court

¹ *Beeching and others, ex parte*, 4 B. & C., 136; 6 Dowl. & R. 209.

² *Cobbett, in re*, 14 Mees. & W. 175; 3 Dowl. & L. 79.

³ *R. v. Batcheldor*, 1 Per. & Dav. 516.

⁴ 2 Hawk. 139. *R. v. Earl Ferrers*, 1 Burr. 631. *R. v. Shaw*, 6 Dowl. & Ry. 154.

⁵ *R. v. Hooper and others*, 1 Ch. Rep. 491.

⁶ *R. v. Booth*, 2 Ld. Keny. 172.

⁷ *R. v. Edwards*, 4 T. R. 440.

⁸ Not to the "gaoler or sheriff."

⁹ 2 Hawk. c. 15, s. 17.

¹⁰ *R. v. Roddam*, Cowp. 672. *R. v. Fowler*, 1 Salk. 350.

¹¹ *Hill, ex parte*, 3 C. & P. 225, Bayley, J.

¹² Sect. 6.

¹³ *R. v. Isaacs*, 20 L.J. Q.B. 395; 2 Pr. Rep. 255.

of Queen's Bench will not grant the writ to bring up a prisoner before a coroner's jury who has been committed for murder by magistrates, without a strong case.¹

Motion, by whom made.] The court would not allow a prisoner's father to move for a *habeas corpus*, but required that the motion should be made by counsel.²

Error.] Whether error will lie upon a *habeas corpus* may be a question fit to be raised upon some future occasion. In *R. v. The City of London* the judges resolved that there was in that case a return on a writ of privilege upon which no issue could be taken nor demurrer joined, "neither upon our award herein doth any error lie."³ On the other hand, there is an opinion of Holt, C. J., apparently leaning to the contrary.⁴ And there is the inclination of Jervis, Att. Gen., in *R. v. Dimes*, in favour of the writ of error.⁵

Waiver.] Supposing the first writ to be irregular, a second writ obtained by the prisoner in order to remove himself into another county will cure the mistake.⁶

Quarter sessions.] If the assizes and quarter sessions occur contemporaneously, and the grand jury at the assizes are discharged, the better course is for the quarter sessions to dispose of their county business and adjourn to a future day for the trials of the prisoners. It was so held where the judge of assize was trying prisoners at the time.⁷ Still, it is not to be understood that the court of assize is a court of appeal from the quarter sessions, nor from the borough sessions where the recorder presides. The commissions are not similar. However inconvenient, therefore, it may be for both courts to sit at the same time, a conviction at the borough sessions is not erroneous because the assizes happen to be then in progress.⁸ An indictment found at sessions, which they cannot try, may be removed by *certiorari*; and, in that case, a *habeas* may issue to bring up the prisoner, to the Central Criminal Court, for instance.⁹ Although it has been said, that if such a bill be transmitted to the assizes, the prisoner should be acquitted, the bill being a nullity, and that the 5 & 6 Vict. c. 38, s. 2, applies only to bills found at the passing of the Act.¹⁰ Parke, B., however, in a case of rape, left the prisoner to his writ of error, the bill having been found at sessions.¹¹ Two indictments had been found against the prisoner at the sessions for the North Riding, one for

¹ *Wakley, ex parte*, 14 L. J. M. C. 188.

² *Newton, in re*, 24 L. J. C. P. 148; 16 C. B. 97.

³ *R. v. City of London*, 8 Rep. 121, 127.

⁴ In *Ashby v. White*, 14 How. State Trials, 806.

⁵ 14 Q. B. 554.

⁶ *Newton v. Rowe*, 13 L. J. C. P. 73; 7 Sc. 543; 8 Sc. 26.

⁷ The Quarter Sessions, 9 C. & P. 790, Coleridge, J.

⁸ *Smith v. Reg.*, 3 Cox, 586.

⁹ *R. v. Phillips*, 2 Cox, 114.

¹⁰ *R. v. Ramsden*, 1 Cox, 37.

¹¹ *R. v. Allum*, 2 Cox, 62.

assisting an escape, the other for an escape in person. The court of quarter sessions sent the prisoner to be tried at the assizes. Both indictments were transmitted annexed to a certificate signed by the deputy clerk of the peace that they were found. They had the names of the witnesses on the back, and they were signed by the foreman at the sessions as found. Wood, B., doubted whether he could try the case, and the prisoner was discharged by proclamation. 1. The judge had never tried an indictment found at the quarter sessions, and removed into the Queen's Bench by *certiorari*, and thence sent to the assizes. 2. The public inconvenience of such a course. 3. The necessity of a new indictment at the assizes found by the grand jury of the county. But the judges held these opinions wrong, and thought that the prisoner should have been tried at the assizes.¹ The jurisdiction of courts of quarter sessions² is pointed out by 5 & 6 Vict. c. 38, s. 1. They are forbidden by that statute to try for the following offences: treason; murder; capital felony; any felony punishable by transportation for life, when committed by a person not previously convicted of felony; misprision of treason; offences against the Queen's title, prerogative, person, or government, or against either house of parliament; offences subject to *præmunire*; blasphemy, and offences against religion; administering or taking unlawful oaths; perjury and subornation of perjury; making or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanor; forgery; unlawfully and maliciously setting fire to any crop of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern; bigamy, and offences against the laws relating to marriage; abduction of women and girls; endeavouring to conceal the birth of a child; offences against any provision of the laws relating to bankrupts and insolvents; composing, printing, or publishing blasphemous, seditious, or defamatory libels; bribery; unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person; stealing or fraudulently taking, or injuring or destroying, records or documents belonging to any court of law or equity, or relating to any proceeding therein; stealing or fraudulently destroying or concealing wills or testamentary papers, or any document or written instrument being or containing evidence of the title to any real estate, or any interest in lands, tenements, or hereditaments; and under 4 & 5 Will. 4, c. 36, several such offences were withdrawn from the jurisdiction of certain quarter sessions. But in this respect the Central Criminal Court Act is repealed by 14 & 15 Vict. c. 55, s. 13.

¹ *R. v. Wetherell*, Russ. & Ry. 381. By 22 & 23 Vict. c. 4, s. 4, every general session of the peace for the county of Middlesex, and every adjournment thereof, shall have power to try and determine all appeals, and have all other powers

which do now or shall hereafter belong to the general quarter sessions for the said county, and such sessions may be held at Clerkenwell.

² "County, riding, division, or liberty," and recorders of boroughs.

This Act does not extend to towns corporate which are not counties of themselves.¹ The venue, however, must be laid in the county of the city or town.²

And such justices and recorders are prohibited from trying in like manner for any offence under 9 & 10 Vict. c. 25,³ the Act for "preventing malicious injuries to persons by fire, or by explosive or destructive substances."

By 5 & 6 Vict. c. 38, s. 2, a judge of the superior courts at Westminster, acting under any commission of oyer and terminer or gaol delivery, may issue any writ of *certiorari* or other process, directed to the justices of the peace acting for any county, riding, division, or liberty, or to the recorder of any borough, within the county, commanding them to certify and return, into the court holden under the authority of such commission, any indictment or presentment found before any such justice or recorder, for any offence which such justices or recorder will not have jurisdiction to try, and the several recognizances, examinations, and depositions relative to such indictments and presentments, and also, if necessary, by writ of *habeas corpus*, to cause any person who may be in the custody of the keeper of any gaol or prison, charged with any such offence, to be removed into the custody of the keeper of the common gaol.

And by sect. 3, every recognizance of every description entered into for the prosecution at any court of sessions of the peace, for any offence beyond their jurisdiction, shall be as obligatory on the parties as to the proceedings before the justices of oyer and terminer or gaol delivery acting in and for that county, as if originally entered into before them. But one week's notice must be given, either personally or by leaving the same at the place of residence as of which the party bound by such recognizance is therein described, to appear before the court of oyer and terminer or gaol delivery, instead of the said court of sessions of the peace: Provided also, that the judge who shall grant such writ of *certiorari* or *habeas corpus* shall cause the party applying for such writ, whether he be the prosecutor or party charged with such offence, to enter into a recognizance, in such sum, and with or without sureties, as the judge may direct, conditioned to give such notice as aforesaid to all parties bound by recognizance.

Commissions of assize.] By 3 Geo. 4, c. 10, s. 1, commissions of assize may be opened on the day succeeding that specified, unless Sunday, and then on the day after. And, by sect. 2, the cause of the delay shall be certified to the lord chancellor. Provided, that the commission shall be opened on the exact day, if possible.

In the case of a special commission read in open court, the court refused in *R. v. Bernard* to allow a second reading of it, on the ground of the prisoner not having been present at the reading.⁴

¹ *R. v. Milner*, 2 Car. & K. 310.

² *Russ. & Ry.* 144. *R. v. Mellor*.

³ Sect. 15.

⁴ *R. v. Bernard*, 1 Fost. & F. 240.

CHAPTER IV.

THE GRAND JURY.

Grand jury.] The first proceeding after the committal or other disposal of the prisoner, is to submit a charge against him to the grand jury. This is done by indictment. The sheriff returns the names of persons qualified to serve, and the number must, at the least, be twenty-four, some out of every hundred.¹ A mistake in this respect, as by sending in the names of improper persons, may be amended by the judge, who has power to reform the pannel. And it is a ground of challenge that a grand juror is not duly qualified, or that he has not been rightly returned.² Or that he is a person legally disqualified in other respects, as by outlawry, alienage, attainder, &c.³ But it is said, that although old men above seventy, or such as are sick or infirm, or non-dwellers in the county, ought not to be returned, they may lawfully serve if they think fit.⁴ An Irish peer, not in the House of Commons, ought not to be a grand juror.⁵ A prisoner who takes exception to the indictment by reason of an objection to the grand jury, shall have counsel assigned to him.⁶

By 6 Geo. 4, c. 50, s. 1, the qualification of a grand jurymen in courts of sessions of the peace is as follows:—The age is between 21 and 60, and the residence must be in the county where the issue is to be tried. Every man is liable to serve who shall have, in his own name, or in trust for him, 10*l.* a year within the county in lands, &c., freehold or otherwise, or in rents issuing out of such lands and rents together, in fee simple, fee tail, or for the life of himself or another, or 20*l.* a year upon a lease for 21 or more years, or any term determinable upon a life or lives; or who shall be a householder and rated to the poor's rate⁷ to the value of 30*l.* in Middlesex, or 20*l.* in any other county; or, lastly, who shall occupy a house containing 15 windows.⁸

With regard to the number of these grand jurors, 12 at least must be sworn, and not more than 23, in order that 12 may be a majority.⁹ However, should there be more than 23, and

¹ 4 Com. 302. In Middlesex, the sheriff makes a return into the Court of Queen's Bench.

² 1 Ch. Cr. L. 310.

³ See 2 Hawk. c. 25, s. 16.

⁴ Id. s. 20.

⁵ Case of the Irish peer, Russ. & Ry. 117.

⁶ 2 Hawk. c. 25, s. 29.

⁷ Or inhabited house duty.

⁸ As to the old law of qualification, see Hale, Hist. 155; 2 Hawk. c. 25, s. 14; Russ. & Ry. 177; 1 Ch. Cr. Law, 308.

⁹ 4 Com. 302.

should the defendant plead and be convicted, the Court of Queen's Bench will not quash the indictment on motion. Should the error appear on the record, the defendant may bring his writ of error in law, and if it do not so appear, he may bring error in fact.¹

But the names of 12 grand jurors must appear on the record.²

We now come to speak of their duties. They are to inquire of all offences in the county determinable by the court into which such offences are returned.³ But they cannot go beyond their precincts,⁴ and the finding of a collateral matter expressly alleged in an indictment to have happened in a different county is void.⁵

They have the power of summoning witnesses before them, and it is considered so highly criminal to refuse to be examined before them, that the court are accustomed to impose an immediate fine for the offence.⁶ And so necessary is it considered to enforce the production of proper evidence, that, if an instrument be withheld, the grand jury may receive secondary evidence of its contents. Unless, indeed, the deed or writing relate to the title of the witness's estate.⁷

The jury, however, are not allowed to see depositions, although there may be grounds for suspecting that a witness has been tampered with in consequence of his prevarication.⁸

The grand jury are, moreover, to examine the witnesses upon oath. In default of this rule being observed, the prisoner was released, the grand jury having been discharged.⁹ But in such a case where they had not been discharged, Alderson, B., desired that the bill should be taken back, and that the witnesses should be examined upon oath.¹⁰ And, after conviction, it was thought fit, under such circumstances, to recommend the prisoner for a pardon without deciding upon the validity of the conviction.¹¹

The better opinion is, that a bill should be found upon probable evidence, and that it should not be required that proof necessary to convince a petit jury¹² should be established, and it is observable, that if a person in custody be carried before the grand jury without a proper authority, it is a matter of justification for the gaoler only, and not of objection on the part of the accused.¹³

The swearing of the witnesses must take place during the session. Where, in consequence of the absence of justices, the session had

¹ *R. v. Marsh*, 6 Ad. & E. 236; 1 Nev. & P. 187.

² *R. v. St. Michael*, 2 Sir Wm. Bl. 718. See also *Aylett v. Rex*, in error, 3 Bro. P. C. 529.

³ 2 Hawk. c. 25, s. 1.

⁴ Id. s. 34.

⁵ Id.

⁶ 1 Hawk. c. 22, s. 4.

⁷ *R. v. Hunter*, 3 C. & P. 591.

⁸ *R. v. Denby*, Leach, 514; Anon. 1 Lew. C. C. 70.

⁹ Anon. 1 Lew. C. C. 322.

¹⁰ Id.

¹¹ *R. v. Dickinson*, Russ. & Ry. 401.

¹² 2 Curw. Hawk. 354, n., where the cases are collected.

¹³ *R. v. Dr. Dodd*, Leach, 155.

lapsed, it was held that a party could not be legally convicted upon an indictment found by the grand jury upon the testimony of witnesses sworn by the officer of the court after that event.¹ But the mode of swearing the witnesses in the presence of the jury will not be inquired into by the court, because the jury may find a bill upon their own knowledge. So an improper mode of swearing will not vitiate the indictment.² And now by 19 & 20 Vict. c. 54, s. 1, every foreman of a grand jury shall administer the oath to the witnesses, and the name of every witness shall be indorsed on the back of the indictment, and the foreman shall write his initials against the name of such witness, and a false oath or affirmation shall incur the penalty of perjury: Provided that nothing in this section contained shall affect any fees by law payable to any officer of any court for swearing witnesses.

By sect. 2, no witness need be sworn in open court in order to give evidence before the grand jury. By sect. 3, the word "foreman" shall include any member acting for the foreman, and "oath" shall include "affirmation."

The court, which usually instructs the grand jury in matters of law,³ will also give them assistance with respect to witnesses. Therefore, where the grand jury applied to the court upon an occasion when the only persons whose names were upon the back of the indictment had been proved to have been guilty of a conspiracy, the jury were informed that they ought not to find a bill upon that testimony alone.⁴ The grand jury applied to the court in a case where the witness was too ill to travel, but the gaoler was ready to prove that the prisoner had told him, the gaoler, that he would plead "Guilty." The recorder answered, that the bill might be found upon the gaoler's oath.⁵

The grand jury may not disclose the evidence. Their oath forbids it. It would be a high misprision,⁶ nor can a juror be asked to explain the finding.⁷ Nor can their clerk be compelled to make a disclosure.⁸ Nor will the Court of Queen's Bench receive the affidavit of a grand juror as to what passed in the jury room concerning the indictment.⁹ Although a grand juror may be required to say who was the prosecutor of an indictment, that being a question which does not interfere with his oath.¹⁰ And it is related of Judge Buller, that where a grand juror threw down a note to the prisoner's counsel to the effect that the witness then under examination had stated quite the reverse to the grand jury on that morning, he ruled, that the grand juror should appear and give evidence. This was done, and the prisoner being

¹ Middlesex Sp. Commission, 6 C. & P. 90. That the justices of Middlesex might meet and hold intermediate sessions. See *R. v. Mallaney and another*, Id. 96.

² *R. v. Russell*, Car. & M. 247, Wightman, J.

³ 4 Com. 303.

⁴ 2 Curw. Hawk. 354, n.

⁵ *R. v. Tong*, 2 Cox, 290.

⁶ 4 Com. 126.

⁷ *R. v. Cooke*, 8 C. & P. 582.

⁸ 12 Vin. Ab. 38 (5).

⁹ *R. v. Marsh*, 1 Nev. & P. 187.

¹⁰ *Stykes v. Dunbar*, Selw. N. P. 1066.

acquitted, the witness was afterwards convicted of perjury.¹ The grand jury must not take upon themselves to form a judgment in cases of insanity.²

The evidence being gone through, either a true bill is found or the bill is thrown out, and it is no objection that the bill has not been signed by any of the jurors.³ For an indictment differs from a coroner's inquisition, inasmuch as there is no doubt of its authenticity.⁴ If, by mistake, the jury return a true bill on both counts, where there are more than two, the judgment will be arrested.⁵ Should the bill be ignored, the jury may still find a bill for the same offence at the same assizes or sessions, if there be additional evidence.⁶ But, it seems that no second bill can be preferred upon the same facts.⁷ If the bill be mislaid and not found till the jury are discharged, they cannot find another bill, and the finding being insufficient, the prisoner will be admitted to bail until the next session. He is not entitled to his discharge till the second session.⁸ But *Austin's case* is to the contrary.⁹

The grand jury cannot find a bill true in part and false in part. As in forcible entry and detainer. If the entry with force be negatived, and the detainer found, the whole bill is void.¹⁰ So, it seems that if two be charged with murder, and the jury find a bill against one for murder and against the other for manslaughter, a new bill should be preferred.¹¹ It is otherwise if the bill be found against one for murder, and ignored as to the other.¹² And upon a bill for murder the jury may find manslaughter.¹³ Although Parke, B., directed a new bill upon such an occasion, notwithstanding a suggestion at the bar that it was usual to allow an altered bill instead of one entirely new.¹⁴ And it is clear that an indictment against several may be found against one or more, and rejected as to the rest.¹⁵ And a bill also may be returned true upon one or more counts amongst several.¹⁶ Thus a true bill was found for an assault, and *ignoramus* was indorsed upon a count for a riot.¹⁷ For the rejection of the one count leaves the indictment as to the count which the jury affirm, just as if there had been originally that one count only.¹⁸

¹ Law Mag. vol. 17, p. 43 (n. 5); 4 Com. by Christian, 126. It was in a capital case.

² *R. v. Hodges*, 8 C. & P. 195.

³ *R. v. Sidoli*, 1 Lew. C. C. 211.

⁴ Id. 54, Holroyd, J.

⁵ *R. v. J. Carlisle*, 8 C. & P. 584, cited.

⁶ *R. v. Newton*, 2 Moo. & Rob. 503. *R. v. Humphrey*, infra, was referred to. S. C. nom. *R. v. Simonite*, 1 Cox, 30, Wightman, J. Additional evidence had been procured.

⁷ *R. v. Humphreys*, 1 Car. & M. 601, Patteson, J. *R. v. Austin*,

4 Cox, 385, Wightman, J., and the recorder.

⁸ *R. v. Thompson*, 1 Cox, 268.

⁹ 4 Cox, 385.

¹⁰ 1 Hawk. c. 14, s. 40. For other cases, see 2 Hawk. c. 25, s. 2.

¹¹ *R. v. Carew*, 1 Ro. Rep. 407.

¹² *R. v. Cary*; *Sembl.* S. C. as *Carew*, sup. 3 Bulstr. 206.

¹³ *R. v. Caulkin*, 3 Ch. Burn. 443.

¹⁴ *R. v. Turner*, 1 Lew. C. C. 176.

¹⁵ Steph. 256, citing 1 Ch. Cr. L. 323-4.

¹⁶ Id. citing 1 Chitty, *ut sup.*

¹⁷ *R. v. Fieldhouse*, Cowp. 325.

¹⁸ Id., Aston, J.

The grand jury may themselves amend a mistake. So that where they returned a true bill against P. and others, and indorsed P.'s name as a sworn witness upon the bill, Bolland, B., after objection made, directed that the bill should be handed back to them. They then retired, and soon afterwards returned with a true bill against the others, not including P.¹

In a *nisi-prius* record, the names of the grand jury need not appear in the caption.²

The grand jury occasionally make presentments of offences within their county, as nuisances, &c.³ And upon this presentment an indictment is framed.⁴

There are some presentments, however, which cannot be entertained.⁵ It may be added, that the presentment of a constable for an offence, whether at the assizes or sessions, must be made before the grand jury.⁶

Lastly, this jury may be called back if they have not left the building of the court, although discharged, or if they have not separated. A new bill may thus be laid before them.⁷

Verdict in civil action when equivalent to finding by grand jury.] In some cases the verdict in a civil action will suffice without the intervention of the grand jury. As where the defendant justified words amounting to a charge of felony, and proved his justification. Here the plaintiff might be put on his trial without the grand jury.⁸ Again, the defendant had money to carry to a bank, and the plaintiff brought an action against him for this money, upon which it was left to the jury to say whether the defendant had or not feloniously converted the property to his own use. The jury having found in the affirmative, the court directed a verdict to be entered for the defendant, and said, that, upon their finding, the defendant might be tried without the intervention of a grand jury.⁹

Vexatious indictments for certain misdemeanors.] By 22 & 23 Vict. c. 17, no indictment for perjury, subornation, conspiracy, obtaining money or other property by false pretences, keeping a gambling house, keeping a disorderly house, and for any indecent assault, shall be presented to or found by any grand jury, unless the prosecutor has been bound over, or unless the accused has been committed or bound to appear, or unless the

¹ *R. v. Perceval and others*, 1 Lew. C. C. 155. 514; 1 Man. & Ry. 272; Nom. *R. v. Somerset, JJ.*

² *R. v. Davis*, 1 C. & P. 470.

³ 1 Ch. Cr. L. 163.

⁴ 4 Com. 301.

⁵ See *R. v. Killinghall*, 1 Burr. 17.

⁶ *R. v. Bridgewater and Taunton Canal Company*, 7 B. & C.

⁷ *R. v. Holloway*, 9 C. & P. 43, Parke, B. Whether any objection can be taken to any proceeding before a grand jury, qu.? *R. v. Clements*, 5 Cox, 191.

⁸ *Cook v. Field*, 3 Esp. 133, Lord Kenyon.

⁹ *Prosser v. Rowe*, 2 C. & P. 421.

indictment be preferred by an order in writing from a judge of the courts at Westminster, or the attorney or solicitor general;¹ or, in perjury, by direction of any court, judge, or public functionary authorized by 14 & 15 Vict. c. 100, to direct a prosecution for perjury. By sect. 2, if the justice should refuse to commit or bail for any such offence, still the prosecutor may insist upon being bound by recognizance to prosecute, and the recognizance shall be transmitted as if the justice had committed.²

Process.] Supposing the party not to be in custody, or that he should be at large on bail, it is desirable to know how he is to be brought up to answer the charge. In felony, this is carried into effect by a writ of *capias*, which all courts having the power to try may award.³

By 5 Ed. 3, c. 11, where any person, being indicted or outlawed for any felony in one county, shall be dwelling or received in another county, the justices assigned to hear and determine such felonies shall direct their writs to all the counties of England where need shall be, to take such persons indicted.

And by 48 Geo. 3, c. 58, s. 4, whenever any person shall be charged with any offence in Her Majesty's Court of Queen's Bench, not being treason or felony, and the same shall be made appear to any judge of any of the common-law courts at Westminster by affidavit or by certificate of the indictment, such judge may issue his warrant under his hand and seal, and cause such person to be apprehended and brought before him or some other judge, or before a justice, in order to his being bound to the Queen's Majesty, with two sufficient sureties, in such sum as in the said warrant shall be expressed, with condition to appear in the said court at the time mentioned in such warrant, and to answer to all indictments for any such offence; and in default the judge or justice may commit such person to the common gaol of the county, city, or place where the offence shall have been committed, or where he shall have been apprehended, until he shall become bound as aforesaid, or be discharged by the Court of Queen's Bench in term time, or by a judge in vacation; and the recognizance to be thereupon taken shall be returned and filed in the said Court of Queen's Bench, and shall continue in force until such person shall have been acquitted, or shall have received judgment, unless sooner ordered by the same court to be discharged; and where any person, either by virtue of such warrant of commitment, or any writ of *capias ad respondendum* issued out of the said court, is now detained or shall hereafter be committed to and detained in any gaol for want of bail, the prosecutor may cause a copy of the indictment to be delivered to such person, or to the gaoler, keeper, or turnkey of the gaol wherein such person is or shall be so detained, with a notice thereon indorsed, that

¹ The same in Ireland.

³ 4 T. R. 521; 11 & 12 Vict.

² Not to extend to Scotland, s. 3. c. 42, s. 3.

unless such person shall within eight days from the time of such delivery of a copy of the indictment as aforesaid, cause an appearance and also a plea or demurrer to be entered in the same court to such indictment, an appearance and the plea of "Not guilty" will be entered thereto in the name of such person; and in default the prosecutor, upon an affidavit made and filed in the said court of the delivery of a copy of such indictment, with such notice indorsed thereon as aforesaid, to such person, or to such gaoler, keeper, or turnkey, which affidavit may be made before any judge or commissioner of the said common-law courts authorized to take affidavits in such courts, may cause an appearance and the plea of not guilty to be entered, and such proceedings shall be had as if the defendant had appeared and pleaded not guilty, and if upon the trial the defendant shall be acquitted, the judge may order that such defendant shall be forthwith discharged.

When the assizes or sessions are over, the clerk of assize or of the peace will upon application by the prosecutor, grant a certificate of the indictment being found, upon which a judge of the Queen's Bench, or a justice, will grant a warrant to apprehend the person therein mentioned.¹ No copy of the indictment is necessary for this purpose.²

And by 11 & 12 Vict. c. 42, s. 3, similar powers are given to any justice *in respect of persons at large*, whether bound or not. The warrant enables the justice or any other justice to deal with the prisoner, and upon oath or affirmation as to his identity, he shall be committed or bailed without further inquiry. If the person indicted be in prison, the justice, upon such proof of identity, may issue a warrant of detainer until the prisoner be removed by *habeas corpus*, or discharged by due course of law.

Outlawry.] In a proceeding by indictment, if the defendant cannot be found so as to be taken upon a *capias* or bench warrant, he may be outlawed.³ But by several statutes passed in the reign of Hen. 6, before any exigent is awarded in treason or felony, writs of *capias* shall be directed to the sheriff within six weeks before the return, and after the return the proceedings shall be as heretofore. Any exigent awarded contrary to this provision shall be void.⁴

But the outlawry may be avoided or reversed.⁵ Outlawry does not lie against a parish or corporation, nor against a hundred, nor a peer, except for felony or breach of the peace, nor against an infant for felony under the age of fourteen.⁶ And in misdemeanor, outlawry does not, as in treason or felony, operate as a confession.⁷

¹ 1 Ch. Cr. L. 440.

² *R. v. Redfern*, 2 Adol. & E. 387; 4 Nev. & M. 198.

³ Steph. 273; for the proceedings on outlawry see Hawkins, Tit. "Outlawry." Counsel need not be assigned upon a collateral matter, as whether the prisoner were be-

yond sea before the exigent awarded. *R. v. O'Carney*, T. Jones, 180.

⁴ 6 Hen. 6, c. 1; 8 Hen. 6, c. 10, s. 3; 10 Hen. 6, c. 6, s. 1.

⁵ Steph. 274.

⁶ Id. 1 Ch. Cr. L. 348.

⁷ *R. v. Tiffin*, 2 Salk. 494.

The prosecutor having moved to reverse an outlawry against the prisoner, which was bad, in order that he might be brought up for judgment, it was endeavoured to go on with the consideration of errors assigned against the *conviction*; but the court would only reverse the outlawry, declining to go into the matter of errors.¹ It was also held that no objection could be taken for want of continuances from the time of the non-appearance to that of the reversal of outlawry. No continuances were necessary during the proceedings to outlawry, nor during its existence. The record of the Queen's Bench (the indictment had been removed there by *certiorari*), commenced:—"Pleas before, &c., of the term of St. Michael, 4 Wm. IV.," being the term of the defendant's appearance in the Queen's Bench. Then followed regular continuances down to the non-appearance: then the outlawry: then, after an interval of several terms, an entry "Hil. T. 9 Vict.," being the term in which the defendant was brought into court after the outlawry: then an entry, "And that is to say, on the 26th Jan. 1859, in this same term," recording the bringing in of the defendant. It was held, that this was a sufficient commencement of the proceedings, subsequent to the outlawry without fresh *placita*, and that it was sufficient for the record to state, that the defendant, "being a prisoner in custody by virtue of a warrant theretofore issued upon the said judgment of conviction of outlawry, is brought in custody aforesaid into court here," without further describing the process under which he was taken.²

By 4 & 5 Wm. & M., c. 18, s. 3, outlawry may be reversed by attorney, without appearance, or bail, except where special bail shall be ordered by the Court of Queen's Bench,³ and this special bail is of course where the action is brought for a sum exceeding 20*l.*, and the defendant being abroad, by his attorney, signs judgment of reversal.⁴ If he is at home, the case may be different.⁵

¹ *Wright v. Reg.* (in error), 16 L. J. Q. B. 10; 14 Q. B. 48.

² S. C.

³ And see sects. 4, 5.

⁴ *Havelock v. Geddes*, 12 East, 622. *Serocold v. Hampsey*, Id.

624, n. *Commerell v. Beauclerk*, 21 L. J. Q. B. 137.

⁵ *Porter v. O'Meara*, 5 Bing. N. C. 624; 4 Jur. 1204. *Bank*

of England v. Reed, 7 Mees. & W. 159; 8 D. P. C. 848.

CHAPTER V.

OF THE PROCEEDINGS BEFORE TRIAL.

Postponement of Trial.] A postponement of the trial may take place by leave of the court, as where the inquiry is deferred till the next assizes or sessions, or where a writ of *certiorari* issues. Again, the trial may be put off at the instance of the prosecutor or of the accused, upon just cause shown. As if there be an excitement against the prisoner: but he must first plead.¹ So, the absence of a material witness, unless abroad and unlikely to return,² especially if tampered with,³ will have this effect. The illness of the prisoner, or of a witness;⁴ the impossibility of producing the fullest evidence for the prosecution or defence, by reason of the shortness of time; an omission to make up a record;⁵ the neglect of the prosecutor to furnish a particular of the charges;⁶ the publication of writings calculated to influence the jury;⁷ want of due

¹ *R. v. Bolan*, 2 Moo. & Rob. 192.

² *R. v. D'Eon*, 3 Burr. 1513. *Att.-Gen. v. Phillips*, 13 Price, 592. *Att.-Gen. v. Moss*, Id. 258. See *R. v. V. Jones*, 8 East, 31.

³ *R. v. Parish*, 7 C. & P. 782. *R. v. Gutteridge*, 9 C. & P. 228. And the prisoner was not admitted to bail. But the matter lies in the discretion of the judge, who will sometimes take bail with sufficient notice, or, in the absence of collusion, will frequently discharge the prisoner upon his own recognizance. *R. v. Osborn*, 7 C. & P. 799. *R. v. Beardmore*, Id. 497.

⁴ *R. v. Chapman*, 8 C. & P. 558. A trial was put off till the next assizes where the absence arose from illness, although the postponement had taken place once before, on the ground that the prosecutor was too ill to attend, by reason of wounds given to him by the prisoner, and of which he died. The second postponement took place upon an arraignment for murder, a material

witness being ill. *R. v. Bowen*, 9 C. & P. 509. *R. v. Savage*, 5 C. & P. 143.

⁵ *R. v. Bowman*, 6 C. & P. 337. Time was given in order that a *mandamus* might be applied for.

⁶ *R. v. Hodgson*, 3 C. & P. 422. Embezzlement, but not in the case of the attorney-general. *Att.-Gen. v. Lambirth*, 5 Price, 386.

⁷ *R. v. Gray*, 1 Burr. 510. *R. v. Jolliffe*, 4 T. R. 285. It is a great contempt to circulate partial statements, or, indeed, any papers relating to a cause on the eve of trial. *R. v. Burdett*, 1 Ld. R. 148; Salk. 645. But it has been held not to be a *contempt* to exhibit inflammatory publications in an assize town respecting a case about to be tried; as where a model of Gilham, the murderer, was shown in the town hall before the trial, in company with a bust of Williams, who was suspected of being the murderer of the Marrs and Williamsons. *R. v. Gilham*, Moo. & Malk. 165.

notice by the defendant in perjury of his intention to try;¹ adding counts by leave;² a commission to examine witnesses abroad;³ all these, amongst others, are grounds for delay.

It is worthy of remark to inquire as to what the judge will do if there be no deposition of the witness before the magistrate in the case of absence. It seems, that he will require an affidavit, stating in what point the importance of the testimony rests, from whence he will judge of the materiality of the witness.

This right to apply for a postponement is not for the advantage of the prosecutor only, but also of the prisoner, and the prisoner may apply concerning a witness for the prosecution. As where a witness was absent, having been previously bound over to the assizes, so that the prisoner would, of course, expect his attendance. It was a case of murder, and the prisoner intended, upon cross-examination, to have elicited from this person facts favourable to him. The court postponed the trial, although it was not shown that any endeavours had been made to procure the attendance of the witness.⁴ A child labouring under inflammation of the lungs could not be separated from its mother, nor brought to the court, being unweaned. A surgeon's affidavit to that effect was held sufficient, the mother being a material witness.⁵ Where it was discovered that the principal witness against a party charged with rape was totally ignorant of the nature of an oath, Rooke, J., directed that the trial should stand over in order that the child might be instructed, and, at the next assizes, the prisoner was convicted upon her testimony, and executed.⁶ But, in a similar case, the party being an adult, the rule was different.⁷ So again, where a child was of very immature age, Pollock, C. B., would not postpone the trial for instruction, although he would have so done had she been ten or twelve years old.⁸ So, in a case of murder, where it was proposed to show previous attempts upon the life of the deceased, by witnesses who had not been examined before the justice, the court would not postpone the trial, in order to allow time for investigating the characters of these witnesses, and of the proposed evidence.⁹ Two charges were made, one for riot, another for feloniously demolishing a house. One of the parties had been in gaol for more, the other for less, than twenty days. It was stated that

¹ *R. v. Trenfield*, 9 C. & P. 284.

² *R. v. Stone*, 1 Fost. & F. 310. The defendant could not claim to be tried instantly.

³ But not if they have had time to return. *Att.-Gen. v. Laragoity*, 3 Price, 221. See *Att.-Gen. v. Thacker*, 2 Price, 116.

⁴ *R. v. Savage*, 1 Car. & K. 75.

⁵ *R. v. Macarthy*, Car. & M. 625.

⁶ See *R. v. Murphy*, Leach, 430, n.; *R. v. Williams*, 7 C. & P. 321.

⁷ *R. v. Wade*, 1 Moo. C. C. 86.

The judge doubted whether he had done right in directing that the adult should be instructed, and the judges were of opinion that an acquittal should have been directed. The prisoner having been convicted upon the educated testimony, a pardon was recommended.

⁸ *R. v. Nicholas*, 2 Car. & K. 246.

⁹ *R. v. Johnson*, Id. 354.

the first prisoner intended to traverse, and was not prepared to try his case for riot. The judge, upon this, postponed the trial, but only for two days, because the general nature of the charges so far agreed as that the prisoners could not be ignorant of them.¹ A defendant in perjury was arrested on the Wednesday before the trial, as he was going to deliver his brief. The case was called on on Saturday, but the L. C. J. would not postpone the trial unless the arrest could be shown to have been collusive with the prosecution on the part of the person making the capture. Proof that a witness for the prosecution stood by during the arrest was not deemed sufficient.² Where the prosecutor has failed to succeed upon one or more indictments, he will not be allowed to postpone the remaining cases till a future session, the prisoners having been arraigned upon all the cases.³

It is not too late to postpone the trial, upon affidavit, soon after the jury have been charged, but before any evidence has been offered.⁴

Costs and expenses.] In cases of felony, no costs can be allowed to the prosecutor at the prisoner's expense, however far his witnesses may have come, although the prisoner should succeed in postponing the trial. Nor are such costs allowable under 7 Geo. 4, c. 64, s. 22, until the trial takes place.⁵ But, in misdemeanors, if the record be withdrawn by the prosecutor, without a due countermand of trial, *he* must pay costs to the defendant.⁶ And if the trial, on misdemeanor, be put off at the instance of the defendant, he must pay the costs of the day.⁷

Nor can any costs be allowed to the prisoner, but the court will discharge him on his own recognizance.⁸

Certain costs were incurred upon argument by the prosecutor, which were part of the costs of the prosecution, and allowable under 7 Geo. 4, c. 64, s. 22. Such costs, the court said, would, for the future, be taxed by the officer of the court by which the case was reserved, and who would certify the amount to the clerk of assize, or to the clerk of the peace.⁹ The warders at Millbank brought a prisoner to Wells to be tried for larceny. The court would not allow the costs of transit. The governor of Millbank was a public officer, and bound to produce the prisoner.¹⁰ And, of course, if the clerk of the peace, who is authorized to prosecute, fails in so doing, he cannot have any expenses.¹¹

¹ *R. v. Howell*, 9 C. & P. 437.

² *R. v. Gordon*, Car. & M. 410, Lord Denman.

³ *R. v. Fuller*, 9 C. & P. 35.

⁴ *R. v. Fitzgerald*, 1 Car. & K. 201. See further upon this head, *R. v. Ratcliff*, 1 Sir W. Bl. 3.

⁵ *R. v. Hunter*, 3 C. & P. 591.
R. v. Young, 2 Cox, 280.

⁶ *R. v. Bartrum*, 8 East, 269.

⁷ *R. v. Doyle*, 1 Esp. 125.

⁸ *R. v. Crowe*, 4 C. & P. 251.

⁹ *R. v. Lewis*, 7 Cox, 406.

¹⁰ *R. v. Waters*, 8 Cox, 350.

¹¹ *R. v. Cook*, 1 Fost. & F. 389.

CHAPTER VI.

THE INDICTMENT AND ITS INCIDENTS.

Indictment and its incidents.] We will now proceed to consider the indictment and pleas connected with the prosecution and defence, after which the trial, evidence, and their consequences will follow in order.

Indictments are of a public nature,¹ although there is also a remedy by action, where a matter concerning the public convenience is either prohibited or commanded, as the repair or obstruction of a highway.² And where a new offence is created with a particular mode of proceeding, no indictment will lie.³ In the absence of such a specific direction, the proceeding by indictment obtains.⁴ So it is where there is a substantive clause of prohibition, and a particular provision given afterwards with reference to another matter.⁵ So where a further penalty is inflicted for an offence punishable at common law.⁶ So where the statute prescribes the procedure by action *or otherwise*, an indictment may be preferred.⁷ Some cases have been mentioned in the old books where an indictment has been held unnecessary, but they would hardly avail at this day.⁸ The chief parts of an indictment are,—the venue, the party indicted, the prosecutor, time and place, the facts and intent. The caption is no part of the indictment. It is merely made up with the record as a preamble, although the jurisdiction to try must appear in the caption, as “to hear and determine,” &c.⁹ Other circumstances worthy of consideration in an indictment are, the joinder of prisoners and of offences.—First as to the venue.

Venue.] By 28 Hen. 8, c. 15, s. 1, all treasons, felonies, robberies, &c., committed at sea, or in any haven, river, creek, or place within the jurisdiction of the admiral, may be dealt with as if such offence had been committed upon the land in England, and a commission shall be had under the Queen’s great seal directed to the admiral, or to his lieutenant or deputy, and to three or four such other substantial persons as shall be appointed by the lord chancellor for the time being from time to time. Such persons shall proceed upon the oaths of twelve men of the shire, or four of them at the least.

¹ 2 Hawk. c. 25, s. 4.

² Id. For instances where indictments will not lie in respect of matters of a private nature, see 2 Curw. Hawk. 289, *n*.

³ 2 Curw. Hawk. 290, *n*.

⁴ 2 Curw. Hawk. 290, *n*.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ 2 Hawk. c. 25, s. 4, &c.

⁹ *R. v. Carter*, Str. 442.

By sect. 2, every indictment found and presented before such commissioners of any such offence being committed in or upon the sea, &c., shall be good and effectual in law; and there shall be the like order, process, judgment and execution, as if the offence had been committed on land. If the accused deny the charges, the trial shall be by a jury of twelve men, and the same punishment shall follow as in cases of a trial for an offence on land.

By sect. 5, in the case of the Cinque Ports, the commission shall be directed to the lord warden, or to his deputy, and to three or four such other persons as the lord chancellor for the time being shall appoint; and by sect. 6, the inquisition and trial shall be made and had by the inhabitants in the said five ports or the members of the same.¹

Then the stat. 39 Geo. 3, c. 37, s. 1, extended the 28 Hen. 8 to all offences. Still the judge of the admiralty, assisted by two judges, presided, and passed sentence; but by 7 Vict. c. 2, s. 1, Her Majesty's justices, or others Her Majesty's commissioners of oyer and terminer or general gaol delivery, shall have the powers of commissioners of oyer and terminer for the trying of offences committed within the jurisdiction of the admiralty.²

By sect. 2, in all indictments so preferred before the said justices and commissioners last mentioned, the venue laid in the margin shall be the same as if the offence had been committed in the county where the trial is had, and all material facts shall be stated to have taken place "on the high seas."³ Sect. 3 directs the trial, and sect. 4 saves the Central Criminal Court.

And by 24 & 25 Vict. c. 94, s. 9, where any person shall, within the jurisdiction of the admiralty of England or Ireland, become an accessory to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, and whether such felony shall be committed within that jurisdiction or elsewhere, or shall be begun within that jurisdiction and completed elsewhere, or shall be begun elsewhere and completed within that jurisdiction, the offence of such person shall be felony; and in any indictment for any such offence the venue in the margin shall be the same as if the offence had been committed in the county or place in which such person shall be indicted, and his offence shall be averred to have been committed "on the high seas;" provided that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.

The prisoners were indicted for feloniously wounding in the county of Glamorgan. The offence was committed at sea, close to Penarth Roads in the British Channel, between the Glamorgan-shire and Somersetshire coasts. The indictment charged, that the

¹ See Steph. 261, 264.

² See *R. v. Bruce*, Leach, 1093; *Russ. & Ry.* 243. *R. v. Lacey*, Mo. 121.

³ See 1 Will. 4, c. 70, s. 19. *R. v. Parry*, Leach, 108. *R. v. Widdow*, 3 Camp. 78. *R. v. Wyndham*, *Russ. & Ry.* 197.

offence had been committed in Glamorgan, but there was no averment that it had taken place on the high seas, and therefore, it was not framed under 7 Vict. c. 2. The court held, that the place in question formed part of the county of Glamorgan. Both shores of the British Channel form part of England and Wales. Looking at the local situation of this sea, it must be taken to belong to the counties of the shores by which it is bounded. The Flat and Steep Holm islands, which are abreast of the anchorage ground close by which the felony happened, are always treated as part of the parish of St. Mary's, Cardiff. Therefore, as the whole of this inland sea must be distributed between the two counties, it followed, that the *locus in quo* was within Glamorganshire.¹

By 11 & 12 Will. 3, c. 12, s. 1, if any governor, lieutenant-governor, deputy-governor, or commander-in-chief of any plantation or colony within Her Majesty's dominions beyond the seas, shall, within his government or command, be guilty of oppressing any of His Majesty's subjects beyond the seas within his government or command, or shall be guilty of any other indictable offence contrary to the laws of this realm, or the laws in force within his government or command, such offence shall be inquired of, heard, and determined in His Majesty's Court of Queen's Bench at Westminster, or before such commissioners and in such county of this realm as shall be assigned by His Majesty's commission; and by 42 Geo. 3, c. 85, s. 1, if any person employed by or in the service of His Majesty in any civil or military station, office, or capacity out of Great Britain, or having, holding, or exercising any public station, office, capacity, or employment out of Great Britain, shall commit any indictable offence in the execution or under colour or in the exercise of any such station, &c., every such offence may be prosecuted and determined in the Court of King's Bench, either upon an information exhibited by the attorney-general, or upon an indictment found, in which information or indictment such offence may be charged to have been committed in the county of Middlesex; and all such offenders not having been before tried out of Great Britain, shall, on conviction, be liable to such punishment as may by any law now in force, or any Act that may hereafter be passed, be inflicted for any such offence committed in England, and shall also be liable, at the discretion of the Court of King's Bench, to be adjudged to be incapable of serving His Majesty in any station, office, or capacity, civil or military, or of holding or exercising any public employment whatever. This section, notwithstanding the word "indictment," does not extend to felonies. The word "information," was considered unanswerable upon an objection to an indictment for larceny in the Queen's Bench, when the defendant pleaded guilty to a charge of extensive plunder abroad, for "information lies not for a felony."²

¹ *R. v. Cunningham and others*, Bell, C. C. 72; 28 L. J. M. C. 66.

² *R. v. Shawe*, 5 M. & S. 403,

By 17 & 18 Vict. c. 104,¹ s. 267, offences committed by any master, seaman, or apprentice, either ashore or afloat, who is or has been previously employed for three months in the service, shall be tried as if committed within the jurisdiction of the admiralty, although actually committed out of the dominions of Her Majesty. A ship sailed from London towards China. Three chests of tea were stolen from her when off Whampoa, a river twenty or thirty miles from the sea. No evidence was given whether the tide flowed there or not, but the court held, that the Central Criminal Court had jurisdiction without this evidence.²

By 18 & 19 Vict. c. 91, s. 21, if any British subject charged with a crime or offence on board a British ship at sea, or in any foreign port or harbour, or if any person not being a British subject, charged with any crime or offence on board a British ship at sea, is found within the jurisdiction of any court of justice in Her Majesty's dominions, which would have cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court may hear and try the case as if the fact had been committed within such limits.³ The prisoner was a foreign sailor, one of the crew of the British ship *Ontario*, and he wounded the prosecutor, one also of the crew, and also a foreigner, on the high seas. It was agreed that he was not "found," but brought into the jurisdiction in custody, and against his will. But the court were clear that the conviction was right.⁴ In another case, it was suggested under similar circumstances, that the original capture was illegal for want of a warrant, and therefore that the prisoner could not have been "found." But it appeared that he shot an officer who apprehended him, not to regain his liberty, but out of revenge, and the judges said that the act would then be murder, although the arrest might have been unlawful. The prisoner was executed.⁵

Venue. Boundary.] By 7 Geo. 4, c. 64, s. 12, where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties or places, or partly in one county and partly in another, or within the distance of 500 yards of any such boundary or boundaries, or shall be begun in one county or place and completed in another, every such felony or misdemeanor may be dealt with, &c., in any of the said counties or places, in the same manner as if it had been actually and wholly committed therein.

This section applies to county boundaries only, not to limited jurisdictions. The word "borough" is not mentioned. Therefore, where a prisoner was arraigned at a borough sessions

¹ The Merchant Shipping Act.

² *R. v. Allen*, 7 C. & P. 664.

³ The Act, however, of 12 & 13 Vict. c. 96, is saved by a proviso.

⁴ *R. v. Lopez*, Dears. & B. 525;

27 L. J. M. C. 48.

⁵ *R. v. Sattler*, Dears. & B. 539.

in Southwark for an offence committed within the city of London, but certainly within 500 yards of Surrey, the recorder directed an acquittal, and upon the subsequent trial at the Old Bailey, he overruled the prisoner's plea of *aut. acq.*, and the judges held that he had done right.¹ The trial might also have taken place at the assizes, or at the quarter sessions for Surrey.² So, again, an indictment laid an assault to have been committed at the parish of St. Martin, Stamford Baron, in the county of Northampton, and within the borough of Stamford. After *traverse* and *certiorari*, a *venire* was ordered into Lincolnshire, and the defendant was convicted. The assault happened within 500 yards of the boundaries of Northampton and Lincoln, but as the indictment positively stated the offence to have been committed in Northampton, the court arrested the judgment.³ The venue in this case was "borough of Stamford," and it was endeavoured to reject the parish of St. Martin, Northampton, because, in order to have succeeded, the offence should have been laid and tried in the same county. But the court would not permit the rejection.⁴ The calculation of the 500 yards must be made by the direct line of measurement from the border, not by the *nearest road*.⁵ In counties of cities and towns corporate, prisoners may be committed for trial to the next adjoining county.⁶

So where the prisoner obtained a post-office order in Middlesex and got the money in Kent.⁷ And thus it is that the words "town corporate" in 38 Geo. 3, c. 52 (to which we are coming), means a town corporate which is a county of itself, as Kingston-upon-Hull.⁸

Venue in the county of a city or town corporate.] By 38 Geo. 3, c. 52, s. 1, in every indictment removed into the King's Bench by *certiorari*, and in every information filed by the attorney or solicitor general, or by leave of the Court of King's Bench, if the venue in such indictment be laid in the county of any city or town corporate, it shall be lawful for the court in which such indictment shall be depending, at the prayer of any prosecutor or defendant, to direct the issue to be tried by a jury of the county next adjoining to the county of such city or town corporate, and to award proper writs and take all proceedings necessary for such trial.

By sect. 2, any prosecutor may prefer his bill of indictment in pursuance of such direction, at any sessions of oyer and terminer or

¹ *R. v. Welch*, 1 Moo. C. C. 175.
The recorder presided at Southwark as well as in London.

² 1 Moo. C. C. 176.

³ *R. v. Mitchell*, 2 Q. B. 636;
2 Gale & D. 274.

⁴ 2 Q. B. 636.

⁵ *R. v. Wood*, 5 Jur. 225.

⁶ The trial may generally be in either county. *R. v. Gallant*, 1 Fost. & F. 517.

⁷ *R. v. Jones*, 3 Car. & K. 346.

⁸ *R. v. Milner*, 2 Car. & K. 310.

general gaol delivery; and every such bill when found shall be as valid as if the same had been found to be a true bill by any jury of the county of the city or town corporate.

The 3rd section directs that these indictments shall be filed with the proper officer of the next adjoining county, and by sect. 4 the defendant is to be removed to the gaol of that county.

By sect. 5, the recognizances are to be forfeited for non-appearance.

By sect. 6, notice left at the abode of the recognizers shall be as effectual as if served personally. But the recognizances shall not be estreated till the following sessions, in order that cause may be shown.

By sect. 7, the recognizances are to be returned to the next court of oyer and terminer, and then after such notice no indictment shall be preferred in the city or town corporate.

Sect. 8 places the expenses in the discretion of the judges.

By sect. 9, York is to be deemed adjoining to Kingston-upon-Hull, and Northumberland to Newcastle.

There are excepted from the Act, by sect. 10, London, Westminster, Southwark, Bristol, Chester, and the criminal jurisdiction of Exeter. But the exceptions of Bristol, Chester, and the Exeter criminal jurisdiction are withdrawn by 5 & 6 Will. 4, c. 76, s. 109.¹

By 51 Geo. 3, s. 2, all expenses not provided for by 38 Geo. 3, c. 52, s. 8, are included. And now, lastly, by 14 & 15 Vict. c. 55, s. 19, all offences not triable at quarter sessions may be tried in the adjoining county, when committed within the above jurisdictions, but in which the Queen has not, for five years previously, granted a commission of oyer and terminer.

Bail had surrendered the defendant to the custody of the York city gaoler, under 38 Geo. 3, c. 52, and a *habeas corpus* issued to bring up the body, and the judge made out a committal to the county. The old bail then renewed their undertaking at the judge's lodgings. The clerk of arraigns attended with the indictment and recognizances, and the judge made an order to file them amongst the records of the county. A new traverse was entered, and a new jury pannel struck.² The statute of Geo. 3, however, does not apply to indictments sent by the Court of Queen's Bench to be tried in the next adjoining county, after a removal by *certiorari*.³ It needs not to be averred in the indictment that the county where the venue is laid is that next adjoining. When the record is drawn up, that may appear in the memorandum or caption.⁴

A venue was stated to be "Yorkshire, being the next adjoining county to the town and county of Kingston-upon-Hull, to wit."

¹ Sect. 11 of 38 Geo. 3 relates to ancient privileges, and sect. 12 to extra costs.

² *R. v. Rowbattel*, 1 Lew. C. C. 278.

³ *R. v. Nottingham*, 4 East, 208, under sect. 12.

⁴ *R. v. Goff*, Russ. & Ry. 179. As to Bristol and Gloucestershire, *R. v. Holden*, 8 C. & P. 606.

There is no county of Kingston-upon-Hull; it should have been, "town of Kingston-upon-Hull and county of the same town." Nevertheless, it was held sufficient.¹ And although an offence may be tried in the county although committed in the county of the town, yet it should be laid in the county of the town.² The prisoner was tried by a jury of Haverford West, a county of itself, but the offence was committed at P., which was added by the Boundary Act, 2 & 3 Will. 4, c. 64, to the borough of Haverford West, and by 5 & 6 Will. 4, c. 76, was declared to be part of it. Coleridge, J., after having been referred to the case of *R. v. Gloucestershire Justices*,³ allowed the trial to proceed.⁴ So where an offence was committed in a borough situate partly in one county and partly in another, the offence was deemed triable in either county under the Act of 14 & 15 Vict. c. 55, s. 19.⁵

An indictment at the quarter sessions in Coventry was held to have been rightly tried by a jury of the whole county, although by 5 & 6 Vict. c. 110, the quarter sessions and assizes are to be held separately at Coventry for the city of Coventry and certain other parts of the county of Warwick.⁶ An offence, if any, took place at the gaol of Worcester, within the county of that city, and more than 400 yards from the county. The county of the city had a separate jurisdiction, its own recorder and quarter sessions. It was made a question whether the quarter sessions had power to try the case. The statute 4 Geo. 4, c. 64, s. 48, was relied on for the prosecution.⁷

Venue. Journey, voyage, inland navigation, &c.] By 7 Geo. 4, c. 64, s. 13, where any felony or misdemeanor shall be committed on any person or on or in respect of any property in or upon any coach, waggon, cart, or other carriage whatever employed in any journey, or shall be committed on any person or on or in respect of any property on board any vessel whatever employed on any voyage or journey upon any navigable river, canal, or inland navigation, such felony or misdemeanor may be dealt with in any county through any part whereof such coach, &c., or vessel shall have passed in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county; and in all cases where the side, centre, or other part of any highway, or the side, bank, centre, or other part of any such river, canal, or navigation, shall constitute the boundary of any two counties, such felony or misdemeanor may be dealt with in either of the said counties through or adjoining to or by the boundary of

¹ *R. v. Grundy*, 2 Cox, 357.

² *R. v. Mellor*, Russ. & Ry. 144.

³ Cited, 7 C. & P. 338.

⁴ *R. v. Piller*, 7 C. & P. 337; 5 Cox, 187.

⁵ *R. v. Gallant*, 1 Fost. & F. 517.

⁶ *R. v. Holloway*, Den. & P. 287; 12 Q. B. 319.

⁷ *R. v. Harris*, Dears. 346.

any part whereof such coach, &c. or vessel shall have passed in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if actually committed in such county.

An assault was committed in a Brighton train before its arrival at Three Bridges: there the parties separated. It was urged that trains were not within the Act, that the journey to New Cross (where the assault was alleged) was not performed in the same carriage, and that the words, "should have passed," must be confined to the time of the offence. The recorder overruled the objections, and referred the words to the time of the trial. Therefore, the trial was right at the Central Criminal Court under 7 Geo. 4, c. 64, and 4 & 5 Will. 4, c. 36, s. 28.¹

By 51 Geo. 3, c. 100, s. 1, it shall be lawful for the court before which any conviction shall have taken place upon any indictment under 38 Geo. 3, c. 52, to order every such convict to be punished according to law, either within the county where such conviction shall have taken place, or within the county of the city or town corporate wherein such offence shall have been committed; and in cases where the court shall order such convict to be punished within the county of such city or town corporate, it shall be lawful for the court, after passing sentence upon every such convict, to order him to be delivered into the custody of the sheriff, gaoler, or other proper officer of the county of such city or town corporate; and the sheriff, gaoler, or other proper officer of the county of such city or town corporate is hereby commanded to receive into his custody every such convict, and to execute the sentence so passed upon him in such adjoining county, as if he had been tried and had received such sentence in the county of such city or town corporate.²

We come now to a very important clause. By 14 & 15 Vict. c. 100, s. 23, it shall not be necessary to state any venue in the body of any indictment, but the county, city, or other jurisdiction named in the margin shall be taken to be the venue for all the facts stated in the body of such indictment; provided that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment; and provided also, that where an indictment for any offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue.

A larceny of a post-office letter was stated to have taken place at Peterborough. Peterborough has an ordinary commission, and a commission to try all treasons, murders, &c. There is no non-intromittant clause, but the county magistrates exercise no jurisdiction. There is a separate *custos rotulorum* and clerk of the

¹ *R. v. French*, 8 Cox, 252.

² See 14 & 15 Vict. c. 100, s. 23.

peace. It was held that the jurisdiction of the gaol delivery at Northampton was not ousted.¹ A letter containing a false pretence was received in C., a borough. It had been posted out of the borough. The letter produced some money which came to hand out of the borough. The venue in this case was held to have been well laid in the borough.² The county used always to be considered a sufficient venue without more,³ although some parish or ward was formerly mentioned in the body of the indictment; and an indictment for perjury, laying the offence to have been committed "at the Guildhall of the city of London," was held bad.⁴ So where, upon not guilty pleaded, it turned out that the crime was committed in a different county, an acquittal was the consequence.⁵ And where local description comes in question, the local rule must prevail. As where an indictment was removed by *certiorari* and tried in Middlesex, judgment was arrested for want of an allegation that the offence had been committed in that county, and the court would not allow a suggestion *nunc protunc*.⁶ So where the venue in the margin was Central Criminal Court, but that in the body of the indictment "St. Mary, Lambeth, in Surrey," it was held that the indictment should have been at the assizes for Surrey, it having been removed into the Queen's Bench by *certiorari*.⁷ But, with consent, the indictment may be amended in this respect.⁸ So, in libel, the venue was, "Central Criminal Court to wit," and the publication was said to have taken place "at the parish of St. Mary, in the county of Middlesex, within the jurisdiction of the Central Criminal Court." The defendant having removed the indictment by *certiorari*, afterwards withdrew his plea of Not guilty, and moved to arrest the judgment. But the allegation was deemed sufficient, and judgment was pronounced by the court at Westminster.⁹ He "withdrew" it, whereby the Queen remaineth against him without defence. This form was held sufficient.¹⁰

For ecclesiastical purposes, a parish may, perhaps, be divided, each part being called a parish. Nevertheless an indictment is good which calls the whole a parish, it being usually known as such for common purposes, as the "parish of Birmingham."¹¹ The correct name of a parish was "St. Mary, W." The indictment called it "the parish of W." In the Central Criminal

¹ *R. v. Crane*, 3 Cox, 53.

² *R. v. Leech*, 7 Cox, 100; 2 Hawk. c. 25, s. 34.

³ *R. v. Gompertz*, 14 L. J. M. C. 118; 9 Jur. 401.

⁴ *R. v. Harris*, Leach, 800.

⁵ *R. v. Hart*, 6 C. & P. 123. Not aided by 7 & 8 Geo. 4. See 3 Camp. 77, as to the old law. Steph. 264.

⁶ *R. v. Stowell*, 5 Q. B. 44; Dav. & M. 189.

⁷ *R. v. Connop*, 4 Ad. & El.

942.

⁸ *R. v. Lord Ashburton*, 5 Q. B. 48, n.; 15 L. J. M. C. 97.

⁹ *R. v. Gregory*, 14 L. J. M. C. 82; 7 Q. B. 274.

¹⁰ *Gregory v. Reg.* 15 Q. B. 957; 15 Jur. 74.

¹¹ *R. v. Howell*, 9 C. & P. 437.

Court Act¹ this parish is called "the parish of W." The court held the statement sufficient, although the correct name was "St. Mary, W."² The indictment mentioned "St. Botolph, Aldgate," and there being no negative proof that there was no such place as "St. Botolph, Aldgate," the conviction was supported.³ And it is quite clear, that it needs not to be proved affirmatively for the prosecution that the parish laid is the right parish, though, upon one occasion, the judges expressed their doubt how they should hold if the non-existence if the parish laid were proved negatively for the prisoner.⁴ Subsequently, however, it seems to have been the opinion that the objection could only avail as a plea in abatement, at least, where there was nothing of locality in the charge, and the court will now amend under the statute. A charge of setting fire to a stack of pulse was deemed to be of this nature, and the judges unanimously affirmed a conviction where the parish laid was "Normanton-on-the-Would," and the prisoner proved that there was no such parish. Moreover, the judges at the trial thought, that they could not reject "on-the-Would" as surplusage, because it was likewise in proof that there were two Normantons, Normanton-on-the-Would and Normanton-on-Trent, but not Normanton singly. The opinion of the judges, however, being that the objection could only be by plea in abatement, the point of surplusage became immaterial.⁵ Hence it follows, that unless local description be necessary, the mention of the county is not now met with.⁶

Where a parish extended into two counties, an indictment charging the offence in either was held good.⁷ But if a penalty be given to the poor of a particular parish, the parish must, of course, be correctly set out.⁸ So if there be two townships, and the matter be local, it is better to lay it in the parish at large, for if the wrong township be stated, the error will be fatal.⁹

To these observations we may add, that the words, "parish aforesaid," refer to the parish last mentioned. So that where the prisoner and two others of the parish of Walcot were indicted for being riotously assembled at the parish of St. Peter and St. Paul, and for beginning to demolish a house, situate at the parish aforesaid, Park, J., held the indictment sufficient for the cause above mentioned, although two parishes had been previously named.¹⁰ So as to counties, that in the margin shall be preferred if more than one are mentioned.¹¹ After verdict, it was held, that

¹ 4 & 5 Will. 4, c. 36.

² *R. v. St. John*, [Burglary,] 9 C. & P. 40.

³ *R. v. Bullock*, 1 Moo. C. C. 324, n.; Car. Cr. L. 282.

⁴ *R. v. Dowling*, Ry. & M. N. P. C. 433. The statutes 9 Hen. 5, c. 1, and 18 Hen. 6, are repealed. See 2 Hawk. c. 25, s. 83.

⁵ *R. v. Woodward*, 1 Moo. C. C. 323.

⁶ *Post*. Burglary. Stealing in a dwelling house, &c.

⁷ *R. v. Perkins*, 4 C. & P. 363.

⁸ 2 Russ. C. M. 800, citing Arch. Cr. Pl. 95.

⁹ *R. v. Wood*, 1 Lew. C. C. 36.

¹⁰ *R. v. Richards*, 1 Moo. & Rob. 177.

¹¹ *R. v. Rhodes and another*, 2 Ld. R. 888. See *Sutton v. Fenn*, 3

this statement, "a foreign country called America," was good. The objection was, that the particular country in America should have been pointed out.¹

By 4 & 5 Will. 4, c. 36, s. 3, all offences which in other indictments would be laid to have been committed in the county where the trial is had, and all material facts which would be, in other indictments, averred to have taken place in the county where the trial is had, shall, in indictments prepared and tried in the Central Criminal Court, be laid to have been committed, and be averred to have taken place "within the jurisdiction of the said court." Where an allegation was introduced that the offence had been committed in Middlesex, the venue being "Central Criminal Court to wit," it was deemed sufficient upon *certiorari*.²

India.] The statute 9 Geo. 4, c. 74, s. 56, does not extend to persons not otherwise amenable to the jurisdiction of the court. The words "within the limits of the charter of the said united company" mean, within the trading limits.³

Defective venues.] Nevertheless, although venues are sometimes so imperfectly laid as to hazard the verdict, yet the stat. 14 & 15 Vict. c. 100, s. 24, has provided, that no want of a proper or perfect venue shall vitiate the indictment. If, however, there be no jurisdiction, the imperfect venue cannot be cured. *A fortiori*, if there be no venue at all, the statute will not cure, for where there is no venue there is none to cure.

Therefore, where the count had "Lancashire" in the margin, but no words of reference were added to show where certain unlawful assemblies mentioned in that count had been held, the judgment on that count was arrested.⁴ But another count in the same indictment was attended with better success. The defendants were charged with aiding and abetting certain unlawful assemblies. The places where these assemblies were held were imperfectly stated. Thus, "at divers places," without more, but the aiding

Wils. 339. But see *R. v. Elnor*, Cro. El. 184. All such objections are, however, at present, for the most part, unavailable by reason of the statutes and the powers of amendment.

¹ *R. v. Myddleton*, 7 T. R. 739. There might have been another place called America besides that continent. *Per Cur.*

² *R. v. Hunt*, 10 Q. B. 925; 17 L. J. M. C. 14. The indictment had been found at the Central Criminal Court, with the marginal venue, "Central Criminal Court." It charged, that A., late of the parish

of M. in the county of Middlesex, *vi et armis*, at the parish aforesaid, in the county aforesaid, did, &c. The indictment was removed by *certiorari* into the Queen's Bench, and was tried by a Middlesex jury. This was held not to be a mis-trial. It was before 9 & 10 Vict. c. 24, and *R. v. Countesthorpe*, 2 B. & Adol. 487, was cited.

³ *Nga Hoong v. Reg.* 7 Cox, 489. The judgment of the supreme court of Calcutta was reversed.

⁴ *R. v. O'Connor*, 5 Q. B. 16; Dav. & M. 761.

and abetting were charged to have taken place at the parish aforesaid in the county aforesaid, and there being Lancashire in the margin, the latter venue was proper ; the former¹ being an imperfect statement, was helped by the statute.² The venue in the margin shows that the indictment was found by a grand jury in the county named, not (as in civil cases) that the complaint is laid as arising within the county.³ An indictment described the defendant as of the parish of S. in the city of London. The venue in the margin was, "Central Criminal Court to wit;" but the venue in the body omitted the words "in the county aforesaid," saying only, "at the parish aforesaid." Here there was merely an imperfect venue, and the statute came in aid to cure it, for as nothing appeared to the contrary, it would be presumed that all the parish of S. was in the city of London, and, accordingly, the trial was well had at the sittings of the Central Criminal Court in London.⁴ And it may be added, that besides the remedy by statute in this respect, there is, on the part of the judge, a power to amend. Hence, if a venue should be unnecessarily introduced in the body of the indictment, it may be rejected as surplusage, or struck out.

Changing the venue.] For the purpose of securing an impartial trial, the Court of Queen's Bench will change the venue, but the power is quite discretionary. Upon a criminal information, very strong grounds must be shown.⁵ A prejudice existing in the county is insufficient without more.⁶ Nor will the fact of the witnesses being in another county cause the court to change the venue.⁷ The question is, whether the defendant can have an impartial trial.⁸ The gentry of a county were addicted to fox-hunting, and there was an indictment for a conspiracy to destroy foxes. Here seemed to be a proper case for interference ; but the court would not change the venue.⁹ There was a charge of conspiracy for procuring false votes to be given at an election for bridge-master of the city of London. The venue was changed from the Central Criminal Court to Westminster.¹⁰ Perhaps the rank of magistrate may be the cause of prejudice so as to destroy impartiality.¹¹ The mode of changing the venue is by entering a sug-

¹ "At divers places."

² *R. v. O'Connor*, ut sup.

³ S. C.

⁴ *R. v. Albert*, 5 Q. B. 37 ; Dav. & M. 89. Whether the statement in question was, in reality, defective, qu. ?

⁵ *R. v. Harris and others*, 3 Burr. 1330.

⁶ *R. v. Penprase*, 4 B. & Adol. 575 ; 1 Nev. & M. 312. *R. v. Stephenson*, 5 Jur. 341.

⁷ *R. v. Dunn*, 11 Jur. 287. *R. v. Meade*, 3 D. & Ry. 301.

⁸ See *R. v. Fawle*, 2 Ld. Raym. 1452 ; and *R. v. Powell*, from Salop, as cited in S. C. ; *R. v. Thomas*, 4 M. & S. 442 ; *R. v. Ellis*, 6 B. & C. 145 ; *R. v. Pinney*, 3 B. & Adol. 947 ; *R. v. Russell*, 4 B. & Adol. 536, n., and there are very many other instances.

⁹ *R. v. King*, 2 Ch. Rep. 217.

¹⁰ *R. v. Simpson*, 5 Jur. 462.

¹¹ *R. v. Farewether*, Cro. Car. 348. *R. v. Pinney*, 3 B. & Adol. 947.

gestion on the record when removed by *certiorari*, that the jury process should be awarded in a foreign county.¹ This suggestion, however, needs not to state the facts which warrant the change.² Usually the venue goes into some other county upon the same circuit.³ Not necessarily the next adjoining county.⁴ With reference to the time for applying to change, it seems that issue must first be joined.⁵ And, moreover, one of several defendants may apply for the purpose of removing the venue in misdemeanor into an adjoining county, and a suggestion will be entered, although there be no affidavit of consent on the part of the others. Nevertheless, there should be no ground for presuming dissent on the part of the latter.⁶ Sometimes terms will be imposed on the defendant in order that the prosecutor may not be injured by the departure from the usual course of procedure.⁷

Amendments.] Very considerable powers are confided to the judges by the legislature with regard to amendments, and these powers are exercised with a liberality commensurate with their importance.

Any judge sitting at *nisi prius*, or any court of oyer and terminer, gaol delivery, or general or quarter sessions of the peace, on the trial of any indictable offence, if he shall see fit, may cause the record whereon the trial is pending, when any variance shall appear between any matter in writing or in print produced in evidence and the recital upon such record, to be forthwith amended. So, in felony or misdemeanor, in case of any variance between the record and the evidence, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place,⁸ or in the name or description of any person or body politic or corporate, or alleged to be the owner of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person, &c., therein alleged to be injured or damaged, or intended so to be by the commission of such offence, or in the christian name or surname, or both christian name and surname, or other description, of any person therein named or described,⁹ or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property therein named or described, for the court, if it shall consider such variance not material to the merits of the

¹ *R. v. Holden*, 5 B. & Adol. 347 ; 2 Nev. & M. 167.

² *R. v. Hunt and others*, 3 B. & Ald. 444.

³ *R. v. ———*, 6 Jur. 131.

⁴ *R. v. Coule*, 2 Burr. 834. The trial being in Northumberland, upon an indictment found in Berwick, although Durham was the next adjoining county. 1 T. R. 365 ; see *R. v. Amery*, Id. 363.

⁵ *R. v. Forbes*, 2 D. P. C. 440.

Whether upon an indictment for libel, after the striking of a special jury, the venue can be changed, qu. ? *R. v. Tarpeley*, 1 Har. & Wol. 58.

⁶ *R. v. Browne*, 6 Jur. 168.

⁷ *R. v. Hunt*, *R. v. Hodgson*, 5 B. & Adol. 351.

⁸ "Liberty" is omitted.

⁹ See *R. v. Lord Cardigan*, 1841, cited, 24 L. J. M. C. 117. Dears. 477, n.

case, and that the party accused cannot be prejudiced thereby in his defence on such merits, may order such record to be amended, according to the proof, by some officer of the court or other person, both where such variance occurs and elsewhere where necessary, on such terms, as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and if the trial shall be had at *nisi prius* the order for the amendment shall be indorsed on the *postea*, and returned with the record, and all such papers, &c., shall be amended; and in all other cases the order for the amendment shall either be indorsed on the indictment, or be engraved on parchment, and filed with the indictment among the records of the court. Provided that in the case of postponement the court may respite the recognizances of the prosecutor and witnesses, and of the party accused, and his surety or sureties, if any, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the party accused shall be bound to attend to be tried, at the proper time and place, without any fresh recognizances. Provided also, that where any such trial shall be to be had before another jury, the crown and the party accused shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn.¹

Amendments were by no means unknown before the more modern statutes. Nevertheless it has been a ground for amending indictments with a sparing hand, that the amendment is, in point of fact, an alteration of the presentment upon oath of the grand jury.²

There must be something to amend by. Where the object was to show that twenty-eight, instead of twenty-three, persons had acted as grand jurors, the court could not interfere for want of minutes to amend by, the town clerk of the place where the indictment was found swearing that he had none in his possession.³ The names of grand jurors need not, as it seems, be set out in the caption of an indictment removed by *certiorari*, and as the cap-

¹ 9 Geo. 4, c. 15; 11 & 12 Vict. c. 46, s. 4; 12 & 13 Vict. c. 45, s. 10; 14 & 15 Vict. c. 100, s. 1. The verdict and judgment shall then be as valid as if they had been originally so. 14 & 15 Vict. c. 100, s. 2. The records may be drawn up in the amended form, without noticing the amendments. 14 & 15 Vict. c. 100, s. 3.

² *R. v. Hewins*, 9 C. & P. 786. *R. v. Cooke*, 7 C. & P. 559. In

R. v. Hewins, the indictment stated that four commissioners were commanded to examine witnesses. The commission put in was, that the commissioners, or three or any two of them, might examine. The judge would not allow the amendment under 9 Geo. 4, c. 15.

³ *R. v. Marsh*, 1 Jur. 38. The indictment had been removed by *certiorari*. 6 Ad. & El. 236.

tion may be amended, the court would not stop a case upon the suggestion of such an omission.¹ Here, again, there must be minutes to amend by.² Sometimes the court will invite the consent of the defendant before an amendment is permitted. As where an indictment had the venue "Central Criminal Court" in the margin, but there was no venue in the body: here the amendment was not made without the consent of the defendant.³ Whilst, in *R. v. Wilkes*, an information for a misdemeanor was amended without such consent, and after the record was made up and sealed.⁴ And this may be done even just before trial,⁵ *à fortiori*, after plea pleaded.⁶ A variance in a letter was always amendable.⁷ The word "commissioner" has been exchanged for commissioners in the case of an affidavit upon which perjury was assigned.⁸ So if misrecitals do not affect the merits of the case, the judge will be apt to accede to an application to amend.⁹

A plea in abatement may not be amended.¹⁰ And the judge will not amend where ordinary care might have avoided the mistake.¹¹ As where in a case of receiving stolen goods, the name of the prosecutor was used in the *scienter*, instead of that of the prisoner.¹² But in an indictment for stealing and receiving, the power to amend by inserting the right name was yielded to without argument.¹³ Where under the 1 Will. 4, c. 70, s. 9, judgment was pronounced at the assizes on a criminal trial upon a King's Bench record, the court could amend the judgment by setting it aside or by arresting it.¹⁴ In January, 1843, the defendant pleaded not guilty to a misdemeanor, the indictment for which had, at his instance, been removed by *certiorari*. In Michaelmas Term he withdrew his plea, and judgment was entered, but sentence was deferred. The plea roll, including the *retraxit*, was then made up. But the clerk omitted, after the several days of the month in the jury process, to state the term and year of the reign in which they respectively were. He entered a *venire facias juratores* as issuing out of Hilary Term, 1843, returnable on April 16, which was Sunday. The prosecutor entered up judgment, and all the subsequent proceedings down to the sentence in Trinity Term, 1845, by which the defendant was sentenced to six months' imprisonment, and, in so doing, the term and year of the reign after

¹ *R. v. Davis and others*, 1 C. & P. 470.

² *Ut sup. R. v. Davis*. See note (b) there.

³ *R. v. Lord Ashburton*, 8 Jur. 143.

⁴ *R. v. Wilkes*, 4 Burr. 2527. And before a single judge.

⁵ *R. v. Harris and others*, 1 Salk. 47; 4 Burr. *ut sup.*

⁶ 1 Salk. *ut sup.*; and see *Id.* Tit. "Amendment."

⁷ *R. v. Withers*, 4 Cox, 17 Harniss for Harness, p.

⁸ *R. v. Christian*, Car. & M. 388.

⁹ See *R. v. Newton*, 1 Car. & K.

469.

¹⁰ *R. v. Cooke*, 2 B. & C. 871.

¹¹ *R. v. Hewins*, 9 C. & P. 786.

¹² *R. v. Larkins*, 23 L. J. M. C.

125; Dears. 365.

¹³ *R. v. Vincent and another*, Den. & P. 464; 21 L. J. M. C. 109.

¹⁴ *R. v. Nott*, 7 Jur. 621.

the several days of the continuances were omitted, together with the continuances from Easter Term, 1844, to Easter Term, 1845. The Bail in Error Act passed in August, 1845, and the defendant then sued out a writ of error with recognizances, assigning for error that the 16th of April was Sunday, that the terms and years in the jury process and continuances were omitted after the months, and that the continuances from Easter Term, 1844, to Trinity Term, 1845, were omitted. The defendant was discharged from prison in Trinity Term, 1845, having undergone two months of his sentence. In Trinity Term, 1846, the prosecutor obtained a rule, pending the writ of error, to issue a *ven. fac. jur.* as of Hilary Term, 1843, returnable in Easter Term, 1843, and not on a Sunday, to correct the roll accordingly, and to insert the terms and years after the months, together with the omitted continuances, on the roll. The court made the rule absolute.¹ And the court amended the description of Acts of parliament which were misrecited in the indictment.² There were three assignments in an indictment for perjury. The first and third being almost the same, the judge directed the jury upon the second as though it had stood first, and upon the first and third together as the third. The verdict was guilty on the second, and not guilty on the first. But the jury meant to *acquit* on the second, and to convict on the first and third, treating the assignments as the judge had in summing up. The judge amended the *postea* by entering up judgment for the crown on the first and third, and for the defendant on the second. But the court thought that this amendment should not have been made from the judge's recollection.³ It would seem, that an indictment cannot be altered after verdict, for that would make a jury party to the finding.⁴ The amendment of "widow" for "wife" was allowed under 7 Geo. 4, c. 64, s. 19.⁵ And it is to be understood generally, that if a party applies to the court, as for a *mandamus*, and fails for want of being properly prepared, and is thus incapacitated, according to the rule, from coming again with new or amended materials, not only a private person, but public officers also, as churchwardens, are concluded by it.⁶

The following cases have been decided since the stat. 14 & 15 Vict. c. 100:—The prisoner was charged with poaching on land belonging to George William Frederick Charles, Duke of Cambridge. A witness proved "George William," and that the duke had other names. An amendment was prayed to strike out "Frederick Charles." This was refused by the quarter sessions. The

¹ *R. v. Gregory*, 4 Dowl. & L. 777; 2 B. C. Rep. 47. The earlier statutes of amendment applied to criminal as well as civil cases, *ut sembl.*

² *R. v. Westley*, 29 L. J. M. C. 35; Bell, 193.

³ *R. v. Virrier*, 12 Ad. & El. 317; 4 Per. & D. 161.

⁴ By Cresswell, J., in *R. v. Harris*, Dears. 347.

⁵ *R. v. J. and M. Orchard*, 8 C. & P. 565.

⁶ *R. v. Pickles*, 12 L. J. 40; 6 Jur. 1039.

jury found a verdict of "Guilty," and the identity of the duke. On a case reserved, the court held the conviction wrong:—1. The names were not proved as laid. 2. The court of quarter sessions might have struck out all the christian names, but not "Frederick Charles" only. And they were not bound to amend. Their power was discretionary. They should have directed an acquittal, having refused to amend.¹ The court considered themselves bound by *R. v. Lord Cardigan*.² In an indictment for concealment, it was charged that the child's body had been laid *in* and among a heap "of carrots." The evidence showed, that it was not laid "in," but "behind." No amendment was permitted.³ The judge allowed a count, under 1 Vict. c. 85, s. 2, with intent to murder a particular individual, to be inserted after plea, because, before plea, it might have been demurrable for generality to charge an intent to murder a person unknown.⁴ W. was indicted for stealing the goods of B. and another, and C. as receiver in the same indictment. There was a count against C. for a substantive felony. W. pleaded guilty, C., not guilty. The prosecutor did not appear, and the names of the owners, as laid in the indictment, were not proved. It was proposed to amend by stating the property to have belonged to persons unknown. To this it was objected, that the amendment would falsify the record as to the prisoner W., upon which Platt, B., amended the record as to the *substantive felony*.⁵ An indictment for arson called the thing burned a "barn," whereas it was a stack of barley. Both barn and barley had, however, been destroyed by fire. This was amended.⁶ So again in arson, where the house of the tenant was irregularly described as that of the landlord, Crompton, J., allowed an amendment, promising to save the point, but there was an acquittal.⁷ So "cutting and wounding" may be exchanged for "wounding" only.⁸ In bigamy the allegation of apprehension in the county was allowed. The notes of a judge at a former trial were not allowed to be amended.⁹ If the materiality of an averment in perjury be not sufficiently stated, the omission is not amendable under 14 & 15 Vict. c. 100, s. 25.¹⁰ And Hill, J., refused to strike out the word "feloniously" in a case where it appeared that the forgery of an agreement was only a forgery at common law.¹¹

The jurors, &c.] To say "the jurors of," instead of the "jurors

¹ *R. v. Frost and another*, Dears. 474; 24 L. J. M. C. 116.

² Cited, 24 L. J. M. C. 117; Dears. 477, note (a).

³ *R. v. ———*, 6 Cox, 391.

⁴ *R. v. Lallement*, 6 Cox, 204.

⁵ *R. v. Winch*, Id. 523.

⁶ *R. v. Neville*, Id. 69.

⁷ *R. v. Kimbrey*, 6 Cox, 464.

⁸ *R. v. Child*, 5 Cox, 197, and in this case, after "Common

Pleas," the words "and others their fellows" were allowed to be inserted, and "assizes" was struck out as surplusage. The words "assigned to deliver the said gaol" were deemed to refer to the last-named judge only.

⁹ S. C.

¹⁰ *R. v. Harvey*, 8 Cox, 99; not cured by sect. 20 of that Act.

¹¹ *R. v. Wright*, 2 Fost. & F. 320.

for," &c., is no ground of objection in arrest of judgment. For "of our lady the Queen" may be rejected as surplusage, and the jurors shall be intended to be those jurors who are mentioned in the caption.¹ Nor is it error; as where it was said, "the jurors of our lady the Queen," &c., "in the tenth year of our sovereign lady Queen Victoria," &c. For the caption and indictment taken together destroy the objection, or the caption itself cures the defect.² And it seems that they should be called "jurors of the county." A record of conviction at the assizes began, "Yorkshire to wit." It recited a commission to justices to hear and determine, &c., and it set forth an indictment found by A., &c. grand jurors, mentioning, except in one instance, their places of residence, but omitting to call them "good and lawful men within the county of York," and not mentioning the county. Patteson, J., inclined to think an objection made upon this account fatal.³ If there be a Quaker juryman, the *form* is, "the jurors, &c., upon their oath and affirmation present," &c.⁴

Name and description of accused.] It is necessary to state the christian name and surname of the prisoner, and formerly the place of abode was added, as well as the condition of the prisoner, usually labourer, and if he had more names than one, an *alias dictus* was employed.⁵ But either a bad addition, or the want of one, was cured by appearance.⁶ But these forms are now no longer necessary by reason of the statutes of amendment.

Idem sonans.] When the name proved sounds the same as that in the indictment the variance will be immaterial. As Segrave for Seagrave,⁷ Whyneard for Winyard,⁸ McNicole for McNicoll,⁹ Beneditto for Benedetto.¹⁰ But not M'Carn for M'Cann,¹¹ nor Shakespeare for Shakepear,¹² nor Townend for Tewnend,¹³ nor, of course, Lunns for London.¹⁴ And upon the question, whether Darius and Trius were the same, the court said that the jury should have had the question submitted to them, and the conviction was quashed.¹⁵ The judge can only decide when the names must necessarily sound the same.¹⁶ If the defendant refuse to tell his name and be unknown, he is to be indicted as a "person to the jurors unknown," but who is personally

¹ *R. v. Turner*, 2 Moo. & Rob. 214.

² *Broome v. Reg.* (in error), 17 L. J. M. C. 52; 12 Q. B. 834.

³ *Whitehead v. Reg.* (in error), 7 Q. B. 582.

⁴ 9 C. & P. 78.

⁵ See 1 Hen. 5, c. 5. *R. v. Checkets and others*, 6 M. & S. 188.

⁶ 1 Sid. 247; 2 Hawk. c. 25, s. 47. *R. v. Matthews*, Leach, 584.

⁷ Str. 889.

⁸ *R. v. Foster*, Russ. & Ry. 412.

⁹ *R. v. Wilson*, Den. 284; 2 Car. & K. 527.

¹⁰ *Abitbol v. Beneditto*, 2 Taunt. 401.

¹¹ *R. v. Tannet*, Russ. & Ry. 351.

¹² *R. v. Shakespeare*, 10 East, 83.

¹³ *R. v. Wright and others*, 1 Lew. C. C. 135.

¹⁴ *R. v. Woodward*, Leach, 253,

¹⁵ *R. v. Davis*, Den. & P. 231;

20 L. J. M. C. 207.

¹⁶ S. C.

brought before the jurors by the keeper of the prison. Under such a mode of preferring a charge a prisoner was convicted for libel.¹ An indictment against a receiver stated a burglary by a certain person, or certain persons, to the jurors unknown; and it turned out that a bill had been previously presented to the grand jury, charging one H. M. as principal, and it also appeared that both indictments related to the same offence. The conviction of the receiver was held good, although the principal felon was alleged in the indictment to have been unknown. This circumstance formed no good objection to the second indictment.²

Dilatory pleas of misnomer are, indeed, now entirely discouraged,³ and amendments may be made.

Defects in indictments.] The defects which shall not vitiate an indictment are pointed out by 7 Geo. 4, c. 64, s. 20, and 14 & 15 Vict. c. 100, s. 24. No indictment or information shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words, "as appears by the record," or of the words, "with force and arms," or of the words, "against the peace," nor for the insertion of the words, "against the form of the statute," instead of "against the form of the statutes,"⁴ or *vice versa*, nor for that any person mentioned in the indictment or information is designated by a name of office or other descriptive appellation, instead of his proper name, nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, nor for want of a proper or formal conclusion,⁵ or for want of or imperfection in the addition of any defendant, nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence.⁶

If any objection should be taken notwithstanding this clause it must be on demurrer.⁷ Thus, by 14 & 15 Vict. c. 100, s. 25, every objection to any indictment for any formal defect apparent on the face thereof shall be taken, by demurrer, or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared.

¹ *R. v. —*, Russ. & Ry. 489.

² *R. v. Bush*, Id. 372.

³ 7 Geo. 4, c. 64, s. 19.

⁴ *R. v. Collins*, Leach, 827, *R. v. Pim*, Russ. & Ry. 425, no longer apply.

⁵ As "to the great scandal" instead of "the common nuisance."

R. v. Holmes, 22 L. J. M. C. 122.

⁶ *Sill v. Reg.*, Dears. 132; 22 L. J. M. C. 41.

⁷ *R. v. Law*, 2 Moo. & Rob. 197.

And by 7 Geo. 4, c. 64, s. 21, where the offence charged has been created by any statute, or subjected to a greater degree of punishment by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute if it describe the offence in the words of the statute.

Baron and feme.] There are sufficient distinctions both with regard to the framing of an indictment against a married woman, or one reputed to be such, as well as with reference to the facts themselves which affect individuals under coverture, to warrant us in entering a little at large into the matter. Thus, where the evidence was that the woman had passed as a wife, and had been addressed in that character before third persons, and nothing arose to rebut the presumption of marriage, Hullock, B., left it to the jury to say whether the prisoner were wife or not, and, that question being found in the affirmative, an acquittal ensued.¹ In the last case, the prisoner had pleaded to an indictment, charging her as a *single woman*. If, however, the indictment charges her as *a wife*, the evidence of a presumptive marriage is not necessary.² And herein rests the distinction. For where the charge was laid against A. as a single woman, and the evidence was, that both she and her pretended husband had committed the offence, that the woman had lived with the man for two years, and was reputed to be his wife, it was held, that an acquittal on the ground of coercion could not be directed, in the absence of evidence to convince the jury of the marriage.³ This is entirely a question for them.⁴ So, where a woman was charged with harbouring a murderer, the counsel for the prosecution was considered to be justified in not offering any evidence against her if he had reason to suppose that she had been married to the murderer, and when also it appeared that the woman considered herself a wife, and had, as such, lived with the man for years. And this was held correct, in spite of a suspicion that the marriage, if not invalid, was at least irregular.⁵

The wife is not, as a general principle, answerable for any felonies committed in the presence of her husband, except treason and murder, to which latter offences she may likewise be accessory before the fact;⁶ perhaps manslaughter;⁷ perhaps an assault to commit murder.⁸ And it has been said that robbery is an exception;⁹ but this is very doubtful, unless it be construed as robbery

¹ *R. v. Quinn*, 1 Lew. C. C. 1. *R. v. Robinson*, 203. See also *R. Atkinson*, 1 Russ. C. M. 24.

² *R. v. Knight and ux.* 1 C. & P. 116.

³ See *R. v. Hassell*, 2 C. & P. 434. *R. v. Adey*, Leach, 208.

⁴ See *R. v. Woodward*, 5 C. & P. 861.

⁵ *R. v. Good*, 1 Car. & K. 185.

⁶ *R. v. Somerville and Arden*, 1 And. 204; 1 Hale, P. C. 45, 47. *R. v. Manning*, 2 Car. & K. 903.

⁷ 1 Hale, P. C. 47, 434, 516; 2 Moo. C. C. 58.

⁸ 2 Moo. C. C. 58.

⁹ 1 Hawk. c. 4, s. 11; Kel. 31; 2 Moo. C. C. 58. But see 1 Curw. Hawk. 4, n. (7.)

with violence, for burglary was very early held to be within the rule.¹ Although, if a woman were to use violence during a burglary in company with her husband, it may be a question as to the view which the judges would take of the rule and *exceptions*. Forgery is clearly within the rule;² of course, larceny. A woman can no more be charged with a felony in receiving goods from her husband knowingly, than she could be accessory after the fact for receiving her husband after the commission of a larceny.³ The rule is the same with regard to coining instruments. The woman tried to break them up, but this was not deemed to be a felonious possession of them, the husband being in the house.⁴ However, if the woman should act an independent part, or if there be other circumstances to repel the presumption of coercion, the case will differ. Even if she is *the principal actor*, and incite, it is said that she may be charged.⁵ In fact this would negative coercion, *à fortiori*, if she should do the act voluntarily,⁶ or in her husband's absence.⁷ Upon one occasion a woman was convicted of taking a false oath to obtain letters of administration, although her husband was present, and the decision must have proceeded upon the fact of her having been the chief promoter of the crime.⁸ So, where the wife was most active in concealing stolen goods, she was presumed to have escaped from control, and was convicted.⁹ The husband being reluctant to commit a robbery, was persuaded by his wife, yet he was convicted, and the woman acquitted.¹⁰ The distinction is between the active agency of the wife, as where she received goods in order to make profit of them, and her attempt to screen her husband. In the first case she may be convicted, in the second she should be acquitted.¹¹ The presence of the husband is the main question, and yet if the wife should act in his absence, obviously under duress, she ought to be acquitted. The jury must find with what view she received goods in her husband's absence; so that, if the question of guilt be left generally to the jury, without particular reference to the law of husbands and wives, the conviction will be set aside.¹² So,

¹ 1 Hale, P. C. 45; Kel. 31. See Leach, 351.

² *R. v. Atkinson*, 1 Russ. C. M. 20.

³ *R. v. Brooks*, 22 L. J. M. C. 121; Dears. 184.

⁴ *R. v. Boober and ux.*, 4 Cox, 272.

⁵ 1 Hale, P. C. 516.

⁶ *Id.* East, P. C. 559.

⁷ 1 Hale, P. C. 516.

⁸ *R. v. Dicks*, 1 Russ. C. M. 19.

⁹ *R. v. Eliza Archer and others*, 1 Moo. C. C. 143. See *R. v. Banks*, 1 Cox. 238. But a pardon was recommended for her, because the charge against husband and wife having been joint, it had not been left

to the jury whether she had received goods in the *absence* of her husband, although she had been the most active.

¹⁰ Case on the Midland Circuit, cited, 1 C. & P. 117, n.

¹¹ *R. v. M'Clarens and others*, 3 Cox, 425. Receiving stolen goods.

¹² *R. v. Wardroper*, Bell, 249; 29 L. J. M. C. 116. Had the question been properly left, and had the jury convicted the wife, the court would have supported the conviction. The woman knew that the goods were unlawfully obtained, for she wore part of them, and offered others for sale, but the point was not left to the jury.

where a wife got implements to rescue her husband from prison by his direction.¹ A husband put his hand into the room where his wife was engaged in committing a felony, and said "Get on," and yet the wife was convicted, for the jury thought she was acting an independent part.² A wife, in her husband's absence, though by his order, procuration, and command, uttered a forged certificate, and yet was held rightly convicted.³ This case, however, would at this day be seriously scrutinized, although just in the main, for if the fear were continuing, it would be difficult to support a conviction. A wife wrote a threatening letter, and her husband delivered it. It was held that she alone might be found guilty, if the husband could be believed ignorant of the contents.⁴ A woman went from shop to shop without going in, but attending upon her husband, who was illegally engaged, and she was acquitted. Had she taken an independent part, she might have been convicted.⁵ There was a joint indictment for receiving, and a general verdict, "Guilty." The evidence showed either one joint receiving, or two several acts of receiving; if the one, the wife could not be convicted because of her husband's presence; if the other, the charge against the wife could not be proved as laid. He was convicted, and the wife acquitted. Here the court severed the verdict, and there was a several summing up.⁶ On the other hand, where the receiving is quite apart and without his control, he cannot be convicted, although he adopts her receipt.⁷ A woman robs lodgings let to her husband, in his absence. In the house she is supposed to be subject to a continuing dominion, and the exception in her favour as to absence is made out;⁸ whereas, where the lodgings were let to the *wife*, and the husband rarely came, the presumption failed, and the case assumed an appearance unfavourable to the woman.⁹ A man and his wife were tried before Vaughan, J., for arson. The man was a cripple, and bedridden in the room. The learned judge, after conferring with Tindal, C. J., held, that the presumption of coercion was repelled.¹⁰ Even what the woman says in her husband's presence may be considered as having been said under coercion; as, where the wife exonerated her husband in a case of receiving stolen goods found in the house, and took the blame upon herself.¹¹ A notion once prevailed that a married

¹ *R. v. Ryan*, cited, 1 C. & P. 117, n.

² *R. v. Hughes*, Starkie on Ev. 1440, citing 2 Lew. C. C. 230.

³ *R. v. Morris*, Russ. & Ry. 270; Leach, 1096.

⁴ *R. v. J. & M. Hammond*, Leach, 444. Both were acquitted.

⁵ Case at Durham Sp. Assizes, 1829. Math. Cr. Dig. 262.

⁶ *R. v. Mathews and ux.* Den. 596. *Primâ facie*, if goods are found in a man's house, he not

the thief, is the receiver. Den. 601, Coleridge, J.

⁷ *R. v. Dring and ux.* Dears. & B. 329.

⁸ *R. v. May*, 1 Hawk. c. 43, s. 5.

⁹ *R. v. Mann*, Id. s. 6. Under 3 & 4 Wm. & M. c. 9, s. 5; 24 & 25 Vict. c. 96, s. 74.

¹⁰ Maidstone Sp. As. 1838. 2 Moo. C. C. cited.

¹¹ *R. v. Laughner*, 2 Car. & K. 225.

woman should be liable in all cases not capital,¹ but certainly, in the majority of misdemeanors she is answerable: as for keeping a bawdy-house,² a gaming house,³ riot, &c.,⁴ assault and battery,⁵ uttering counterfeit coin,⁶ an assault under 1 Vict. c. 85.⁷ However, in assault, the wife must herself assault. Upon a joint indictment against husband and wife for a felonious wounding, it appeared that the wife wrote letters which induced the prosecutor to come within reach of the husband, who hurt him. The jury found, that the wife acted under coercion, and that she did not personally inflict a blow. Pollock, C. B., "The jury have disposed of this case." The wife's conviction was reversed.⁸ Offences against the laws of customs. Still, there are exceptions: if the husband should fail to provide his apprentice with food, this, in law, would be a breach of duty, and although his wife would be liable if she were to be an active agent in withholding the food, she is not otherwise responsible.⁹ So, although the husband would be guilty of harbouring his wife knowingly after a felony, the converse holds with respect to her.¹⁰ And it is said, that, as a *feme*, a woman cannot be convicted of conspiracy,¹¹ nor can a wife be convicted of stealing her husband's goods.¹² But if a man takes the husband's goods and elopes with the wife, he is guilty of larceny, although not if he receives them from her.¹³ Lastly, should the woman accomplish her criminal act without her husband's interference, no subsequent conduct of his will take away her liability, nor consequently make him a principal, however such conduct might affect him as accessory,¹⁴ although it is said that a husband may be accessory to the wife *before* the fact.¹⁵ The joinder of husband and wife is by no means a ground for quashing the indictment, because the charge must be considered as joint and several, as the facts may appear.¹⁶ Where, in larceny of the woman's goods, one count laid the

¹ 1 Hawk. c. 1, s. 13.

² Id. s. 12. *R. v. Williams*, 1 Salk. 384; 10 Mod. 63. So, ravishment of ward, and trespass. Id.

³ *R. v. Dixon and ux.*, 10 Mod. 335.

⁴ 1 Russ. C. M. 20. Citing Dalt. 447.

⁵ *R. v. Ingram and ux.*, 1 Salk. *ut supra*.

⁶ *R. v. Price*, 8 C. & P. 19. See *R. v. Conolly*, Id. 21.

⁷ *R. v. Cruse and ux.* 2 Moo. C. C. 53.

⁸ *R. v. Smith and ux.* Dears. & B. 553; 27 L. J. M. C. 204.

⁹ *R. v. Squires*, 1 Russ. C. M. 20.

¹⁰ 1 Hawk. c. 1, s. 10; 2 Car. & K. 390. *R. v. Manning*.

¹¹ 1 Hawk. c. 72, s. 8. If the husband should abscond after a verdict against him and his wife, the court will not delay judgment against the wife. *R. v. Thomas and ux.*, Ca. Temp. Hardw. 278.

¹² 1 Hale, P. C. 514. *R. v. Willis*, 1 Moo. C. C. 375. *R. v. Harrison*, Leach, 47.

¹³ *R. v. Tolfree*, 1 Moo. C. C. 243.

¹⁴ *R. v. Hughes*, 1 Russ. C. M. 22.

¹⁵ Notwithstanding that it could not be so in the case cited. Leach, 1102, *n*.

¹⁶ See 1 Hale, P. C. 46.

property in the wife and another in the crown, the wife admitted her coverture, and judgment was arrested for want of the record of the husband's conviction. It might have been for misdemeanor.¹

Principal and accessory.] As to the principal and accessory,—1, there is the principal in the first degree; 2, in the second degree; 3, the accessory before the fact; 4, after the fact.² The first is he who commits the act, the second is the aider and abettor.³ The third, absent at the time, has yet counselled the commission of it;⁴ and the fourth is he who, cognizant of the offence, receives, relieves, comforts, or assists the felon after the deed.⁵

Properly speaking, persons who counsel misdemeanors are termed abettors, and those who procure felonies, accessories. In many manslaughters there cannot be accessories, as on sudden quarrels, debates, or affrays;⁶ but in others there may be accessories. As if a husband should leave a poisonous ingredient in the way of his wife, and she dies after the taking, he is guilty of manslaughter, if not of murder.⁷

Principals in the first degree are those who assemble with a felonious intent, and continue in company till they have accomplished their design, aiding and abetting one another at the same time.⁸ So where one procures another to commit felony although the former be absent, as in the case of a man persuading his companion to drink a poisonous liquor under the pretence of physic, and then leaving him to take the potion. Here is the principal in the first degree, although absent.⁹ Or that of a man giving a forged note to an innocent person, and then absenting himself whilst it is uttered.¹⁰ So, where several unite to commit forgery, and each executes a part of the fabricated instrument, although they may not be together when the writing is completed.¹¹ Each may not know the particular confederates who respectively execute portions of the forged instrument.¹² In these cases a substantive.

¹ *R. v. Johnson and another*, 1 Cox, 59.

² 4 Com. 34. A new felony carries with it all the incidents of accessory at common law. But where an offence at common law is only made more penal, aiders and abettors are not to be understood of such as aid before and after the fact, but such as are present only. This is to be understood when an offence is made more penal by a particular description of the fact, and not under a general denomination of the crime. 2 Salk. 543.

³ 4 Com. 34.

⁴ *Id.* 35.

⁵ *Id.* 37.

⁶ *R. v. Bibithe*, 4 Rep. 43 (b); East, P. C. 218.

⁷ *R. v. Gaylor*, Dears. & B. 288.

⁸ 2 Hawk. c. 29, s. 7, where several examples are given.

⁹ 2 Hawk. c. 29, s. 11.

¹⁰ *R. v. Palmer and another*, 1 New. Rep. 96; Leach. 978.

¹¹ *R. v. Bingley and others*, Russ. & Ry. 446. *R. v. Stansfeld and others*, 1 Lew. C. C. 145.

¹² *R. v. Kirkwood and others*, 1 Moo. C. C. 304. *R. v. Dade and others*, *Id.* 307. To the same effect and establishing the same principle, although the case was one of misdemeanor, see *R. v. Moland and others*, 2 Moo. C. C. 276.

agency is always present with the guilty party. In the case of the innocent destroyer of his own life, the real agency of the murder is with the absent man: he, therefore, though absent, is the principal in the first degree. In the case of the forged notes, each forger is carrying on chief agencies; each is a principal in the first degree. So in privately stealing from the person, there are no principals in the second degree, for the hand which takes the property is alone guilty of the offence.¹ However, where several agreed to commit a burglary, and one communicated the intention to the officer for the purpose of apprehension, it was held, that the party thus impeaching his confederates, although present, and pretending to aid in the commission of the crime, could not be said to be a principal, and that the fact of his having agreed for a reward under the statute made no difference. But some of the judges thought that he might have been indicted as an accessory before the fact.² So where two persons had been admitted into a house by previous concert with the servant, who, however, had laid a trap for them, and betrayed them to the police, it was held, that though the prisoners could not be convicted of burglary, yet, that one of them, who took some plate, might be found guilty of stealing in the dwelling house; and the others, who were in the house but took nothing, might have been convicted of being accessories before the fact.³

Accessories, 24 & 25 Vict. c. 94.] By 24 & 25 Vict. c. 94, s. 1, whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon.

By sect. 2, whosoever shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished.

Accessories after the fact:

By sect. 3, whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the

¹ *R. v. Baynes*, Leach, 7; East, P. C. 700.

² *R. v. Dannelly*, Russ. & Ry. 310.

³ *R. v. Jones*, Car. & M. 218.

principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished.

By sect. 4, every accessory after the fact to any felony (except where it is otherwise specially enacted), whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be liable to be imprisoned in the common gaol or house of correction for any term not exceeding two years, with or without hard labour, and it shall be lawful for the court, if it shall think fit, to require the offender to find sureties, both or either, for keeping the peace, in addition to such punishment. Provided that no person shall be imprisoned for want of sureties for more than one year.

By sect. 5, if any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die, or be pardoned, or otherwise delivered before attainder; and every such accessory shall upon conviction suffer the same punishment as he would have suffered if the principal had been attainted.

By sect. 6, any number of accessories at different times to any felony, and any number of receivers at different times of property stolen at one time, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.

By sect. 7, where any felony shall have been wholly committed within England or Ireland, the offence of any person who shall be an accessory either before or after the fact to any such felony may be dealt with, inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which the act by reason whereof such person shall have become such accessory shall have been committed; and in every other case the offence of any person who shall be an accessory either before or after the fact to any felony may be dealt with, inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felony or any felonies committed in any county or place in which such person shall be apprehended or be in custody, whether the principal felony shall have been committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within Her Majesty's dominions or without, or partly within Her Majesty's dominions and partly without; provided that no person who shall be once duly tried either as an accessory before or after the fact, or for a substantive felony under the provisions hereinbefore contained, shall be liable to be afterwards prosecuted for the same offence.

In treason, all are principals, except where a new treason is enacted, and the words, "counsellors, aiders, and abettors," or words to that effect, are made use of. In that case it has been long used to exclude receivers or comforters after the fact from the penalties of treason.¹

In misdemeanors all are principals, whether present or not.²

Abettors, 24 & 25 Vict. c. 94.] By 24 & 25 Vict. c. 94, s. 7, whosoever shall aid, abet, counsel, or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.

This had long been the rule,³ and it extends to misdemeanors not indictable,—those, for instance, under the Larceny and Malicious Injuries Act, which are punishable upon summary conviction.⁴

Principals in the second degree.] Those who are present aiding and abetting are principals in the second degree, so that the indictment against them states that they were "feloniously present,"⁵ or there should be words to that effect, as that the prisoner was present aiding and abetting the felony aforesaid.⁶ They may be constructively present, as in the case of a determined breach of the peace, when murder is committed, although some of the party may have been out of view.⁷ So in robbery, when one of the gang rides away from the rest, robs a man, and then returns to his companions, though it seems that the gang should be near enough to render mutual assistance.⁸ So where the abettors screened the actual burglar with an umbrella.⁹ So where some of the thieves were in a shop, and one waited without, he was held equally guilty as a principal with those who were taking the goods.¹⁰ So where a prisoner was charged under similar circumstances as a *receiver*, his conviction was held wrong.¹¹ The fact of an infant of tender years being made the instrument of a burglary, a man waiting without, will make no difference as to the man's guilt as principal.¹² Persons present and acting in concert are, *à fortiori*, principals, as duellists,¹³ rioters,¹⁴ personators.¹⁵ In cases of felo-

¹ 1 Hale, P. C. 235; Fost. 341; and see East, P. C. 96. As to offences at sea, see *ante*.

² 2 Moo. C. C. 277.

³ *R. v. Moland and others*, 2 Moo. C. C. 276.

⁴ 24 & 25 Vict. c. 96. Id. c. 97.

⁵ *R. v. Cannon and another*, 1 Lew. C. C. 227.

⁶ *R. v. Towle and others*, Russ. & Ry. 314; 2 Marsh. 466. See 2 Hawk. c. 23, s. 89.

⁷ 2 Hawk. c. 29, s. 8. *R. v. Howell*, 9 C. & P. 437.

⁸ 2 Hawk. *ut sup*.

⁹ *R. v. Jordan*, 7 C. & P. 432. See 2 Hawk. *ut sup*.

¹⁰ *R. v. Gogerly and others*, Russ. & Ry. 343. *R. v. Byford and another*, Id. 521. *R. v. Mouncer*, East, P. C. 639.

¹¹ *R. v. Owen*, 1 Moo. C. C. 96.

¹² 1 Hale, P. C. 555.

¹³ 2 Hawk. c. 29, s. 8.

¹⁴ *R. v. Royce*, 4 Burr. 2073.

¹⁵ *R. v. Potts*, Russ. & Ry.

niously shooting, although the fact be negatived that the prisoner's hand fired the shot.¹ Several, therefore, may be guilty of the same act of shooting.² In *R. v. Gibson*,³ Eyre, B., observed that it was the same as if a string were tied to the trigger and all pulled it.⁴ So if one persuade another to self-murder with an understanding that both should die, and then, the attempt being made, one dies, the survivor is guilty of murder as a principal.⁵ So upon a preconcerted scheme to steal goods, A. managed to get the owner out of the way, so that B. might commit the robbery, it was held, that the receipt by one was a felonious taking by all. Thus A. B. and C. got the prosecutor to intrust them with money. A. handed it to B. and enticed the prosecutor away, upon which B. and C. ran away with the property.⁶ So in rape. The aiders and abettors are principals in the second degree.⁷ One was to counterfeit coin, another to put it off. Here both were principals in the first degree. But had there been no agreement, but the second party, nevertheless, were to put off the coin with a guilty knowledge, he would be guilty in the second degree,⁸ and any alteration in the character of the act makes no difference. If parties assemble with intent to commit a trespass, and a felony is committed by some of them, all present are guilty of felony.⁹ However, the principal assumes a new character,—1, when there is no crime in the agent; 2, where the person accused as principal is absent; 3, where one does an act without the cognizance of the others. The offence might be committed by an insane person. In such a case a count framed for aiding and abetting a murder was held invalid, for there must be an abetting of a sane person. But the prisoners were deemed principals in the first degree under another count.¹⁰

Again, unless persons are assembled for the purpose of accom-

¹ *R. v. Towle and others*, ante. " *R. v. Towle* is good law: it was acted on in *R. v. Tyler*," 8 C. & P. 616, per Lord Denman, C. J.

² *R. v. The Coalheavers*, Leach, 64, 66.

³ East, P. C. 413; Leach, 359.

⁴ East, *ut sup.*; Leach, 359, n. See *R. v. Bear*, East, *ut sup.* *R. v. Wells*, Id. 414. *R. v. Mackally*, 9 Rep. 67; 3 T. R. 105; per Buller, J.

⁵ *R. v. Dyson*, Russ. & Ry. 523.

⁶ *R. v. Standley and others*, Id. 305.

⁷ East, P. C. 446.

⁸ Id. 186.

⁹ *R. v. Howell*, 9 C. & P. 437.

¹⁰ *R. v. Tyler*, 8 C. & P. 616. Formerly, the abettor must have been near enough to have given his help. *R. v. Stewart and another*, Russ. & Ry. 363. *R. v. King*,

Id. 332. *R. v. M'Makin and another*, Id. 333, n. *R. v. Kelly*, Id. 421. *R. v. Soares and others*, Id. 25. *R. v. Dyer*, East, P. C. 767. As where A. unlocked a door and went away, and B. then came and stole. A. was not a principal. *R. v. Jeffries and another*, 3 Cox, 85. A person came to a town with an utterer of a forged note, and went out with him, but managed to be absent while the note was uttered. He rejoined him again soon afterwards, and near the place of uttering. Here, although the person ran away when the utterer was apprehended, the judges held that he was not aiding and abetting. *R. v. Davis and another*, Russ. & Ry. 113. So in the case of counterfeit coin. *R. v. Else*, Id. 142. *R. v. Badcock and others*, Id. 249. *R. v. Page and another*, 2 Russ.

plishing the specific crime charged, or to do some act to show their participation in it, they are not principals, nor, indeed, accessories. Two went out to commit a felony; upon an alarm given, one, in running away, maimed a pursuer. The other was held to have been improperly convicted for maliciously cutting.¹ The character of the offence was not the same. Had the other prisoner gone out with the intention of resisting the apprehension of his confederate, (not a very probable surmise,) the case might have been different.² Three soldiers went to rob a pear tree. One stood at the gate with his sword drawn. The owner's son collared this man, who stabbed him, and although the soldier who gave the blow was guilty of murder, the others were considered to be entirely innocent of the higher offence.³ So upon a charge under 1 Vict. c. 85, s. 2, for inflicting a bodily injury dangerous to life, the abettor must have been aware of the intention to murder, in order to warrant a conviction.⁴ *A fortiori*, where the original purpose is lawful, and death ensues.⁵ And a person entirely passive during the commission of a felony, although guilty of misdemeanor, is neither principal nor accessory.⁶

It may be added here, that in charging a person with an offence, the same party might have been arraigned as principal or accessory, as where A. commanded B. to kill C., and afterwards joined with him in the fact.⁷ Now, however, he would be charged as principal. Moreover, a person charged as principal in the first degree may be acquitted, and yet the aider and abettor may be found guilty, the indictment concluding that both did the murder, and the verdict finding that the prisoner convicted did the act.⁸ There were two counts for murder, the first charged three persons as principals in the first degree; the second charged A. as principal in the first degree, and B. and C. as abetting. The grand jury ignored the first count as to B. and C., and found a true bill against A. on both counts, and against B. and C. on the second count. Here although A. was acquitted, it seems that B. and C. might be convicted upon the second count as principals.⁹

C. M. 82. But the judges have subsequently decided that these cases of *Else* and *Page* were wrongly decided, the distinction between felony and misdemeanor not having been sufficiently adverted to. *R. v. Greenwood*, Den. & P. 453; 21 L. J. M. C. 127.

¹ *R. v. White and another*, Russ. & Ry. 99. *R. v. Arrigoni*, East, P. C. 399, 400. *R. v. Borthwick*, 1 Dougl. 207.

² See *R. v. Tattersall and others*, 1 Russ. C. M. 27. *R. v. Moore*, Leach, 314.

³ Fost. 353. See also *R. v. Hodgson*, Leach, 6; Anon. Id. 7, n.

⁴ *R. v. Cooper and another*, 5 C. & P. 535.

⁵ Fost. 354; 2 Hawk. c. 29, s. 9.

⁶ 2 Hawk. c. 29, s. 10.

⁷ 2 Hawk. c. 29, s. 1; and see *R. v. Byford and another*, Russ. & Ry. 521.

⁸ *R. v. Shaw*, East, P. C. 351; Leach, 360.

⁹ *R. v. Phelps*, Car. & M. 180. Principals in the second degree are punishable as principals in the first degree under the Malicious Injuries Act, and upon summary conviction. 24 & 25 Vict. c. 96, s. 98. Id. c. 97, s. 56.

Accessory before the fact.] Accessory before the fact is he who consents to the felonious design of another, but is so far absent at the time of its perpetration as to be unable to render any aid to the principal, either in that or in any other felony which might ensue in consequence.¹ There is a difference between misprision of felony and being accessory to it; for instance, if a man conceal, or tacitly acquiesce in a crime, this is misprision.² And there is a distinction between the accessory and the principal in the second degree, for the latter must be present,³ and this offence before the fact is capable of being countermanded.⁴ The offence, however, is complete upon agency. As in arson, where A. commissions B. to procure the aid of another. Here it is sufficient to make A. accessory before the fact that he employs an agent without naming the person to be procured.⁵ In treason there is no accessory.⁶ So in forgery at common law, or by statute.⁷ And there can hardly be an accessory in manslaughter because of the sudden provocation,⁸ unless, for instance, in the administering of drugs. In that case there might be accessory before the fact.⁹ A person may be accessory before the fact at common law.¹⁰ And there may be an accessory who procures another to be himself accessory to the principal.¹¹

However, the principal may not obey, or may exceed his instructions. In the first case, it seems that a substantial compliance with the order will involve the accessory. As if A. should counsel B. to poison C., and B. should shoot instead of poison.¹² But if the plan of A. and B. be to burn C.'s house, and B., the principal, burn the house of D. without any mistake, A. is not accessory.¹³

So as to the excess, if the consequence be a probable event, the procurer will be guilty. As if A. should counsel B. to rob C., and, in so doing, B. should kill C.,¹⁴ or should procure the burning of D.'s house, in doing which the house of E. is burnt.¹⁵ If A. desire a child under the age of discretion to commit an offence, A. is a principal; but if the child be of capacity, A. is accessory.¹⁶ Where one counselled a pregnant woman before the birth to murder the child, which was done, he was held to be an accessory, the procurement being considered in the light of a continuing felony.¹⁷ So where A. invited B. to a house with a view of murdering him, A.

¹ 2 Hawk. c. 29, s. 16. *R. v. Soares and others*, Russ. & Ry. 25. *R. v. Tuckwell*, Car. & M. 215.

² Steph. 9; 1 Hawk. c. 59, s. 2; 2 Hawk. c. 29, s. 23.

³ *R. v. Gordon*, Leach, 515; East, P. C. 352.

⁴ 2 Hawk. c. 29, s. 16.

⁵ Id.

⁶ 2 Hawk. c. 29, s. 1.

⁷ *R. v. Bothe*, Mo. 666.

⁸ *R. v. Goose*, Mo. 461; 4 Rep. 43; 2 Hawk. c. 29, s. 24.

⁹ *R. v. Gaylor*, 7 Cox, 253.

¹⁰ *R. v. Morris*, Leach, 1096.

¹¹ 2 Hawk. c. 29, s. 1.

¹² 2 Hawk. c. 29, s. 20.

¹³ Id.

¹⁴ Id. s. 18.

¹⁵ Id.

¹⁶ *R. v. Course*, Fost. 349.

¹⁷ 2 Hawk. c. 29, s. 18.

was held to be accessory to the murder.¹ There was an attempt at assassination in Paris by means of an explosive machine, which killed one person. A., an alien Frenchman, was privy to the plot, and was resident in England. Whether he was indictable either as a principal or an accessory, was made a question.²

*Accessory after the fact.*³ Accessory after the fact is he who harbours or aids the principal or accessory before the fact after the commission of the deed.⁴ In treason there are no such accessories, nor in crimes under the degree of felony.⁵ Where an attempt is made to defeat the ends of justice by hindering the apprehension of the criminal;⁶ where there is an agreement to take money in order to keep witnesses out of the way;⁷ where the prisoner procures a person to harbour the principal or accessory before the fact, although he himself do not act;⁸—all these are cases of accessory after the fact. Yet the harbourer must do some personal act.⁹ Merely suffering an escape will not create the offence,¹⁰ unless, indeed, the party arresting be he who suffers the escape;¹¹ nor taking back goods which have been stolen, if the person so receiving them back be the owner.¹² But these are high misdemeanors. And the receipt of a felon under bail is excusable, for there is no hindrance of the trial.¹³ Nor is the advising of the friends of the accused to persuade the witnesses not to appear against him such an act, nor rendering him general assistance of that nature, although these acts may be otherwise punishable.¹⁴ Next, there must, of course, be a guilty knowledge, and the felony must be complete when the aid is given. So that if one gives a mortal wound, and B. receives him, and *then* death ensues, B. is not guilty as accessory after the fact.¹⁵ If a man be indicted for a great offence, as murder, and he be convicted of the less, a party charged as accessory after the fact is not the less liable to conviction.¹⁶

¹ *R. v. Manning*, 2 Car. & K. 903.

² *R. v. Bernard*, 1 Fost. & F. 240. See S. C. post, "Homicide."

³ Under 11 & 12 Vict. c. 46, a general verdict of "guilty of stealing and receiving at the same time" was considered right. *R. v. Hughes*, 29 L. J. M. C. 71; Bell, C. C. 242. The old law, making the conviction of the principal felon a condition precedent to the conviction of the accessory before the fact, is taken away by the modern Acts. 24 & 25 Vict. c. 94, ss. 3, 4, ante.

⁴ 2 Hawk. c. 29, s. 26.

⁵ East, P. C. 93.

⁶ See 2 Hawk. c. 29, s. 27, &c.

⁷ Anon. Mo. 8.

⁸ *R. v. Jarvis*, 2 Moo. & Rob. 40. And he may be convicted upon the uncorroborated testimony of an accomplice. See *R. v. Good*, 1 Car. & K. 185.

⁹ *R. v. Chapple*, 9 C. & P. 355.

¹⁰ 2 Hawk. c. 29, s. 18.

¹¹ Id.

¹² Anon. Mo. 8.

¹³ 2 Hawk. c. 29, s. 29.

¹⁴ Id. As misdemeanors.

¹⁵ 2 Hawk. c. 29, s. 35.

¹⁶ *R. v. Greenacre*, 8 C. & P. 35. He, however, was convicted of the greater offence.

This question as to accessory after the fact is for the jury.¹

Name of prosecutor.] The name of the prosecutor, if known, should be stated in the indictment; so that where the prosecutor came before the grand jury in support of an indictment charging the felony to have been done by a person unknown, it was held that the case could not be supported.² Further, it is necessary that the principal should be said to have committed the offence, and not merely that he has been indicted for it.³ Where there was a statement in the usual form that the principal felon stole the property, without any addition to the prisoner's name, and without adding "*contra pacem*," it was doubted whether that was an indictment against the principal, or merely an inducement to the charge against the accessory. It would seem that it was an indictment.⁴ But the judge would not amend.

More than one principal.] The accessory may be arraigned with reference to two principals or more, and if he be found guilty as to one only the verdict will be good.⁵ In a case of sending threatening letters, the letters were admitted in evidence although the principal was absent.⁶

No repugnance.] There must not be any repugnance in setting forth a charge against an accessory. If the indictment should charge the stroke on one day, and the death on another, and then call on the accessory to answer the abetting at the time of the felony and murder, without more, it was deemed insufficient.⁷

Time in indictment.] With respect to the allegation of time in the indictment, it was usual in old days⁸ to require the day of the month and year, and either the year of the King's reign or the year of our Lord, in words at length, or at least in Roman numerals.⁹ Although where the indictment stated that the prisoner committed the offence on the 20th of July, in the 4th year of the

¹ See *R. v. Lee and another*, 6 C. & P. 536; *R. v. Greenacre*, ut sup. For further information as to this accessory, see 2 Curw. Hawk. 445, 457.

² *R. v. Walker*, 3 Camp. 264; East, P. C. 651, 781. And see *R. v. Elsworthy*, 1 Lew. C.C. 117.

³ 9 Rep. 118. *R. v. The Lord Sanchar*.

⁴ *R. v. Lyons*, 9 C. & P. 555. See, as to the indictment, 1 Ch. Burn. Tit. "Accessory."

⁵ See Fost. 361, *R. v. Graham*, Leach, 87, where, however, the indictment was held bad for saying

"the felony aforesaid," after charging the prisoners respectively with two different offences.

⁶ *R. v. Hansill*, 3 Cox, 597. Whether if A. demands money by letters, with menaces, and B. inserts letters and articles in a newspaper in order to assist A. in obtaining money, B. is an accessory after the fact to A.'s felonious act. Qu.? S. C.

⁷ See 2 Hawk. c. 23, s. 88.

⁸ 1 Ch. Cr. L. 217; Lofft. 228; 5 T. R. 607.

⁹ *R. v. Philips*, Str. 261.

reign of King George the Fourth, concluding, "against the peace of our lord, the *now* King," whereas, in fact, the trial took place in 1820, at the summer assizes, in 1 Geo. 4, the judges held, that "fourth year of the" might be rejected, and then, that the words, "20th of July, in the reign of King George the Fourth," could only mean July, 1820; and also, that "against the peace of our lord the *now* King" showed the mistake to have been in the year and not in the reign.¹ But where the offence was laid on the 21st of June, 1 Vict., and the indictment concluded "against the peace of Her Majesty," and the proof was of an offence committed in April, 7 Will. 4, the prisoner was held entitled to an acquittal.² "Victoria the First" was held mere surplusage.³ Nevertheless, these distinctions have given way before the new statutes.

Hence, if time be material, it would be bad to⁴ allege a certain Act of parliament as having passed in the 2nd and 3rd years of the reign, &c., instead of an Act passed in the session holden in the two years.⁵ Under 6 Geo. 4, c. 108, s. 52, it was made penal to exhibit lights to persons at sea between the 21st of September and the 1st of April. The indictment laid the offence to have been committed on the 9th of March. It was objected that as the prosecutor was not bound to the day laid, although the fact was proved as laid, yet that there ought to have been a distinct and substantive averment in the words of the statute, time having been of the essence of the offence. But on motion to arrest the judgment, Littledale, J., held, that the indictment was good, and that he was bound to take judicial notice of the truth of the allegation of time.⁶ And, where, in a case of poaching, the time was laid "7th October, in the year" without more, Alderson, J., took the opinion of the judges, who held, that the fault was that of time imperfectly stated, and so cured by verdict.⁷ So it was again where the indictment alleged, that the jurors, &c. present, that J. B. "on the 17th day of November, in the 10th year of our sovereign lady Queen Victoria, assaulted," &c. This was a defective statement and cured by the statute.⁸ On the other hand, an indictment for perjury stated the act as having been done on the 29th of June, in the year 1846. Parke, B., after considering, said, that he had never seen an indictment without the year of the monarch or the "year of our Lord," but he left the defendant to his writ of error, and did not arrest the judgment.⁹ The Statutes of Amendment, however, award a very extensive power to the judges to correct, before verdict, these errors.

¹ *R. v. Gill*, Russ. & Ry. 431.

² *R. v. Pringle*, 2 Moo. & Rob. 276. See also *R. v. Fenwick*, 2 Car. & K. 915. *R. v. Scott*, 25 L. J. M. C. 128.

³ *R. v. Bevis et ux.*, 1 Cox, 27.

⁴ See 1 Ch. Cr. L. 224.

⁵ *R. v. Biers*, 1 Ad. & E. 327; 3 Nev. & M. 475. See *R. v. Hick-*

eringill, 11 Mod. 113; 2 M. & S. 123.

⁶ *R. v. Brown and others*, Moo. & Malk. 163; and see *R. v. Simpson*, 10 Mod. 248, 341.

⁷ *R. v. Hall and others*, 1 Lew. C. C. 232; before the statute.

⁸ *Broome v. Reg.* 17 L. J. M. C. 152; 12 Q. B. 934.

⁹ *R. v. Kimpton*, 2 Cox, 296.

Unless the hour be material, as, for instance, in burglary and night poaching, it is not usual to mention it.¹ And even in those cases an allegation that it was done in the "night" might be sufficient, although the custom is to mention the hour. When a bare omission is charged, as not scouring a ditch, no time, it is said, needs to be alleged.² On the other hand, to charge a man with several offences at several times, without specifying a day certain, was held bad,³ but time not being essential, it is a fault now helped by the statute.

The date of a note was July 2, 1830, and the forged instrument was charged as having been done on the same day. The statute⁴ did not come into operation till 20th July, and there was no evidence to show that the crime had been done in the county where the prisoner was apprehended. The jury found that the forgery had been committed after 20th July, but it was moved to arrest the judgment by reason of misstating the time. The judges held, that as there was no provision varying the charge, nor introducing any additional statement, but merely a power for the prosecutor to charge in one county that which before the statute he must have charged in another, the conviction was good.⁵

Offence.] Some offence in particular must be accurately set out. There cannot be either intendment or implication.⁶ The statement and the fact should correspond.⁷ Where the offence charged has been created by statute, or subjected to a greater degree of punishment, the indictment or information, after verdict, shall be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.⁸ In a case of arson, the word "unlawfully" was left out, a word which the statute used. The judge would now, probably, amend. But although judgment was arrested, the prisoners were convicted upon a fresh indictment, and executed.⁹ It is often the custom to use the words "last aforesaid," where various acts, as shootings, are alleged; yet the words "as aforesaid" are sufficient.¹⁰ Unless the value of property be of the essence of the offence, it is no longer necessary to mention it.¹¹

Affirmation of jurors.] By 6 & 7 Vict. c. 85, s. 2, in any legal proceedings, whatever proceedings may be set out, it shall not be necessary to specify that any particular persons who acted as jurors, had made affirmation instead of oath, but it may be set

¹ 2 Hawk. c. 44, s. 25. See *R. v. Waddington*, Id.

² 2 Hawk. c. 25, s. 79.

³ Id. s. 82.

⁴ 1 Will. 4, c. 66, s. 24.

⁵ *R. v. Treharne*, 1 Moo. C. C. 298.

⁶ See Say. Rep. 204.

⁷ 2 Hawk. c. 25.

⁸ 7 Geo. 4, c. 64, s. 21.

⁹ *R. v. Turner and another*, 1 Moo. C. C. 239.

¹⁰ *R. v. Voke*, Russ. & Ry. 531. The words in each count being grammatically and legally referable to the last antecedent matter.

¹¹ See 2 Hawk. c. 25, s. 75.

out that they served as jurymen, as if no Act had passed for enabling persons to serve as jurymen without oath.

Name of prosecutor or party injured.] The court will amend errors in the name of the prosecutors or persons injured. Still, a certain amount of caution should be used. If a man is confirmed in a different name from his baptismal name, he should be described by his name of confirmation.¹ And, in other cases, an ordinary degree of care should be exercised to prevent the consequences of an impunity which might, at length, amount to neglect. Care ought likewise to be used where the judges would have a difficulty in amending or inserting a name. A child was baptized by the name of Louis; his mother's maiden name was Drake, and he was recognized by that name. This was evidence for the jury to say whether he was not a bastard, and had acquired the name of Drake by reputation.² The following cases must be read with reference to the power of the court to amend. Upon a trial for the murder of a bastard, the mother's name, Clark, was added to the name of baptism, George Lakeman, and it did not appear that the infant had gained its mother's name by reputation; it was held upon this, that the indictment could not be supported, because there was nothing except the name by which he could be identified.³ So where the indictment neither stated the name of the child, nor that it was unknown to the jurors, nor accounted for the absence of the name, judgment was arrested.⁴ So where the name of Harriet was known, a second count, stating the name to be "to the jurors unknown," was held insufficient, although the first count had failed.⁵ But the absence of the name is well accounted for by the words, "then lately born of the body of J. H."⁶ Again, upon an indictment for the murder of a female child, "whose name to the jurors was unknown," it was not deemed sufficient by the judges for the prisoner's counsel to show in cross-examination, for the purpose of proving a name by reputation, that the prisoner had said she should like the child to be named Mary Ann and little Mary. The father was a dissenter, and the child was not baptized. The conviction was, accordingly, held right.⁷ So, where the child was baptized on Sunday, and was called by her mother's name, and the name of baptism, till Tuesday, it was considered sufficient evidence for the jury to find

¹ *R. v. Smith*, 1 Cox, 248. But the court will amend upon being satisfied.

² *R. v. Drake*, 12 Shaw, J. P. 483; 4 Cox, 333.

³ *R. v. Clark*, Russ. & Ry. 358; 1 Brod. & B. 473. *R. v. Waters*, Moo. C. C. 457. *R. v. Lippiatt*, 1 Cox, 56.

⁴ *R. v. Biss*, 2 Moo. C. C. 93. *R. v. Hogg*, 2 Moo. & Rob. 380.

The judge must have something to amend by.

⁵ *R. v. Stroud*, 2 Moo. C. C. 270. The indictment called the child "Harriet Stroud," but the child was called and baptized by the name of Harriet only. The judge would, probably, amend.

⁶ *R. v. Hogg*, 2 Moo. & Rob. 380.

⁷ *R. v. Smith*, 1 Moo. C. C. 402; 6 C. & P. 151.

that the deceased had been rightly described.¹ An indictment neither stated the name, nor that the name was "to the jurors unknown." It appeared that the child had been born alive, but there being only the mere fact of birth, there could be no presumption that the child had a name. The indictment, moreover, was silent as to any name by reputation or baptism, and, had there been an averment that the name was unknown, the circumstance of there being some name would have been implied.² An indictment for murder charged an assault upon a female child of tender age, and *not named*. This was held sufficient. "Not baptized" would not have been enough, but, "not named" means, that she had acquired no name, neither by baptism nor usage.³ So, upon an indictment against the mother for murdering the illegitimate son of Sarah Scarborough, it was considered sufficient to show that he was sometimes called "Sarah Scarborough's child," and, in his mother's presence, "William Scarborough," and there was no proof of his having been baptized. He was generally called "William," or "Colly." Coltman, J., however, thought this very slight.⁴ An indictment called the prosecutor (a boy), "Edward Dobson," although he gave his name to the constable as "Peach," and it turned out that he was not known by the name of "Peach;" it was held, that as his right name was certainly "Dobson," he had been rightly described.⁵ Still, it is sufficient to give the name by which the prosecutor is best known.⁶

If the charge be for killing a woman "to the jurors unknown," and the proof raises a question whether the person killed was not the prisoner's wife, the prisoner is entitled to an acquittal if the jury affirm that point. For, although there might be no evidence of the christian name, the woman would have a right to her husband's surname.⁷ So, in general, upon a charge which contains the words "to the said jurors unknown," if the name transpired at the trial, it has been usual to direct an acquittal;⁸ but if it should appear that the defendant could not be prejudiced by the substitution of the right name, there seems to be no reason why the judges should not amend, for here would be something to amend by, the real name being disclosed.

An indictment for forging a will charged, in one count, the intent as being to defraud some person or persons unknown. It

¹ *R. v. Evans*, 8 C. & P. 765. The judge might now amend.

² *R. v. Willis*, Den. 80; 1 Car. & K. 722. Here there was no need of amendment, as the conviction was supported, and besides there was nothing to amend by.

³ *R. v. Waters*, Den. 356; 2 Car. & K. 864.

⁴ *R. v. Scarborough*, 12 Shaw, J. P. 265; 3 Cox, 72. *Semble* the judge might amend.

⁵ *R. v. Williams*, 7 C. & P. 298. But the judge might amend.

⁶ *R. v. Gregory*, 8 Q. B. 508. But the judge would now amend.

⁷ *R. v. Campbell*, 1 Car. & K. 82. The judge might amend. There would be something to amend by.

⁸ *R. v. Robinson*, Holt, N. P. C. 595. *R. v. Walker*, 3 Camp. 264. *R. v. Deakin and another*, Leach, 862. *R. v. Woolford*, 1 Moo. & Rob. 384.

did not appear that the forged will was capable of effecting a fraud upon any person. No person's name, therefore, appeared who could have been defrauded. Still, the judges were evenly divided.¹ The only proof of a christian name upon a trial for larceny was the statement of a witness, that he had seen the prosecutor sign his name to the charge against the prisoner, and to the depositions. From that only he knew that the name, as laid in the indictment, was Thomas. This evidence was held admissible, although the documents themselves might not be receivable. The conviction was affirmed.² Jervis, C. J., once held, that upon an indictment for shooting at some boys who had irritated the prisoner in the street, an intent to shoot at some person in particular must appear in order to satisfy the statute.³

In cases similar to the following, in the event of any doubt, the judge would, probably, amend, there being no prejudice to the prisoner. Where the name of the prosecutor is known with convenient certainty, and yet some other appellation attaches.⁴ So Baroness Turkheim, her name being Selina Victoire, but generally known by both names.⁵ So, Mary Davies's goods were held rightly described as those of Mary Johnson, she having assumed the latter name for many years.⁶ An indictment charged an assault upon Eliza Edwards. There were mother and daughter of that name. The conviction was held good, for the real question was as to the party assaulted.⁷ So Thomas Dabbs, though the name was Thomas Tyrrel Dabbs.⁸ And this was different from charging the offence of shooting to have taken place in the dwelling of James B., when the evidence showed that it was the house of John B.⁹ Here, however, the judge would amend, in the absence of prejudice, and this case of *Durore*, even under the old law, was hardly consistent with subsequent authorities,¹⁰ and the name of the owner of the house would now be omitted.

It has long been settled, that no addition is necessary to the

¹ *R. v. Tuffs*, Den. 319.

² *R. v. Toole and others*, Dears. & B. 194; 26 L. J. M. C. 79.

³ *R. v. Lallament*, 6 Cox, 204.

⁴ *R. v. Berriman, and others*, 5 C. & P. 601. The property laid in J. H. and another was rightly described, though the name was J. W. H., the prosecutor being generally known by both names.

⁵ *R. v. Sulls*, Leach, 861. *R. v. Morris*, 5 Cox, 205. S. P. known well by each name.

⁶ *R. v. Norton*, Russ. & Ry. 510.

⁷ *R. v. Peace*, 3 B. & Ald. 579.

⁸ Tyrrel having been disused. *Att.-Gen. v. Hawkes*, 1 Tyr. 3.

⁹ *R. v. Durore*, Leach, 351; see East, P. C. 415. The variance was

fatal. See *R. v. Hodgson*, 1 Lew. C. C. 236. Stealing a horse from Joshua Jennings, not saying the *elder*, there being two persons of that name. *R. v. Bland*, cited, 1 Lew. C. C. 236.

¹⁰ *R. v. Harris*, Salop. Sp. As. 1801. Firing on prosecutor in prisoner's own house. Name wrongly stated. *R. v. Pye*. Robbing R. F. in the dwelling house of A. But the ownership was not proved. *R. v. Johnstone*, robbing R. D. in the dwelling house of Joseph Johnstone, her husband, but the name Joseph was not proved. All these convictions were right, Leach, 352, *n.* But *R. v. Cranage*, 1 Salk. 365, is contra. See other cases, *post*; "Burglary," &c.

name of a prosecutor.¹ But although additions are dispensed with, the different titles and relations of life should not be forgotten. It is necessary to mark the identity of the party; and, on the other hand, it is not safe nor proper to allege more than can with certainty be proved. For, although there are large powers of amendment, there is also a large discretion, and there is the important question of prejudice to the defendant. A judge will perhaps amend when the sessions will decline: the discretion, therefore, is not only ample, but much distributed amongst various courts.

The title of a peer should be set forth. But "The Earl Cornwallis" was deemed an insufficient appellation,² for earl is not necessarily a name of degree. But the judge would amend. A peer of Ireland was called J. H. Esq., commonly called Earl of C." The judges held, that the proper mode of naming this nobleman was "J. H. Esq. Earl of C.," and that they must reject "commonly called," in order to sustain the indictment, for this was a name of dignity, and not a title by courtesy.³ So, where the indictment charged the prisoner with killing Henry *Sandford*, Baron Mount Sandford, the judges, although they sustained the conviction, would have preferred that "*Sandford*" should have been omitted.⁴ So, where the indictment said "G. T., Lord D." the court would have had it "Baron D.," but held the indictment good.⁵ William Byron, Baron Byron, was sufficient.⁶ A woman was robbed when unmarried; afterwards, and when the bill came before the grand jury, she became a *feme covert*; the indictment described her by her maiden name: this was held correct.⁷ A forged request was addressed to a woman in her maiden name; she married, and the averment of intent was laid to defraud the husband, and not the woman unmarried: this was held sufficient.⁸

More, however, than is necessary should be carefully avoided. In bigamy, the second wife was described as "E. C. widow." The evidence showed that she was a single woman. The misdescription was fatal,⁹ but an amendment could be applied for.

It is better to leave out christian names which are uncertain, or omit them altogether if a person can be otherwise well described. The Earl of Cardigan was charged with shooting at Harvey Garnett Phipps Tuckett: these christian names could not be proved. The prisoner was acquitted.¹⁰

So, in a case of night-poaching on the lands of the Duke of Cambridge, his Royal Highness was styled "George William

¹ Leach, 862. *R. v. Keys and others*, 2 Cox, 225. As to the addition of defendants, see *post*, 14 & 15 Vict. c. 100, s. 24.

² *R. v. Caley*, 5 Jur. 709.

³ *R. v. Graham*, Leach, 547. And an amendment would now do as well.

⁴ *R. v. Brinklett*, 3 C. & P. 416. The family name, however, being "*Sandford*," there was no variance,

⁵ *R. v. Pitts*, 8 C. & P. 771.

⁶ 19 How. St. Tr. 1177. But William Baron Byron would have been better.

⁷ *R. v. Turner*, Leach, 536.

⁸ *R. v. Carter*, 7 C. & P. 134.

⁹ *R. v. Deeley*, 1 Moo. C. C. 303.

¹⁰ House of Lords, 1841; 24 L. J. M. C. 117.

Frederick Charles." But only George and William could be proved, although that the duke had *other christian names* was admitted by the witness. The quarter sessions were invited to strike out "Frederick Charles," but they declined. The prisoner was convicted, but the court held that the case ought not to have been left to the jury, the christian names not having been proved as laid. The course would have been to ask for the erasion of *all the christian names*, and the sessions, although not bound, ought to have acceded to this request.¹

Property.] With reference to the mode of alleging property by statute, important alterations have been made.

Thus, by 7 Geo. 4, c. 64, s. 14, in any indictment or information for any felony or misdemeanor, wherein it shall be requisite to state the ownership of property, whether real or personal, which shall belong to or be in the possession of more than one person, whether partners in trade,² joint tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be; and whenever, in any indictment or information for any felony or misdemeanor, it shall be necessary to mention, for any purpose whatsoever, any such partners, &c., it shall be sufficient to describe them in the manner aforesaid; and this provision shall be construed to extend to all joint-stock companies and trustees. Still, if a firm be described, and it turns out that the property belongs to one person alone, the variance will be fatal, unless the powers of the Amendment Acts should be called in aid.³

By 7 Geo. 4, c. 64, s. 15, with respect to the property of counties, ridings and divisions,⁴ in any indictment or information for felony or misdemeanor committed as to any bridge, court, gaol, house of correction, infirmary, asylum, or other building, erected or maintained in whole or in part at the expense of any county, riding, or division, or any goods or chattels whatsoever, provided at the like expense, to be used for making, altering, or repairing any bridge, or highways at the ends thereof, or any court or other such building as aforesaid, or to be used in or with any such court or other building, it shall be sufficient to state any such property, real or personal, to belong to the inhabitants of such county, riding, or division; and it shall not be necessary to specify the names of any of such inhabitants.

So again, in any indictment or information for felony or misdemeanor committed as to any workhouse, poorhouse, buildings, lands, or hereditaments of any union formed under 5 & 6 Will. 4, c. 69, or any parish placed under the control of a board of guardians by virtue of that Act, or as to any goods, chattels, or other property belonging to such union or parish, or provided for the use of the poor

¹ *R. v. Frost*, 24 L. J. M. C. 116.

² 1 Geo. 4, c. 102, [Partners,] repealed by 24 & 25 Vict. c. 101.

³ *R. v. Hampton*, 2 Russ. C. M. 102, citing *Greenwood*, Coll. St. 143.

R. v. Wright, 1 Lew. C. C. 268.

⁴ Liberty is omitted,

thereof, or to be used in or upon any workhouse, poorhouse, building, or land belonging to the same, or by the master of such workhouse or poorhouse, or by any workmen or servants employed therein, such property may be stated to belong to the guardians of the poor for the time being.¹ And in other workhouses than those under unions, similar provisions are enacted, and the property may be laid in the overseers.²

By 7 Geo. 4, c. 64, s. 16, in any indictment or information for felony or misdemeanor committed on or with respect to any materials, tools, or implements provided for making, altering, or repairing any highway within any parish, township, hamlet, or place, otherwise than by the trustees or commissioners of any turnpike road, it shall be sufficient to aver that any such things are the property of the surveyor of the highways of such parish, &c., and it shall not be necessary to specify the name of the surveyor.

So, by 7 Geo. 4, c. 64, s. 17, with respect to turnpike trusts, in any indictment or information for any felony or misdemeanor committed on or with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or other thing, erected or provided in pursuance of any Act for making any turnpike road, or any of the conveniences or appurtenances thereunto respectively belonging, or any materials, tools, or implements provided for making, altering, or repairing any such road, it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, and it shall not be necessary to specify the names of any of such trustees or commissioners.

And by sect. 18, as to sewers, in any indictment or information for any felony or misdemeanor committed on or with respect to any sewer or other matter within or under the view, cognizance, or management of any commissioners of sewers, it shall be sufficient to state any such property to belong to the commissioners of sewers, and it shall not be necessary to specify the names of any of such commissioners.

The following cases are inserted because they have been, and may now be, to some extent, authorities, but nevertheless with due regard to the powers of amendment. In a prosecution by a corporation, the particular names of the private persons were mentioned, and then their corporate name, as A. B. and C., churchwardens of Enfield. The indictment was held bad,³ but this fault could now be amended. So, where there was a corporation of the guardians of the poor of certain parishes, and the property belonging to the corporation was vested in the directors for the time being, the judges held, that an indictment for embezzlement should have laid the property as the monies of the guardians by their corporate names, or in the directors for the time being in their in-

¹ 5 & 6 Will. 4, c. 69, s. 7; 7 Geo. 4, c. 64, s. 16.

² 55 Geo. 3, c. 137, s. 1; 7 Geo. 4, c. 64, s. 16.

³ *R. v. Patrick and another*, Leach, 253; East, P. C. 1059.

dividual names.¹ So, where there was no corporation, and the indictment laid the property in the trustees of the Old Artillery Ground, it was held, that the property ought to have been alleged in A. B. and C., as trustees, &c.² Also, in an indictment the poor law commissioners ought to be described by their name of office.³ So, in the case of a joint-stock bank, it was deemed quite sufficient to lay certain brass to be the property of one of the partners; and an objection that it was indispensable to allege that the property belonged to the "public officer" was not sustained. It signified nothing that neither a manager nor a public officer had been appointed.⁴

Then and there.] The words "then and there" are now rarely used. Even when local description is required, as in burglary, "there" is no longer employed; "then" continues to be inserted upon all occasions. Till lately, however, questions were raised upon this point. In manslaughter the stroke was alleged at All Saints, Poplar, the death at "St. Paul's, Deptford;" and the indictment then charged, that the prisoner was "*then and there*" aiding, &c. It was objected that "there" referred to both parishes, but Patteson, J., replied, that the blow constituted the felony, and, consequently, that "All Saints, Poplar," could alone be intended by those words.⁵ At the present day, if the words should be inartificially introduced, the judge would at once amend; unless, indeed, the local description itself, when necessary, should be, of itself, faulty. The words would be struck out, or amended to meet the difficulty.

The omission of "then and there," as to the swearing of the jury, was held sufficient, in an old case, to warrant an arrest of judgment.⁶

The said.] The first count of an indictment mentioned the wife of the defendant, and the third spoke of the "said wife." It was held sufficient to denote the defendant's wife in the third count.⁷

Last mentioned.] It was charged upon the defendant, that he had produced a false paper of his wife's death and burial; and further, that he was entitled to 5*l.*, in accordance with the rules of

¹ *R. v. Beacall*, 1 Moo. C. C. 15.

² *R. v. Sherrington and another*, Leach, 513.

³ *R. v. Crossley*, 10 Ad. & El. 132; 2 Per. & D. 319.

⁴ *R. v. Pritchard*, 30 L. J. M. C. 169; 8 Cox, 461; Leigh & Cave, 34. Williams, J., cited *R. v. Beard*, 8 C. & P. 143, *post*, "Forgery." And by Wilde, B., "Is it lawful for a man to steal their property because they do not comply with the regu-

lations of a statute?" 30 L. J. M. C. 170.

⁵ *R. v. Hargrave*, 5 C. & P. 170. See *R. v. Swathins*, 4 C. & P. 548, where the words were omitted after at, &c.; also 2 Hawk. c. 25, s. 78. *R. v. Williams*, Leach, 529; East, P. C. 424. *R. v. Watkins*, Car. & M. 264. There are other cases now not applicable, as *R. v. Frances and others*, Com. 478; Str. 1015.

⁶ *R. v. Morris*, Str. 901.

⁷ *R. v. Dent*, 1 Car. & K. 249.

a society, by reason of the death of his wife, "by which said last-mentioned pretence" he obtained the money. This was held sufficient.¹

Against the form of the statute.] This form has also been protected from the consequence of a fatal variance, by the statute 14 & 15 Vict. c. 100, s. 24. But it is still in common use, although the plural number, "*the statutes*," is not cared for.² And the reason is because if an offence be no crime at common law, as the forgery of a bank note, and the words "against the form," &c., be omitted, the judgment will be arrested.³ On the other hand, an offence at common law ought not to conclude, "against the form," &c.,⁴ although it is surplusage. In some cases it may be laid in both ways, as in riot.⁵

Against the peace.] Formerly the words "against the peace of our lord the king" or "our lady the queen" were indispensable.⁶ But the more modern objection was where the offence was committed in the reign of the deceased monarch, and the indictment ended "against the peace" of the successor. This fault was once held fatal;⁷ but afterwards, the word *late* was rejected as surplusage.⁸ And where the word "*late*" did not appear, the judges held that the statute 7 Geo. 4, c. 64, cured the defect.⁹

An indictment for misdemeanor concluded, "to the great scandal of the liege subjects," &c., not saying, "*ad commune*

¹ *R. v. Dent*, 1 Car. & K. 249.

² As formerly. *R. v. Adams*, Car. & M. 299.

³ *R. v. Pearson*, 1 Moo. C. C. 313. *R. v. Radcliffe*, 2 Moo. C. C. 68; see also *R. v. Penhallo*, Cro. El. 231. *R. v. Faulkner*, 1 Saund. 249. *R. v. Brotherton*, Str. 702. *Contrà*, in murder, which was a common-law felony. *R. v. Sawyer*, Russ. & Ry. 294. *R. v. Chatburn*, 1 Moo. C. C. 403. *R. v. Serva and others*, 2 Car. & K. 53, murder on the high seas. So in horse-stealing; *Williams v. Reg.* (in error), 7 Q. B. 251. Previous conviction for felony. *R. v. Blea*, 8 C. & P. 735. In robbery, the word "*rob*" having been used. *R. v. Lennox*, 2 Lew. C. C. 268. So in the case of disobedience to a statute, which is a common-law offence. *R. v. Smith*, 2 Dougl. 441. See also, to the same effect, *R. v. Nelmes*,

6 C. & P. 347; *R. v. Williams*, 14 L. J. M. C. 164; and see also Leach, 678, *n.*; *R. v. Morgan*, East, P. C. 601; 1 Saund. 135 (*a*).

⁴ *R. v. Smith and others*, 2 Dougl. 441. Obstructing navigation.

⁵ Anon. 12 Mod. 502; Holt, C. J.

⁶ Whether in felony or misdemeanor. *R. v. Cook*, Russ. & Ry. 176; 4 Bro. P. C. 302. *R. v. Lane*, 6 Mod. 128; 2 Hawk. c. 25, s. 92.

⁷ *R. v. Lookup*, 3 Burr. 1901. Judgment of King's Bench reversed in the House of Lords.

⁸ *R. v. Scott*, Russ. & Ry. 415. The objection was not taken on demurrer, but the doubt occurred after verdict. The mistake was held bad on demurrer. *R. v. Taylor*, 3 B. & C. 502. *R. v. Smith*, 2 Moo. & Rob. 109.

⁹ *R. v. Chalmers*, 1 Moo. C. C. 352. Anon. 2 Jur. 14.

nocumentum." But the court said that the 14 & 15 Vict. c. 100, s. 24, afforded a complete answer to the objection.¹

Surplusage.] Surplusage to some extent was always rejected by the courts,² though now it may be said to have entirely yielded to the statutes of amendment. Still there cannot be an amendment *after verdict*, in respect of surplusage; as to substitute C. D., the prisoner, for A. B. in a count of receiving the goods of A. B., "the said A. B. well knowing," &c.³

Lord Denman was disposed even to question *Morris's case* upon a rule to quash an inquisition, where the nominative case was used without the verb.⁴ In a case of embezzlement with more than one charge, under 7 & 8 Geo. 4, c. 29, s. 48, and where the embezzled property was stated to belong to different persons, the words connecting the first with the second count were rejected, and the second count was left independent.⁵ In feloniously shooting the words were, did shoot, discharge, and "*send forth*;" "*send forth*" was rejected.⁶ The charge was, that A.'s servant stole his money; the proof, that B.'s money, in A.'s possession, was stolen, A. being the agent to B. The words "servant to A." were rejected.⁷ Where the indictment was for breaking the house of J. D. with intent to steal the goods of J. W., and it appeared that J. W. was put, by mistake, for J. D., the prisoner was acquitted.⁸ But now, this is a case in which the judge would amend. So it was held, that if a man be charged with stealing a black horse, the allegation of colour must be sustained.⁹ It was thought fit to name a

¹ *R. v. Holmes*, 22 L. J. M. C. 122.

² *R. v. Morris*, Leach, 109, 468. *R. v. Harris*, Holt's Cases, 353. *R. v. Redman*, Leach, 477. *R. v. Rudge*, 1 Russ. C. M. 825, note (e). *R. v. Radley*, Den. 450; 18 L. J. M. C. 184. *R. v. Crespin*, 17 L. J. M. C. 128; 11 Q. B. 913. *R. v. Phelps*, Car. & M. 180. A case of murder. The word "was" was rejected. *Ryalls v. Reg.* (in error), 17 L. J. M. C. 93; 18 L. J. M. C. 69. "The jurors *did* say" instead of "say." *R. v. Yates and another*, 6 Cox, 441. Indictment for conspiracy by false pretences; no pretence was proved. Crompton, J., rejected "false pretences." See likewise, *R. v. Smith*, Dougl. 441; 1 Saund. 135, n. (3). *R. v. Mathews*, 5 T. R. 162; Leach, 585. Other cases of surplusage have been a name of title. *R. v. Graham*, Leach, 547. *R. v. Ogilvie*, 2 C. & P. 230. An undue allegation of property. *R. v. Hickman*, East,

P. C. 293. A judgment. *R. v. Baldwin*, 3 Camp. 265. The owner of lodgings in robbery. *R. v. Healey*, 1 Moo. C. C. 1. "Coin," in an indictment for uttering. *R. v. Jones*, 9 C. & P. 761. A false pretence made to J. B. "*and others*." "And others" was rejected. *R. v. Kealy*, 20 L. J. M. C. 57.

³ *R. v. Larkin*, Dears. 365; 23 L. J. M. C. 125.

⁴ *R. v. Great Midland R. C.* 2 Cox, 1. Rule absolute to quash the coroner's inquisition as insensible.

⁵ *R. v. Woolley*, 4 Cox, 251.

⁶ *R. v. Stokes*, 2 Car. & K. 536; 17 L. J. M. C. 116.

⁷ *R. v. Jennings*, Dears. & B. 447.

⁸ *R. v. Jenks*, East, P. C. 514; Leach, 774. *R. v. Durore*, ante.

⁹ 3 Stark. Ev., 1531. But no allegation of colour is necessary, and the judge would strike out the epithet, the question being whether the prisoner had stolen a horse.

place where a defendant was found armed under 57 Geo. 3, and the evidence negatived the allegation of place: here the judges held that this was not surplusage.¹ If there be a count containing a charge rightly made out in proof, and another not rightly laid, the latter may be rejected, and a general finding upon the whole indictment will not be invalid.²

Videlicet.] The ancient form of *videlicet* is now wholly out of use: at least it may be said, that, should it ever appear, it is not of value.³

Averments.] The reader will find the doctrine of averments in different parts of this work under the heads of "Forgery," "Perjury," "Libel," &c. It is a rule that immaterial averments need not be proved.⁴

Interpretation.] By 13 & 14 Vict. c. 21, s. 4, the masculine gender shall include females, the singular the plural, and *vice versâ*, unless, as to gender and number, the contrary is expressly provided. "Month" shall mean calendar month, unless words be added showing that lunar month is intended; and "county" shall mean county of a town or of a city, unless such extended meaning is expressly excluded by words. "Land" shall include messuages, tenements, and hereditaments, houses and buildings, unless where there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure; and the words, "oath," "swear," and "affidavit" shall exclude affirmation, declaration, affirming, and declaring, in the case of persons allowed to declare or affirm instead of swearing.

Joinder of counts.] The joinder of counts is a subject in some measure connected with election; but the election is, in some cases, dispensed with.

A capital offence may be joined with one not capital, burglary with larceny, for example.⁵ So in the case of principals in the first and second degrees.⁶

But counts for felony and misdemeanor ought not be joined. So that if a count for a common assault were to be joined with counts for stabbing with felonious intents, and a general verdict were taken, there would be error upon the record,⁷ and there cannot be an amendment after verdict. But in the last case, the verdict was taken separately, that is, upon one of the counts for

¹ *R. v. Owen and another*, 1 Moo. C. C. 118. ⁵ T. R. 456. See 14 & 15 Vict. c. 100, s. 7.

² *O'Connell v. Reg.* (in error), 11 Cl. & F. 155. ⁶ *R. v. Kershaw*, 1 Lew. C. C. 218.

³ See *R. v. Gillham*, 6 T. R. 265; 16 East, 416. ⁷ *R. v. Gray*, 7 C. & P. 164.

⁴ See *R. v. Holt*, Leach, 593; ⁷ *R. v. Jones*, 2 Moo. C. C. 94.

felony, and the judge, who was aware of the mistake, forbore to put the last count for the assault to the jury. Upon this, the conviction was held right.¹ So, where an assault with intent to rob was joined with a count on misdemeanor for attempting to steal, and a verdict was found against the prisoner upon the count for felony only, Lord Campbell said, that there could be no doubt on the subject. The conviction was affirmed.² Still the courts do not approve of this joinder. In a case of arson there was a count for felony under the statute, and one for misdemeanor at common law. Eyre, C. B., expressed his disapproval of the practice at Hicks's Hall, and desired that it might be discontinued. Here the counsel for the prosecution withdrew the capital charge.³ Counts in misdemeanor may be joined. As an assault upon a gamekeeper in the execution of his duty with a common assault.⁴

By 7 & 8 Geo. 4, c. 28, s. 6, benefit of clergy was abolished with respect to persons convicted of felony, but the joinder of counts which might have been joined before the passing of the Act, was expressly saved. It is no objection that A. and B. received part of the property stolen unconnectedly with each other.⁵ But counts for receiving *certain* articles cannot be joined with counts for receiving *others*.⁶ And counts for being accessory before, *and after* the fact, to the same felony, ought not to be joined.⁷

By 24 & 25 Vict. c. 96, s. 92, in any indictment containing a charge of feloniously stealing any property, a count or several counts for feloniously receiving the same or any part or parts thereof, knowing the same to have been stolen, may be added; and in any indictment for feloniously receiving any property knowing it to have been stolen, a count for feloniously stealing the same may be added; and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election, but the jury who shall try the same may find a verdict of guilty, either of stealing the property, or of receiving the same, or any part or parts thereof, knowing the same to have been stolen; and if such indictment shall have been preferred and found against two or more persons it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty either of stealing or receiving any part or parts thereof, knowing the same to have been stolen, or to find one or more of the said persons guilty of stealing, and the other or others of them guilty of receiving.⁸

¹ S. C.

² *R. v. Ferguson*, 24 L. J. M. C. 61; Dears. 427. Whether the recorder of Manchester left the count for misdemeanor to the jury does not appear.

³ *R. v. Doran*, Leach, 538.

⁴ *R. v. Finacane and another*, 5 C. & P. 551.

⁵ *R. v. Hartall*, 7 C. & P. 475.

⁶ *R. v. Ward*, 2 Fost. & F. 18.

⁷ *R. v. Blackson and others*, 8 C. & P. 43.

⁸ Under the old law. *R. v. Madden*, 1 Moo. C. C. 277.

Several felonies.] If several felonies be charged in the same indictment, the objection should be made before plea, or the swearing of the jury, for it cannot be taken upon demurrer, nor in arrest of judgment, since each count reveals a distinct offence. But the court will sometimes quash the indictment when the fault is discovered before plea, or before the charging of the jury, or afterwards will put the party to his election.¹ Where there are two indictments against different persons for different offences, both charges may be tried at once, *by consent*, the foundation being being the same transaction.²

Superfluous counts.] If there be an oppressive number of counts in an indictment, the better course is to apply to the attorney-general for a summons to the prosecutor's attorney to show cause why the superfluous matter should not be struck out.³ Or, if the clerk of assize should draw an indictment with unnecessary prolixity, he may be compelled to bear the expense of the superfluous part.⁴ And he has no lien on the records in his custody for his fees.⁵

Joinder of parties.] It is said, that when the offence is joint, as the joint keeping of a gaming house, the defendants may be charged either jointly or severally.⁶ But where the offence arises from the personal default of a particular individual, as the following a joint trade without apprenticeship on the part of one partner, the indictment must charge severally and not jointly.⁷ Yet, in the case of publishing two distinct libels upon two several persons,⁸ or in cases of assault upon two persons (whatever the opinion might have been formerly),⁹ the offence may be laid in either way.¹⁰ Under circumstances of positive misjoinder, the indictment will be quashed.¹¹ Where several are charged with several offences, the better opinion seems to be, that there ought not be a joint charge, unless in respect of some one thing to which all of them have a relation.¹²

¹ Stark. Cr. Pl. 39.

² *R. v. Brett and another, R. v. White and others*, 3 Cox, 79.

³ *R. v. Green*, Ca. Temp. Hardw. 209. It was an indictment for riot, and there were 200 sheets of paper. At first, the attorney-general refused to interfere.

⁴ *R. v. May*, Dougl. 194.

⁵ *R. v. Bury*, Leach, 201.

⁶ 2 Hawk. c. 25, s. 89.

⁷ 2 Hawk. c. 25, s. 89.

⁸ *R. v. Benfield and another*, 2 Burr. 980.

⁹ *R. v. Clendon*, Str. 870; 2 Ld. R. 1572; overruled, 2 Burr. 984.

¹⁰ See 2 Burr. 983, 984.

¹¹ *R. v. Tucker and others*, 4 Burr. 2046.

¹² 2 Hawk. c. 25, s. 89.

CHAPTER VII.

THE WRIT OF CERTIORARI.

Certiorari.] The writ of *certiorari* is always granted at the instance of the attorney-general, being an officer of the crown,¹ whether as prosecutor or for the accused, and the court has no discretion.² But it is otherwise in the case of other prosecutors and defendants. It is very considerably governed by statutes. Thus, no writ of *certiorari*, at the prosecution of any party indicted, shall issue in term time out of the Court of Queen's Bench, to remove any indictment for any trespass or misdemeanor found at sessions, assize, or elsewhere, before trial had, unless such *certiorari* shall be granted or awarded upon motion of counsel, and by rule of court, before the judge or judges of the said court sitting in open court, or by leave of the judge of that court, the attorney-general being excepted.³

In vacation writs of *certiorari* may be granted by any judge of any of the common-law courts at Westminster; and the name of such judge, and also the name of such person at whose instance the same is granted, shall be indorsed on the said writ.⁴

An indictment moved into the Central Criminal Court for keeping a disorderly house may be moved into the Court of Queen's Bench at the instance of the prosecutor or defendant, notwithstanding 25 Geo. 2, c. 36, s. 10.⁵ And it may be remarked that a *certiorari* to remove an indictment for the purpose of quashing it, as for want of jurisdiction, is not within these provisions. And although the attorney-general does not interfere, nor the crown, having no direct interest, yet a private person may, in this latter case, have the writ.⁶

To what courts.] This writ lies from the Court of Queen's Bench or Chancery to all courts of inferior jurisdiction, unless there be a statute or charter conferring upon such inferior courts an absolute jurisdiction.⁷ No *certiorari* was necessary to remove

¹ Under 5 Geo. 2, c. 19, s. 2. The rule does not apply to prosecutors, *i. e.*, not under that Act. So that the court refused to quash a *certiorari* where the sessions had quashed a conviction, and the informers had removed the proceedings without entering into any recognizance. *R. v. Spencer*, 9 Ad. & El. 485. But where the quarter sessions had discharged the recognizances, the court refused to interfere by granting a writ to remove the indictment to the assizes.

R. v. Dean, 2 Q. B. 731; 6 Jur. 149. The court also refused a *mandamus* to the sessions to rehear the case.

² 1 Ch. Cr. C. 378.

³ 5 Wm. & M. c. 11, s. 2; 5 & 6 Wm. 4, c. 33, s. 1.

⁴ 5 Wm. & M. c. 11, s. 4; and see 1 & 2 Vict. c. 45.

⁵ *R. v. Brier*, 14 Q. B. 568.

⁶ *R. v. Boulton*, 6 Nev. & M. 26; 4 Ad. & El. 498.

⁷ *Case of the Commoners of the Cambridgeshire Fens*, 2 Hawk. c. 27,

proceedings upon appeal from the quarter sessions under 7 & 8 Geo. 4, c. 33, ss. 82, 84, 85 (an Excise Act). The Court of Exchequer gave judgment under that Act without a *certiorari*.¹

By 4 & 5 Will. 4, c. 36, s. 16, (the Central Criminal Court Act,) indictments found at sessions may be removed by *certiorari* into that court, and indictments found at that court may be removed into the Court of Queen's Bench.

By 9 & 10 Vict. c. 24, s. 3, doubts having been entertained as to the proper place of trial in cases of removal, every writ of *certiorari* shall specify the county or jurisdiction in which the same shall be tried, and a jury shall be summoned, and the trial proceed as if the indictment had been originally preferred in that county or jurisdiction. And the *certiorari* may be applied for upon a prosecution before the finding of the indictment in the same manner as *after* the finding. It is observable that this writ may issue *before* any indictment is found upon any prosecution for misdemeanor.²

By 16 & 17 Vict. c. 30, s. 4, no indictment, except against bodies corporate not authorized to appear by attorney, shall be removed into the Court of Queen's Bench, or into the Central Criminal Court, by *certiorari*, either by the prosecutor or the defendant (other than the attorney-general acting on behalf of the crown,) unless it be made to appear to the court from which the writ is to issue, by the party applying, that a fair and impartial trial of the case cannot be had in the court below,³ or that some question of law of more than usual difficulty and importance is likely to arise upon the trial, or that a view of the premises, or a special jury may be required.⁴

Certiorari, for what causes.] The doubt as to an impartial trial is one of the causes of the issue of this writ. As where an unreasonable prejudice exists, a prepossession against the accused.⁵ And a prejudice in the court below.⁶ Likewise, if the prejudice be the other way, in favour of the defendant. As in the case of a magistrate who circulated a printed account of the charges against him amongst his brethren.⁷ So where the defendant, a member of Oxford University, was the son of an influential magistrate of the neighbourhood, an indictment found at the Oxford sessions was removed.⁸ However, the mere fact that the defendant was a magis-

s. 22; see sect. 23, &c. That the Cinque Ports are not exempt, see sect. 24, Style, Rep. 9, where it was granted from the Cinque Ports. In the case of a *certiorari* in London and Middlesex, it was said to be customary to give three days' notice to the other side. Tho. Raym. 74.

¹ *R. v. Gamble*, 16 Mees. & W. 384, 398.

² 60 Geo. 3 and 1 Geo. 4, c. 4, s. 4.

³ *R. v. Bell*, 8 Cox, 287.

⁴ See *R. v. Chipping Sodbury*, 3 Nev. & M. 104.

⁵ *R. v. Palmer*, 5 El. & Bl. 1024.

⁶ *R. v. Matthews*, cited, 1 Ch. Rep. 571, n.

⁷ *R. v. Grover*, 8 D. P. C. 325.

⁸ *R. v. Trevor*, 4 Jur. 292. A placard and a series of articles concerning the prosecutor also appeared in the case.

trate will not be sufficient.¹ But it will not be awarded on the bare ground of political prejudice. Again, this writ was allowed where the number of jurors in a borough was small, and the defendant was shown to have been in terms of intimacy with many of them.²

Another ground is that of legal difficulty.³ This is provided for by the statute. But the court are to use their discretion upon the subject, especially if the application comes not from the court below, but from the defendant. Proceedings concerning matters of account were mixed up with an indictment for perjury. This was deemed a sufficient ground for withdrawing the case at the defendant's suggestion from the Central Criminal Court. But it will not be allowed on the ground that points of law may arise.⁴ Where the crown lawyers had instituted a prosecution, and the defendant was desirous of having a special jury and the aid of Queen's counsel, Mr. Justice Coleridge allowed the writ to go.⁵

Upon a charge of feloniously demolishing a house, the judge overruled an objection as to the means of destruction, and the court were desired to grant the writ for the purpose of bringing up the record of conviction to be quashed. But the writ was denied.⁶

With respect to that part of the clause of 16 & 17 Vict. c. 30, s. 4, which speaks of a special jury, it was held to be no objection that the writ lay to a court of high jurisdiction, as the Central Criminal Court.⁷ But the court will use its discretion. A special jury was denied upon the suggestion that the truth of the evidence (in a case of perjury) given by the defendant, would depend upon the result of a long series of accounts.⁸ So, although the allegation was, that the assault which occasioned the proceedings arose out of a claim of property, and that difficult questions might arise, so that a special jury would be desirable, the court refused the writ, no suspicion being cast upon the sessions.⁹ A constable seized a butcher's stock as being "corrupt and unwholesome victual," and preferred an indictment against him. The butcher brought an action for the seizure. Here the writ was allowed so that the charge and action might come before the same forum.¹⁰ This case, however, cannot be considered as authority unless upon the ground of the absence of impartiality. So, in nuisance, where a view of the premises is desirable, the writ will issue.¹¹ The writ is available

¹ *R. v. Fellowes*, 4 D. P. C. 607.

² *R. v. Ouseley*, 6 Jur. 193.

³ 2 Hawk. c. 27, s. 27.

⁴ *R. v. Wartnaby*, 2 Ad. & El. 423. *R. v. Harrison*, 1 Ch. Rep. 571. *R. v. Josephs*, 8 D. P. C. 128. Perjury. See *R. v. Heywood*, 4 Jur. 413. *R. v. Lechemere*, Id. 656. Assault.

⁵ *R. v. Jeffs and another*, 1 Cox, 194.

⁶ *R. v. Whiston*, 2 Dowl. (N. S.), 408.

⁷ *R. v. Caldecott*, 1 Dowl. (N. S.), 556.

⁸ *R. v. Morton*, 1 Dowl. (N. S.), 543.

⁹ *R. v. Wellington*, 7 Jur. 44.

¹⁰ *R. v. Broomhead*, 2 Dowl. (N. S.), 715. On the motion of the constable.

¹¹ See 4 Com. 272, 273.

at bar as well as at *nisi prius*.¹ Where the court of quarter sessions quashed a writ for forcible entry, the writ was allowed to see whether there had been a regular judgment so as to found a writ of error. But the court would not review the decision of the sessions upon bringing up the writ of *certiorari*.² And the writ was granted in conspiracy upon the application of *one* defendant, without the consent of the others, that defendant entering into a recognizance to pay costs if he or any other of the defendants should be convicted.³

Refusals of the writ.] The writ has been refused in cases of convictions with regard to assessment to the land tax and poor's rates.⁴ Where issue has been joined, the court will not allow the writ.⁵ If granted, the court, in such a case, will remand the record.⁶ So between verdict and judgment.⁷ So after a conviction, unless the judge below should hesitate as to the sentence.⁸ So upon appeals, at least pending the appeal.⁹ Nor will the court remove the record and proceedings of a court leet in order to inquire into the propriety of an amercement which had been paid.¹⁰ Nor the record of a conviction from St. Helena, the attorney-general not having granted his fiat.¹¹ And the court cannot mitigate a fine imposed by an inferior court, the record of which is brought before them by *certiorari*.¹² So where a discretionary power of imprisonment was given by 10 Geo. 2, c. 28, s. 6, the court granted a *procedendo* for the sessions to enforce the judgment. The rule in the Queen's Bench that, after a *certiorari*, the record cannot be remanded, applies only to cases where the judg-

¹ 4 Com. 320.

² *R. v. Wilson*, 1 New. S. C. 190. See *R. v. Wilks*, 4 Jur. 1061. *R. v. Oulsley*, 6 Jur. 62. *Spittal, in re*, 6 Jur. 438. *R. v. Hare*, 6 Jur. 326.

³ *R. v. Foulkes and others*, 20 L. J. M. C. 196; 1 Pract. Rep. 720. *R. v. Probert and others*, Dears. 30. *R. v. Wilkes*, 25 L. J. M. C. 47. And the removal of one operates as to the other, the name of the party requiring the writ being indorsed on it. 12 Mod. 601. *R. v. Worsenholm and another*.

⁴ *R. v. King*, 2 T. R. 235; 2 Hawk. c. 27, s. 27. Other cases are, *R. v. Fox*, 5 D. P. C. 242. Keeping a bawdy-house, 25 Geo. 2, c. 36, s. 10. But see *R. v. Brier*, ante, 19 L. J. M. C. 121. *R. v. Cook*, 5 Jur. 1181. Embezzling materials, 17 Geo. 3, c. 56, s. 22. *R. v. But-*

cher, 9 D. P. C. 135. 7 & 8 Geo. 4, c. 29, s. 53. False pretences, where the Court of Queen's Bench granted a writ in the nature of a *certiorari* to remove the proceedings, notwithstanding the statute. *R. v. Sill*, 21 L. J. M. C. 214. Dears. 10. 4 & 5 Will. 4, c. 36, s. 16. *R. v. Smith*, Cowp. 24; *R. v. Young and another*, 2 T. R. 472. 8 & 9 Vict. c. 87, s. 101 (Smuggling Act). *R. v. Williams*, 1 Burr. 386. *R. v. Hester*, 4 D. P. C. 589. *R. v. Whiston*, 6 Jur. 1039; 2 Hawk. c. 27, s. 34.

⁵ 1 Hawk. c. 27, s. 30.

⁶ 2 Hawk. c. 27, s. 30.

⁷ *R. v. Potter*, 2 Lord Raym. 938. *R. v. Jackson*, 6 T. R. 145.

⁸ 2 Hawk. c. 27, s. 31.

⁹ *R. v. Sparrow*, 2 T. R. 196, n.

¹⁰ *R. v. Heaton*, Id. 184.

¹¹ *R. v. Lees*, 27 L. J. Q. B. 403.

¹² *R. v. Loveden*, 8 T. R. 615.

ment of the inferior court cannot be carried into effect by the court above.¹ Mr. Justice Erle once refused the writ, notwithstanding an affidavit that the question was, whether the defendants were liable to certain repairs, and that the right to repair would come in issue.²

Writ accurate.] The writ must be particular, for should the record certified be materially different from that described by the writ, the *certiorari* cannot be available. As if it should speak of an indictment for stealing two horses, but the record certified it for stealing only one.³ Thus, in cases where the record fails to be removed through error, the court will either quash the writ and award a new writ, or make such order for the defendant's appearance in the inferior court to answer the proceedings against him, as may be most suitable.⁴

Formal proceedings.] Amongst the formal proceedings necessary to the carrying out of this writ, the first matter to be noticed is the recognizance.

By 5 & 6 Will. 4, c. 33, s. 2, every person indicted or presented in *any* court,⁵ who shall obtain this writ of removal to the Queen's Bench, not being in custody for want of bail to answer such indictment, shall, before the allowance of such writ, enter into a recognizance before some judge of one of the common-law courts at Westminster, or a justice of the peace of the county or place in which the offence is charged to have been committed, or in which such person shall reside, in such sum, and with such sureties,⁶ as the said Court of Queen's Bench or any such judge or justice shall, by indorsement on the said writ, order and direct; and if any such person shall be in custody for want of bail to answer the charge contained in such indictment, he shall be detained in custody until the like recog-

¹ *R. v. Neville*, 2 B. & Adol. 299. *R. v. Rushworth*, 1 New. S. C. 415, on 17 Geo. 3, c. 56, s. 14, where the court again doubted its power to imprison, a return of *nulla bona* for a writ of *levari facias* having been made. *Procedendo* awarded.

² *R. v. Fulford (Inhabitants)*, 6 Cox, 510.

³ See 2 Hawk. c. 27, s. 77, &c. As to the amendment of a return to this writ, see *R. v. Darley*, 4 East, 174. *R. v. Atkinson*, Id. 177. *R. v. Aylett*, Id.

⁴ 2 Hawk. c. 27, s. 82.

⁵ The exact words of 5 & 6 Will. 4, c. 33, s. 2, are any *other* court.

The words include presentments by a court of sessions. *R. v. Baker*, 28 L. J. Q. B. 377.

⁶ If some find sureties, and others not, the indictment ought to be removed as to those who find them, for they ought not to be prejudiced by the default of others. 2 Hawk. c. 27, s. 51. But if a defendant out of custody should move for the writ, as in conspiracy, when his co-defendant is in prison, the consent of the latter should be obtained, or at least the applicant should find bail for him. *R. v. Drake and others*, 22 L. J. Q. B. 304.

nizances shall have been entered into, or until such person be discharged by due course of law.¹

By 5 Wm. & M. c. 11, s. 2, the condition of the recognizance shall be, that the party indicted shall at the return of the writ appear and plead to the said indictment in the Court of Queen's Bench, and that he shall, at his own costs, cause the issue joined, or any plea relating thereunto, to be tried at the next assizes for the county wherein the indictment was found; after such *certiorari* shall be returnable, if not in the cities of London or Westminster or county of Middlesex, and if in the said cities or county, then to cause or procure it to be tried the next term after the writ, or at the sitting after, if the said Court of Queen's Bench shall not appoint any other time, and that he shall give due notice of such trial to the prosecutor or his clerk in court.

And further, by 16 & 17 Vict. c. 30, s. 5, whenever any such writ of *certiorari* shall be awarded at the instance of the defendant, the defendant shall enter into a recognizance with the provision following: that is to say, that the defendant shall pay to the prosecutor, in case he shall be convicted, his costs incurred subsequent to such removal. And the prosecutor shall enter into the same recognizance with regard to the defendant. By 16 & 17 Vict. c. 30, s. 7, in default of recognizance, the court shall proceed to trial as if no *certiorari* had been awarded.

Still one defendant may apply for the writ and others may remain passive. In this case, the *certiorari* goes as to all, and the recognizances of those who have not applied are discharged, nor need they enter into any fresh recognizance. The rule for a *procedendo* was refused.²

The surety not only undertakes to produce the defendant, but he likewise pledges himself to pay the prosecutor's costs in case of a conviction, although the payment of such costs is not mentioned in the recognizance, the statute 5 & 6 Wm. & M. c. 11, being in effect incorporated in the recognizance.³ The recognizance stood thus:—"Before J. J., Esq., one of the justices for the county of," &c. It was held good.⁴ Whether it be directory or not may be a question. Buller, J., upon one occasion, said that the case of *R. v. Goter* had, he believed, been overruled, where the name of the prosecutrix not being on the back of the indictment, she was refused costs, although it was well known that she was the real prosecutrix.⁵

¹ 5 & 6 Wm. & M. c. 11, s. 2. *R. v. Ewer*, 2 Salk. 369; 8 & 9 Will. 3, c. 33; 5 & 6 Will. 4, c. 33, s. 2; and see 1 & 2 Vict. c. 45, s. 1.

² *R. v. Boxall*, 4 Ad. & El. 513; 2 Ch. Rep. 159.

³ *R. v. Hodgson*, Dears. 14; 21 L. J. M. C. 181; 7 Exch. 915. *R. v. Hawdon*, 1 Gale & D. 135;

9 D. P. C. 1009; 1 Q. B. 464. But the court stayed proceedings on account of the defendant's poverty, yet without reference to the liability of the sureties.

⁴ *R. v. Hodgson*, ut supra.

⁵ 2 T. R. 48, note. The recognizance of course continues in force till the costs are paid. *R. v.*

Bodies corporate are relieved from entering into any recognizance under 16 & 17 Vict. c. 30, s. 5.¹ The identity of the party applying for the writ must be made out, and likewise that of the parties upon whom it is to be served. As under 13 Geo. 2, c. 18, the person's name who applies must be specified upon affidavit, and it must likewise be sworn that the applicant is the same party who gave notice to the justices.² And the name of the person must also appear in the notice.³ Secondly, as to the justices, the court will not infer their identity from the mere coincidence of names and descriptions in the order and notice, and affidavit of service. The affidavit must go further and state positively that the justices mentioned as having received notice were those who made the order.⁴ But an affidavit that the notice was served on three justices, naming them, and that they were present at the trial, and hearing the appeal, was held sufficient notice under 13 Geo. 2, c. 18, s. 5.⁵ By that statute, no *certiorari* shall be granted without proof made that six days' notice⁶ has been given to the justice or justices, or two of them, by or before whom such proceedings were had. The affidavit must, therefore, follow this requirement by an allegation that, at least, two of the justices present at the making of the order were served,⁷ and it is not enough to say that they were present at the sessions, without adding that they were present *at the bench* when the case was heard.⁸ And it seems that a subsequent affidavit will not cure the omission.⁹ If a justice on the bench expresses his determination not to vote, he must not be considered as a party to any notice; there must be two justices without reckoning him.¹⁰

The following forms of notice have been supported:—"W. & S. attornies for the overseers of K."¹¹ "Solicitor for the present churchwardens and overseers of Market Harborough."¹² By the

Finmore, 8 T. R. 409. *R. v. Teal and others*, 13 East, 4. *R. v. Besant*, 7 D. P. C. 680. *R. v. Thornton*, 19 L. J. M. C. 113, as to the bail. And bankruptcy makes no difference as to the bail, although the bankrupt may be released. *R. v. Hill*, 22 L. J. Q. B. 322; 2 El. & Bl. 176. Where a side-bar rule was issued under 5 Wm. & M. c. 11, s. 3, and an attachment moved for by the prosecutor for nonpayment of costs, it was held unnecessary to have an affidavit that the prosecutors were the parties grieved. S. C.

¹ *R. v. Mayor, &c., of Manchester*, 26 L. J. M. C. 65.

² *R. v. JJ. of Shrewsbury*, 9 D. P. C. 501.

³ *Ibid.* *R. v. How*, 11 Ad. & El. 159; 4 Per. & D. 320.

⁴ *R. v. How*, ut sup. 9 P. D. C. 501.

⁵ *R. v. Wilts, JJ*, 9 D. P. C. 524.

⁶ Notice on Oct. 13. Application on Oct. 20 held sufficient, and that the 16th would have been time enough. *R. v. St. Mary, White-chapel*, 2 Dowl. (N. S.), 964.

⁷ *R. v. Cartworth*, 3 Gale & D. 162; 1 Dowl. & L. 837. *R. v. Cornwall, JJ.*, 1 New. S. C. 414.

⁸ *R. v. West Riding, JJ.*, 1 New. S. C. 406.

⁹ *R. v. Gilberdyke*, 8 Jur. 79.

¹⁰ *R. v. Herefordshire, JJ.*, 1 New. S. C. 413.

¹¹ *R. v. Westmorland, JJ.*, 7 Jur. 898.

¹² *R. v. Solly*, 9 D. P. C. 115.

attorney or the clerk, without further proof that the party is attorney or clerk.¹ "A. and B. solicitors for C. a ratepayer of the township of M., within and part of the said borough," without any affidavit by C. that the solicitors acted by his authority.² The notice, however, must be accurate in the body of it. It was alleged, that R. N., Esq., was served by giving a counterpart of the notice to W. R., the medical attendant of R. N., whilst R. N. was in bed. But the notice thus failed to state that the counterpart was delivered to W. R. at R. N.'s dwelling house, and it was held insufficient.³

The affidavit (for of course there must be one) should not be entitled in a cause.⁴ The words "before me," are not to be dispensed with. So that a jurat was deemed insufficient which omitted these words before the signature of the commissioner, and the omission could not be cured by reference to the notice.⁵ To this it may be added, that notice to the justices is not the less necessary, because the parties particularly interested in the case have been served.⁶ And the enlargement of the rule *nisi* will not cure objections to the notice, although the justices had appeared.⁷

It is competent to explain any alleged defect in the affidavit of a service by a counter-affidavit. As when it was sworn that a copy of the notice had been left at the chambers of one of the justices on a certain day. Here the prosecutor was permitted to explain by another affidavit that the notice had been put into the letter-box at the chambers, and that the justice had duly acknowledged its receipt.⁸ The notice cannot even be dispensed with if the justices grant a case.⁹

The rule for the *certiorari* is, in misdemeanor, for the most part, though not always, absolute in the first instance; in felony, it is a rule *nisi*.¹⁰ However, where a railway company was indicted, the rule was made absolute in the first instance, because no indictment lies against a railway or other company, unless for *non-feasance*.¹¹

There are limitations as to time in cases of *certiorari*. If a case comes on for argument, it is too late to impeach the form of the writ.¹² So as to the time for applying where a levy was made by commissioners of sewers in May, 1842, it was considered too late

¹ *R. v. West Riding, JJ.*, 1 New. S. C. 406.

² *R. v. Lancashire, JJ.*, 3 Per. & D. 86.

³ *R. v. Nunn*, 1 New. S. C. 49.

⁴ *R. v. Southampton R. C.*, 2 Dowl. (N. S.), 53. *R. v. Jones*, 8 D. P. C. 80. *R. v. Gilberdyke*, 8 Jur. 79.

⁵ *R. v. Bloxham (Inhabitants)*, 1 New. S. C. 370; 2 Dowl. & L. 168; 6 Q. B. 528.

⁶ *R. v. Spachman*, 9 D. P. C. 1060.

⁷ *R. v. Shrewsbury, JJ.*, Id. 501. *R. v. How*, 11 Ad. & El. 159.

⁸ *R. v. St. Mary, Whitechapel*, 2 Dowl. (N. S.), 964.

⁹ *R. v. West Riding, JJ.*, 1 New. S. C. 406.

¹⁰ *R. v. Spencer*, 8 D. P. C. 127. *R. v. Wilson*, 1 New. S. C. 190.

¹¹ *R. v. Devon and Gloucester R. C.*, 1 Gale & D. 457.

¹² *R. v. Fordham*, 4 Jur. 218.

to apply for the writ to remove the presentment, assessment, order, and decree in Easter Term, 1843.¹ And if the six months prescribed by a statute, as the 13 Geo. 2, elapse while the matter is being discussed, the court, upon quashing the writ for want of due notice, will not allow of a new writ after the limited period has passed.² Nor would they grant a *mandamus* to enter continuances.³ The judge will not stop the case upon the ground that the prosecutor has not received notice of trial, but if he has not received it, a mis-trial will accrue.⁴

Next we come to the rules as to quashing the writ, or the documents brought up by it; and here, again, there is a limitation as to time. Where a side-bar rule had been obtained, requiring a clerk of assize to return two indictments, and it was served on the 30th of April, a motion to discharge the rule on the 23rd of May was considered too late.⁵ The 20th of April and the 20th of October agree so to save the limitation. As when the order was made on the first-mentioned day, and the application on the day secondly mentioned. However, as in this case, the judge was absent from town, it was made a question whether the application could be valid. But the writ was quashed, the fiat of the judge not having been got till the 21st.⁶

The court will not listen to an objection that the documents proposed to be quashed have been misdescribed in the writ.⁷ An order of sessions which confirms an order of justices should be the subject of a separate rule. The former does not necessarily draw after it the order of justices.⁸ The order, or a statement that it was in writing, should be expressed in the writ. The consequence of such an omission was, that neither the order nor a copy of it was returned, and the court then reverting to the writ of *certiorari*, recognized the default and quashed the writ itself.⁹

With reference to the merits, the distinction seems to be this: where it evidently appears that the justices had jurisdiction over the subject matter, it will not be permitted to impeach their decision upon affidavit. This view admits that the proceedings themselves were found to be regular upon the hearing of the case on *certiorari*. But when there is evidently no jurisdiction, affidavits

¹ *R. v. Tower Hamlets Comrs.*, 7 Jur. 1169.

² *R. v. Cartworth*, 1 Dowl. & L. 837.

³ S. C. But as a doubt was suggested whether the record itself had been filed, or merely a transcript, a *procedendo*, to carry back the record to sessions, was made the subject of a rule *nisi*. S. C.

⁴ *R. v. Hair*, 1 Car. & K. 389.

⁵ *Newton v. Bayley*, 4 Jur. 192. In this case the court said, that a refusal to return indictments until

certain fees were paid should be accompanied by a statement of the amount due, though such fees may be fixed by Act of parliament. S. C.

⁶ *R. v. St. Mary, Whitechapel*, 2 Dowl. (N. S.), 964.

⁷ *R. v. Fordham (Inhabitants)*, 11 Ad. & El. 73.

⁸ *R. v. Cornwall, JJ.*, 1 New. S. C. 414.

⁹ *R. v. Wigan, JJ.*, 8 Jur. 930. The order was made under 6 & 7 Will. 4, c. 96, s. 6.

to show that fact will be admissible. As when an Act had given to justices an original and final jurisdiction, but it was alleged that the charge actually before them and which gave rise to the *certiorari*, was one independent of the Act, and, therefore, not within its protection.¹ And further, when such a want of jurisdiction is disclosed, it is no answer to say that the proceedings have been made regular on the face of them.² An order was made under 59 Geo. 3, c. 12, s. 24, directing that a parish house should be given up to parish officers. The information stated a refusal by a pauper to give up the house upon demand. This being a matter within the cognizance of the bench, affidavits tending to invalidate the statements in the information were rejected.³

If it be sought to quash this writ, care should be taken to quash the right instrument. The prosecutor of a *certiorari* was called upon to answer an objection to the writ, because certain recognizances had not been entered into.⁴ These recognizances were entered into after the allowance, but not before the issuing of the writ. It appeared that, in fact, the recognizances were not necessary, because the statute did not apply to cases where an order was confirmed without appeal, and here the order was so confirmed. Therefore, the application should have been, not to quash the writ itself, but the allowance, and the rule was discharged.⁵

Some of these writs are, of course. As to bail a person in the country.⁶ So, where a party bound at quarter sessions to keep the peace was convicted of an assault at the petty sessions within the given period, a *certiorari* issued as of course to remove the recognizances in order that proceedings might be taken by *scire facias* to estreat them.⁷

It seems that costs are not required in a common-law recognizance.⁸

By 16 & 17 Vict. c. 30, s. 6, these costs shall be taxed according to the course of the Court of Queen's Bench. At the expiration of ten days after demand made of the person at whose instance the writ of *certiorari* was awarded, and on oath made of demand and refusal, there shall be a writ of attachment granted against him by the court for such contempt;

¹ *R. v. Bolton*, 5 Jur. 1154; 1 Q. B. 66. See *R. v. Badger*, 25 L. J. M. C. 81, where all the cases were considered. 6 El. & B. 137.

² *R. v. Bolton*, ut sup.

³ S. C.

⁴ Under 5 Geo. 2, c. 19, s. 2.

⁵ *R. v. Jones*, 9 D. P. C. 504.

⁶ *R. v. Gregory*, 4 Jur. 1015; in which case an affidavit that the prisoner could not afford to come up by *habeas corpus*, was not necessary. This was a case of felony,

and the depositions were removed. See *Ex parte Nicholson*, 4 Jur. 506.

⁷ *Re White*, 1 New. S. C. 9. See also 2 Hawk. c. 27, s. 37. Judge's fiat. The direction of the writ. Id. s. 38. The mode of returning it. Id. s. 65, &c. The removal of judgments or orders of magistrates. Id.

⁸ *R. v. Sidney*, Str. 1165. *R. v. Ewer*, 2 Salk. 564. *R. v. Fonseca*, 1 Burr. 10.

and the said court shall and may also order the said recognizance to be estreated.

By 5 & 6 Wm. & M. c. 11, s. 3, upon conviction, the Court of Queen's Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough, tithing-man, churchwarden, or overseer of the poor, or any other civil officer, who shall prosecute upon the account of any fact committed or done, that concerned him as officer to prosecute or present, which costs shall be taxed according to the course of the court; and the prosecutor, for the recovery of such costs, shall, within ten days after demand made of the defendant and refusal of payment, on oath, have an attachment for contempt; and the recognizance shall not be discharged till the costs so taxed shall be paid.

The party grieved being entitled to costs, it is necessary to decide as to the persons who belong to that denomination, as well as those who are to be considered as civil officers. The prosecutor of an indictment for a riot was held not to be a party grieved, and his costs were refused, the judges being of opinion that the costs could not be awarded under 7 Geo. 4, c. 64, s. 23.¹ So, a person injured at a riot which took place at a political dinner, was not entitled to costs upon an indictment for libel concerning the dinner, which was removed by the defendants, and upon which libel they were convicted.² So, where a public body indicted the defendant for a libel upon one of their officers, although the indictment was in the name of that officer, costs were not allowed.³ Nor when the city solicitor prosecuted by reason of the inability of the prosecutor to carry on the proceedings.⁴ Nor will the court give costs to a nominal prosecutor, for he cannot be at any expense, as when the prosecution is conducted by a private subscription.⁵ Nor to a mere volunteer.⁶ Although where the prosecutor was himself a subscriber, and where the proportions of the subscriptions were not stated, he was allowed to tax all the costs of the proceedings.⁷ So, where the defendant did not consent to the writ, notwithstanding his subsequent appearance, plea, and trial.⁸

¹ *R. v. Richards*, 8 B. & C. 420. *R. v. Johnson*, 1 Moo. C. C. 173. *R. v. Oates*, Id. 175. *R. v. Ingleton*, 1 Wils. 139. *R. v. Kelsey*, 1 D. P. C. 481.

² *R. v. Caldecott and others*, 1 Dowl. (N. S.), 556.

³ *R. v. Dewhurst*, 2 Nev. & M. 253; 5 B. & Adol. 405. By Lord Denman: "*R. v. Edwards* decides this case," 5 B. & Adol. 408.

⁴ *R. v. Wilson*, 22 L. J. M. C. 53; 1 El. & Bl. 597; Dears. 79.

⁵ *R. v. Cook*, 1 Man. & Ry. 526. *R. v. Barnard Castle (Inhabitants)*, 5 Jur. 799.

⁶ *R. v. —*, 15 Q. B. 1060; 20 L. J. M. C. 53. But see S. C. *infra*.

⁷ *R. v. Williams and others*, 8 Jur. 559; 1 Cox, 77.

⁸ *R. v. Hassell*, 5 D. P. C. 531. See also *R. v. Incledon*, 1 M. & S. 268. *R. v. Thompkins*, 2 B. & Adol. 287. *R. v. Higgins*, 1 Nev. & P. 50.

Although another person may have entered into the recognizances, yet he who employs the attorney to conduct the prosecution is the person entitled to costs, if it be a case for costs and he the party grieved.¹

Under 10 Geo. 4, c. 44, the commissioners of police are justices and civil officers, so that where the defendant removed an indictment preferred by the commissioners, and was convicted, the commissioners had their costs awarded to them.² So is a justice who indicts a road.³ So a party grieved by the stoppage of a footway.⁴ So a society was held entitled to costs for prosecuting an attorney for practising contrary to 6 & 7 Vict. c. 73.⁵ So the guardians of the poor, who preferred an indictment against a father for ill-using his child, were held to be parties grieved.⁶ So a person not bound to prosecute, but yet incurring expense reasonably and with a view to justice, is within the Act.⁷ And in perjury it was deemed no answer to say that the fraud did not succeed, and that the prosecutors were only interested as executors.⁸ It was sufficient that the perjury was complete, and that it might have caused damage to the prosecutors.⁹ And herein lies the distinction between this case and *R. v. Ingleton*,¹⁰ which M. Justice Wightman pointed out. Again, an attempt was made to persuade a person to fire a house, but the individual solicited gave information, and no harm occurred. The defendant removed the indictment, and was convicted and paid her fine, and upon an application for costs against her the court refused them, for no damage was done. It was only intended. The statute only extends to officers and persons grieved.¹¹ In the former case the perjury was accomplished, here the offence was incomplete.

If judgment be arrested, the defendant is not liable under any circumstances.¹² And it seems that the costs are confined to such counts as the defendant is convicted upon.¹³ These costs include the carrying of a defendant to gaol in execution of his sentence, as being incurred in consequence of the sentence; though not immediately occasioned by the *certiorari*.¹⁴ If the defendant die before the day in banc, his bail are liable to the costs,¹⁵ and their

¹ *R. v. Bishop*, 6 Dowl. & L. 499.

² *R. v. Earl Waldegrave*, 2 Q. B. 341. The court noticed the contents of the indictment without having the record brought before them.

³ *R. v. Kettleworth*, 5 T. R. 33.

⁴ *R. v. Williamson*, 7 T. R. 32.

⁵ *R. v. Buchanan*, 3 Cox, 427.

⁶ *R. v. —*, 20 L. J. M. C. 53; 15 Q. B. 1060.

⁷ *R. v. Kenealey*, 4 Cox, 345. A side-bar rule had been obtained for costs, and the rule to discharge that rule was discharged.

⁸ *R. v. Major*, 21 L. J. M. C. 221; Dears. 13. The defendant had removed the indictment.

⁹ S. C. by Wightman, J.

¹⁰ 1 Wils. 139.

¹¹ *R. v. Ingleton*, 1 Wils. 139.

¹² *R. v. Turner and others*, 15 East, 570.

¹³ *R. v. Hawdon*, 3 Per. & D. 44.

¹⁴ *R. v. Gilbie*, 5 M. & S. 520.

¹⁵ *R. v. Finmore*, 8 T. R. 409. *R. v. Turner*, 3 B. & P. 160. Whether the recognizance be previously forfeited or not.

recognizances will not, under any circumstances, be discharged, unless the court be satisfied that these costs have been liquidated.¹ But after a rule for a new trial the bail are not so liable. The defendant was allowed a new trial upon payment of costs. He gave notice of trial, upon which the prosecutor obtained a judge's order, by which the notice was only to stand good if the costs were paid by a certain day. The defendant did not pay them, and died before the assizes, and so before trial. The court held that a side-bar rule calling on the bail to pay costs could not be supported, and that the bail ought not to have been mentioned in the rule. The default of the defendant did not restore the original verdict nor the order of the judge. Had the court in a subsequent term set aside the rule for a new trial, and (the defendant being then alive) had judgment been *then* entered, the case might have been different. But here there was a conviction within the true meaning of the recognizance of bail.² The Central Criminal Court Act³ was held not to affect the right of the prosecutor to these costs, since they depended upon the 5 & 6 Will. 4, c. 33.⁴ In accepting taxed costs, the prosecutor is not restrained from aggravating the fine to be imposed,⁵ but, in a case where one-third of the fine had been awarded to him by an order of the judges, it was directed that the master should deduct one-third from the amount of the taxation.⁶ Therefore, the payment of a fine does not destroy the defendant's recognizance for the costs.⁷

These costs become a vested debt on taxation, and the personal representatives of the party may proceed to recover them.⁸ And, upon the statute,⁹ should the defendant's recognizance be forfeited, it shall stand as a security for costs.¹⁰ Under 1 Vict. c. 78, s. 44, the court will not give costs unless they are applied for on the hearing of the motion to disallow the order of the town council.¹¹ It is scarcely necessary to observe, that no costs are allowable to prisoners in cases of felony.¹² Where an indictment for misdemeanor was removed, and a new trial granted on the ground of surprise, the costs were ordered to abide the event of the trial.¹³ An attachment cannot be granted against a person refusing to pay costs under 5 & 6 Wm. & M. c. 11, s. 2, until the expiration of ten days.¹⁴ Under 5 & 6 Wm. & M. c. 11, ss. 2, and 3, it was insisted that no name was indorsed upon the indictment as of the party grieved, or a public civil officer. But Lord Mansfield said, that it was

¹ *R. v. Lyon*, 3 Burr. 1461.

² *R. v. Bowen*, 19 L. J. Q. B. 103.
63; 7 Dowl. & L. 312.

³ 4 & 5 Will. 4, c. 36, s. 16.

⁴ *R. v. Hawdon*, 9 D. P. C. 1007.

⁵ 2 Hawk. c. 27, s. 53.

⁶ *R. v. Osborne*, 4 Burr. 2126.

⁷ 2 Hawk. c. 27, s. 53.

⁸ *R. v. Chamberlayne*, 1 T. R.

⁹ *Secus* at common law.

¹⁰ 2 Hawk. c. 27, s. 53.

¹¹ *R. v. Dunn*, 8 Jur. 773. See *R. v. Prest*, 20 L. J. Q. B. 17.

¹² *R. v. Crowe*, 4 C. & P. 251.

¹³ *R. v. Whitehouse*, Dears. 1.

¹⁴ *R. v. Ireland*, 3 T. R. 512.

enough if the fact of the prosecutor being a civil officer was proved, as in the case before the court, by affidavit.¹

Still these costs are not limited to the sum of 20*l.* in the recognizance, which is only a further security for them. Therefore the court would not discharge the recognizance until the *taxed* costs were paid.²

Supersedeas.] This writ, bail being filed according to the statute, is a *supersedeas* as to all subsequent proceedings in the court below.³ Not in the absence of bail.⁴ And there is a difference between a ministerial and a judicial proceeding. In the former case, as where process is committed to the hands of a sheriff, the writ is available to stop his proceedings, unless he afterwards obtain a *venditioni exponas*, but, in the latter, where the *certiorari* has not been delivered till after the jury have been sworn upon an indictment, the act being judicial, it is said that the justices may proceed.⁵

Time.] The usual course is to apply for the writ after the finding of the indictment and before issue is joined, and not after a confession in the court below,⁶ but, as we have seen, it may issue, upon application, before indictment found.⁷ The writ is seldom granted after conviction. It may be for special cause, and it will receive no countenance if it be not served till after verdict, although obtained before.⁸ But where no remedy by writ of error exists, a special cause may be found, and the writ may issue at any time before the day given above, and even after then, where error does not lie.⁹ The consequence of such a writ is not to release a prisoner who is in custody without finding sureties, although, if he were out on bail, the removal would discharge the recognizance.¹⁰

It happened in the case of a notorious criminal named Palmer, that the indictment against him could not be conveniently tried at Stafford, and it was proposed to move it to another place than the Court of Queen's Bench, whither the writ of *certiorari* had already placed it. Upon this, the Central Criminal Court was selected as the most worthy, and an Act was passed which fully embraced the whole matter.

By 19 & 20 Vict. s. 1, whenever any indictment or inquisition for felony or misdemeanor committed or supposed to have been committed at any place out of the jurisdiction of the Central Criminal Court shall have been removed by *certiorari* into the

¹ *R. v. Smith*, 1 Burr. 54. See Lofft. 520.

² *R. v. Teal and others*, 13 East, 4.

³ 2 Hawk. c. 27, s. 57.

⁴ *R. v. Bethell*, 6 Mod. 33.

⁵ 2 Hawk. c. 27, ss. 58, 59. As to Berwick. See *R. v. Boyall*, 2 Burr. 834.

⁶ *R. v. Gwynne and others*, 2 Burr. 749.

⁷ *Procedendo* awarded, *ante*.

⁸ *R. v. Dixon*, 6 Mod. 61.

⁹ 1 Ch. Cr. L. 380; 2 Com. 67; by Ryland, 320, n.

¹⁰ *R. v. Richardson*, Leach, 560. Perjury.

Queen's Bench, and it shall appear to such court in term, or to any judge thereof in vacation, that it is expedient for the same to be tried at the said Central Criminal Court, the Court of Queen's Bench in term, or the judge in vacation, shall order the trial to take place at the Central Criminal Court. Upon this, the indictment shall be transmitted to the Central Criminal Court with all depositions, &c.¹ Whether the indictment however or inquisition has been into the Queen's Bench or not, by sect. 3 power is given to that court to remove it for trial to the Central Criminal Court, and a writ shall issue for the purpose of certifying and returning them.

Upon this, with reference to such orders made under the sections 1, 2, and 3, the 4th section directs that all recognizances, depositions, &c. relating to the offence charged in such indictment or inquisition, shall be returned by the justices, coroner, &c. to the Central Criminal Court. Then by sect. 5, upon the order under those sections, that the indictment or inquisition be transmitted, the prisoner may be removed to Newgate, without a *habeas*, with his commitment and detainer.

The 6th section provides, that the defendant needs not to appear personally in the Court of Queen's Bench, nor plead there.

By sect. 7, the prisoner may be arraigned as though the offence had been committed within the jurisdiction of the Central Criminal Court.

The 8th section enjoins the court to which the writ is delivered, to bind over the prosecutor and witnesses to the Central Criminal Court.

And by sect. 9, the defendant may be bailed or committed by the court receiving the writ.

By sect. 10, every recognizance shall be as obligatory as if entered into originally to appear at the Central Criminal Court. But notice must be given to the persons so bound, and the prosecutor or party charged must enter into a further recognizance to give such notice to their respective witnesses. Although if a witness has been personally served with such notice, it shall be sufficient without a fresh recognizance.

The 11th section forbids the discharge of a defendant in prison when the writ arrives. But of course he may be bailed.

The 12th section provides for the apprehension of a defendant at large, and for the compulsory attendance of witnesses in like manner as in cases originally arising in the Central Criminal Court.

So as to expenses and rewards, as though the jurisdiction had been original.²

By sect. 15, it shall not be lawful for any person, by himself or by his counsel, to take any objection, either in the said Central

¹ Sect. 2, by the Queen's coroner and attorney, &c. rules concerning Newgate, or any other gaol, for the purposes of the

² Sect. 13. Another clause (14) Act, and may alter commissions, provides that the Queen may make writs, &c.

Criminal Court, or in any court of error, to any writ of *certiorari*, or to any order of the Queen's Bench or of any judge thereof, or to any other proceeding under or by virtue of which any indictment or inquisition shall have been removed into the said Court of Queen's Bench, or transmitted or removed, under the provisions of this Act, to the said Central Criminal Court, or to any caption of any court before which such indictment shall have been found, or to any matter or thing set out or appearing on the face of the record, save and except only to such indictment or inquisition alone.

Then, upon the transmission or removal of the indictment, the Central Criminal Court acquires full, and, as it were, original jurisdiction.¹ And the question of the proper removal or transmission shall not be inquired into.² And every verdict and judgment in the Central Criminal Court upon such an occasion shall be valid.³

Then, as under 51 Geo. 3, c. 100, s. 1, the sentence may be executed in the county where the offence was committed, or within the jurisdiction of the Central Criminal Court.⁴

By sect. 20, whenever any person shall have been removed into the custody of the said keeper of Newgate, under the provisions of this Act, or shall have been committed to the custody of such keeper by the said Central Criminal Court, such person shall, without writ of *habeas corpus* or other writ, be removed into and from the said Central Criminal Court, when and as often as it may be necessary, by the keeper of the said gaol of Newgate, with his commitment and detainer, in order that he may be tried, sentenced, or otherwise dealt with according to law, and such removal shall not be deemed an escape.

And by sect. 21, such prisoner, whilst he is thus removed or detained, shall be deemed to be in lawful custody.

By sect. 22, a defendant out on bail, who appears under his recognizance, may be bailed again from time to time, and as often as the court may think fit, or may be committed. And this same power, by sect. 23, is given with respect to the prosecutor and the witnesses.

By sect. 24, upon any application under this Act, the Court of Queen's Bench, or a judge thereof in vacation, may impose such reasonable terms upon the prosecutor or the defendant as to bail, the payment of the costs of the prosecutor and witnesses, and of the removal and transmission or removal of such indictment or inquisition, and of the removal of such defendant, and any other matter, as in the judgment of such Court of Queen's Bench or judge may reasonably be imposed.

But when the crown obtains the trial, a sum not exceeding 20*l.*, to enable such person to defray the charges and expenses of

¹ Sect. 16.

² Sect. 17.

³ Sect. 18.

⁴ Sect. 19. See schedules A. and

B., with form of warrants of execution.—Palmer was executed in the county (Stafford) where the offence happened.

the attendance of his witnesses, shall be advanced to the defendant, provided that the sum so advanced shall be allowed for in the sum which, in the event of the acquittal of such person, may become payable under the order in the next succeeding section mentioned.¹

For, under sect. 26, the expenses of a person acquitted shall be ordered to be paid to him, and he shall be so paid out of the treasury.

As to the costs of maintaining the prisoner in Newgate, they shall be paid by the treasurer of the county where the offence was committed.² And an account of those expenses shall be delivered to such treasurer by the clerk to the visiting justices at Newgate, and shall be deemed conclusive, unless objection in writing shall be made by the treasurer within one calendar month.³

Lastly, peers and peeresses, and persons claiming privilege of peerage, are expressly excepted out of the Act by the 29th section.

Carrying down the record.] A defendant cannot carry down a record removed by the prosecutor without the leave of the court.⁴ Should the defendant neglect to carry down the record, the crown will apply for a *procedendo*. The judge may grant this, in the first instance, under 1 & 2 Vict. c. 45, s. 1, without causing the defendant to be previously summoned to show cause. It is in his discretion to make a conditional or an absolute order.⁵ And the power is not limited to the full court. It may be exercised by a single judge, within the meaning of 6 Hen. 8, c. 6, and 1 & 2 Vict. c. 45, s. 1. There were two indictments for conspiracy against D. and others, and R. and others. The prosecutor entered them Nos. 2 and 3, and in that order. But the defendants entered them 10 and 13, and placed R. first. It was contended, that the prosecutor need not enter the records at all, and that it was not the case of an entry by proviso. Erle, J., said that the prosecutor had done right, and that the case should be tried in that order.⁶

Traverse.] In cases of misdemeanor it used to be competent for

¹ Sect. 25.

² Sect. 27.

³ Sect. 28.

⁴ *R. v. Banks*, 6 Mod. 245; 11 Mod. 33; 2 Ld. Raym. 1082. Where a record may be removed without *certiorari*, see 2 Hawk. c. 27, s. 41.

⁵ *R. v. Scaife and another*, Den. & P. 513; 21 L. J. M. C. 221; 18 Q. B. 773. The prisoners were convicted after the *procedendo* and sentenced to transportation, upon which they moved the Court of Queen's Bench for a rule to show cause why the *procedendo*

should not be set aside, and all the subsequent proceedings treated as a nullity. The rule was refused. In this case the indictment had been removed from quarter sessions and tried at *nisi prius*. The prisoners were convicted, but the Court of Queen's Bench granted a new trial. Neither side brought down the record, and the prisoners applied to be tried there, but this could not be done for want of the record.

⁶ *R. v. Duffield and others*, 5 Cox, 286.

a defendant to put off his trial till the next assizes or sessions by traversing the indictment. And the judge would not discharge a defendant at the assizes who had traversed to the sessions.¹

But now, by 14 & 15 Vict. c. 100, s. 27, there shall be no traverse of any indictment, but the trial may be adjourned to the following sessions, upon such terms as to bail, &c. as the court shall think fit, and the recognizances of the prosecutor and his witnesses may be respited, but there needs not to be a fresh recognizance. It was no excuse that the prosecutor had taken down the record, and that the defendant was ready for trial, if the defendant neither made up the record, nor gave notice of trial, and no notice of estreat to himself is necessary.² One entered into a recognizance to appear and try in Trinity Term. She appeared and pleaded, but no trial took place. The court, in Michaelmas Term, declined to discharge her recognizances, but ordered, that they should not be put in suit till the last day of term.³

No imparlance.] By 60 Geo. 3 and 1 Geo. 4, c. 4, s. 1, where any person shall be prosecuted in the Court of Queen's Bench for misdemeanor, by indictment, and shall appear in term in person to answer to such indictment, such defendant, upon being charged, shall not be permitted to imparle to a following term, but shall be required to plead or demur thereto within four days from the time of his appearance; and in default of his so pleading or demurring, judgment may be entered against him for want of a plea; and in case he shall appear by his attorney, it shall not be lawful for him to imparle to a following term, but a rule requiring him to plead may forthwith be given, and a plea or demurrer to such indictment enforced, or judgment by default entered thereupon.

By sect. 2 it is provided, that it shall be lawful for the said court or for a judge of the same, upon sufficient cause shown for that purpose, to allow further time for such defendant to plead or demur to such indictment.

¹ *R. v. Arlett*, 2 Car. & K. 596. 109. *R. v. Minshall*, Id. 576. *R. v. Howell*, 9 C. & P. 437. *R. v. Williams*, 1 Moo. & Rob. 503. *R. v. Wettenhall*, 2 Moo. & Rob. 291. *R. v. Wakefield*, 1 Lew. C. C. 275, 311, 313, n. *R. v. Grubbin*, Id. 314. Anon. Id. 309. *R. v. O'Neill*, 1 Car. & K. 138. *R. v. Parker*, 3 Cox, 299.

² *R. v. Clark*, 5 B. & Ald. 728.

³ *R. v. Grote*, 3 D. P. C. 255; see likewise *R. v. Fry*, Leach, 111. *R. v. Hobby*, 1 C. & P. 660. *R. v. James*, 3 C. & P. 222. *R. v. Jones*, 6 C. & P. 343. *R. v. Donnell*, 7 C. & P. 138. *R. v. Burgiss*, Id. 488. *R. v. Rooney*, Id. 515. *R. v. Featherstonhaugh*, 8 C. & P.

CHAPTER VIII.

OF ARRAIGNMENT AND ITS INCIDENTS.

Arraignment.] The indictment being found, the prisoner is put to the bar to answer it, which is called arraigning him.¹ If he should plead "Not guilty" in treason, felony, or piracy, not having privilege of peerage, he puts himself upon the country.² But the court may postpone the trial. If, being charged with treason, felony, piracy, or *misdemeanor*, he stands mute of malice, (which a jury must try,) and will not plead, the court may order a plea of "Not guilty" to be entered.³ But circumstances occasionally happen which delay this general plea or repel it altogether. These incidents are either of law or of fact. Of the former kind are demurrers to the indictment. The latter may be divided into physical incapacities or wilful impediments. To take the physical defects first, the most usual are dumbness, deafness, idiotcy, or insanity. When such symptoms of incompetency appear, a jury of twelve, who may be bystanders, are sworn to try whether the prisoner stands obstinately mute, or is under the visitation of God.⁴ Upon this issue the counsel for the prisoner may address the jury.⁵ Should the jury return, "Dumb by the visitation of God, or affirm the presence of any such imbecility, the course is to endeavour to explain the nature of the arraignment, and to elicit an answer by some sign. As where it turned out after such a verdict that one deaf and dumb had been in the habit of communicating his ideas with a woman. In this case she was sworn, and the fact being established, the prisoner was convicted and transported.⁶ In a later case the inquiry was, 1, as to the dumbness; 2, whether the prisoner was of sane mind. The counsel pleaded "Not guilty," and the trial proceeded, the evidence not being interpreted. Here the person was deaf and dumb, and the offence was misdemeanor.⁷ So, where a woman who could speak, but of whose deafness there was presumptive evidence, was found "mute by the visitation," &c.; the judges, having considered her case, she was again tried upon the collateral issue, and a second verdict of "mute" having been found, she was immediately given in charge to the same jury in chief, convicted, and sentenced to transportation.⁸

Where a party refused to plead because he had before pleaded to an indictment for the same offence, which was held invalid, by reason of its having been found upon the testimony of witnesses

¹ 4 Com. 322. As to the old system of holding up of the hand, (which, however, was not of necessity,) see 2 Curw. Hawk. 434. *R. v. Ratcliffe*, 1 Sir W. Bl. 3.

² 7 & 8 Geo. 4, c. 28, s. 1.

³ *Id.* s. 2, which they did in *R. v. Bernard*, 1 Post. & F. 240,

⁴ 1 Ch. Cr. L. 424.

⁵ *Id.* *R. v. Roberts*, Car. Cr. L. 57.

⁶ *R. v. Jones*, Leach, 102; *Id.* 452, n.

⁷ *R. v. Whitfield*, 3 Car. & K. 121.

⁸ *R. v. Steel*, Leach, 451; *R. v. Mercier*, *Id.* 183. *R. v. Halton*, Ry. & Moo. N. P. C. 78.

not duly sworn, it was held that the corresponding section of 7 & 8 Geo. 4, c. 28, s. 2, applied to his case.¹ In such a case the party may be required to plead to the second indictment, without questioning the first.² A jury is empannelled, as before, to try the question of "mute of malice" and, without such a trial, evidence cannot be admitted.³

Insanity.] By 39 & 40 Geo. 3, c. 94, s. 1, persons charged with treason, murder, and felony, and acquitted on the ground of insanity, shall be detained during the pleasure of the crown. By sect. 2, if any person indicted for any offence shall be insane, and shall upon arraignment be found so by a jury lawfully impannelled for that purpose, so that such person cannot be tried, or if upon the trial such person shall appear to the jury to be insane, the court before whom any such person shall be brought to be arraigned or tried as aforesaid may direct such finding to be recorded, and order such person to be kept in strict custody until Her Majesty's pleasure shall be known; and if any person charged with any offence shall be brought before any court to be discharged for want of prosecution, and such person shall appear to be insane, it shall be lawful for such court to order a jury to be impannelled to try the sanity of such person; and if the jury shall find him to be insane it shall be lawful for such court to order such person to be kept in strict custody, in such place and in such manner as to such court shall seem fit, until Her Majesty's pleasure shall be known; and in all cases of insanity so found Her Majesty may give order for the safe custody of such person during her pleasure. This 2nd section was considered to include misdemeanors.⁴ But still it was thought right to pass a separate Act, expressly giving the same powers in cases of conviction for misdemeanor, as under 39 & 40 Geo. 3, c. 94.⁵

Upon one occasion the judge directed the following issues:—
1, whether the prisoner stood mute by the visitation of God;
2, whether he were able to plead. These issues the jury found severally in the affirmative. The prisoner then pleaded by a sign "Not guilty." Then, 3, the judge directed the inquiry, whether the prisoner were sane or not. On this question he requested the jury to consider whether the prisoner were of sufficient capacity to comprehend the proceedings, to make a proper defence, to challenge any juror he might wish to object to, and to comprehend the details of the evidence, and that, if they thought him incompetent, they should find him "Of unsound mind." The verdict being "Of unsound mind," the judge ordered his detention under the statute.⁶ In another case, where the prisoner, deaf and dumb,

¹ *R. v. Bitton*, 6 C. & P. 92.

² *R. v. Chamberlain*, Id. 93. Therefore, under the 7 & 8 Geo. 4, c. 28, the trial proceeded as though the party had pleaded, whereas before, the standing mute of malice was considered in the light of a

confession, and there were, at least, two executions under such circumstances.

³ *R. v. Israel*, 2 Cox, 263.

⁴ *R. v. Little*, Russ. & Ry. 430.

⁵ 3 & 4 Vict. c. 54, s. 3.

⁶ *R. v. Pritchard*, 7 C. & P. 303.

was charged with the murder of a bastard child, Park, J., said he should impanel a jury to try whether she were sane, as she did not appear to understand the proceedings, and that he would then reserve it for the judges to say whether she should be detained during pleasure under the Act then in force, or instructed so as to be put upon her trial. The jury, however, found her insane.¹ Indeed, if the prisoner's sanity is in the least doubtful, and the surgeon so pronounces it, the prisoner ought not to be put on his trial.² And it has been held, that a medical man may be asked his opinion, as a matter of science, whether the evidence given discloses a state of mind incapable of distinguishing right from wrong.³ But Alderson, B., would not accede to this case. A physician was called upon a trial, who had never seen the prisoner before that time, in order to say whether the evidence he had heard savoured of insanity. The baron would not allow the question. He said, that particular parts of the evidence might be taken, and assuming them true, it might be asked whether such facts, in the opinion of the physician, showed insanity.⁴

With respect to the proof. Upon one occasion, the counsel for the prosecution began, and called his witnesses to prove the prisoner's sanity.⁵ In this case, the insanity having been suggested as feigned, it was held that, after the case for the prosecution, the prisoner's counsel might controvert it by proof of insanity, so that, in the absence of absolute proof, the judge would ask the officers of the prison concerning the matter, or postpone the trial till the next assizes. The judge then examined the officers in a private room, with the medical attendant. A jury was then impanelled, and, the evidence conflicting, the jury found the prisoner insane.⁶ However, Cresswell, J., would not recognize this case, and he compelled the prisoner's counsel to prove the suggestion made in the first instance. The presumption was in favour of sanity, and he thought that there was no reason for departing from the old practice.⁷ In a case where the prisoner was committed for murder, and was removed to a lunatic asylum by an order of the secretary of state, and a true bill found against him, the recognizances were respited *sine die*.⁸ In a case of manifest insanity, the prisoner needs not to be asked whether he will examine the witnesses. The jury may form their conclusion simply from the prisoner's appearance, without further evidence.⁹ It is to be observed that where the prisoner was declared to be insane by the jury, yet had not done what the law considered essential to constitute the crime charged, he was acquitted generally. Such a case was *casus omissus* in the statute. And the court could not order his detention under 39 & 40 Geo. 3.¹⁰ In

¹ *R. v. Dyson*, 7 C. & P. 305.

² *R. v. Ley*, 1 Lew. C. C. 239; and see *R. v. Burrow*, Id. 238.

³ *R. v. M'Naghten*, 10 Cl. & Fin. 200.

⁴ *R. v. Frances*, 4 Cox, 57.

⁵ *R. v. Davies*, 3 Car. & K. 328.

⁶ *R. v. Davies*, 6 Cox, 326.

⁷ *R. v. Turton*, 6 Cox, 385.

⁸ *R. v. Blackwell*, 7 Cox, 353.

⁹ *R. v. Goode*, 7 Ad. & El. 536.

¹⁰ *R. v. Oxford*, 9 C. & P. 525.

The general question of insanity will be considered under the head of

the case of an insane prisoner committed by magistrates for safe custody under 3 & 4 Vict. c. 54, s. 2, Patteson, J., directed that he should be brought up, if not dangerous. However, the recognizances were respited, and the costs allowed.¹

Fetters.] The prisoner is entitled, upon his arraignment, to humane treatment, and is not to be subjected to any unnecessary ignominy nor reproach, and it is said, that he ought not to be brought to the bar with fetters on his feet, unless there be danger of a rescue or escape.² But upon one occasion the court refused to interfere till after plea, saying, that until the jury were charged they had no authority, and then they ordered the fetters to be knocked off.³

Quashing the indictment.] We have said that the plea may be postponed or dispensed with by matter of law, as by demurrer, or upon an application to the court to quash the indictment. This proceeding may be adopted where it is plain that the judgment, if given upon the charge, would be erroneous.⁴ But here the statute as to amendment interposes and cures, under judicial discretion, a number of formal errors⁵ which formerly operated to destroy the indictment. So that, as the courts have always preferred to leave the defendant to his demurrer, the application to quash is still more rarely made. An indictment cannot be quashed in part.⁶ If an indictment for perjury be preferred at the sessions, that

defences to indictments. As to the removal of persons of European birth from India to England when acquitted on the ground of insanity, see 14 & 15 Vict. c. 81.

¹ *R. v. Dwerryhouse*, 2 Cox, 291. It seems (p. 291) that the prisoner was brought up. The bill had been found. See 1 & 2 Vict. c. 14; 23 & 24 Vict. c. 75.

² 4 Com. 322.

³ *R. v. Waites*, Leach, 28, 36. But the court would not now be so nice. Indeed, fetters are disused, unless in cases of danger.

⁴ 2 Hawk. c. 25, s. 146. So that if the judgment could not be arrested, the application would fail. *R. v. Taylor*, 9 D. P. C. 600. *R. v. Burnby*, 13 L. J. (N. S.) M. C. 29.

⁵ "Formal errors," now amendable. The style of the court. *R. v. Roysted*, 1 Ld. Keny. 255. The caption of the indictment. The indictments presented are true bills,

because bill found, the bills do not become indictments. *R. v. Brown*, 1 Salk. 376. Inserting "King Charles," without saying first or second. *R. v. Ford*, 2 Show. 454. The addition after the *alias dictus*, instead of the first name. *R. v. Ward*, Stark. Cr. Pl. 301. The omission of "on the oaths of twelve men." *R. v. Burkett*, Andr. 230. Charging persons jointly and severally. *R. v. Weston*, Str. 623. *R. v. Tucker and others*, 4 Burr. 2046. Several for the same perjury, *R. v. Phillips and others*, Str. 921. Or for perjury. *R. v. Withers*, 4 Cox, 17. And Rolfe, B., said that the application to quash arises from the prosecution, not from the defendant. Including charges, several in their nature, in the same indictment. *R. v. Kingston and others*, 8 East, 41; Leach, 1105, n. Principal and accessory. *R. v. Austin*, 7 C. & P. 796.

⁶ *R. v. Withers*, 4 Cox, 17.

tribunal will remit the case to the assizes, and the prisoner may be bailed, if in custody, before a magistrate, or he may apply to a judge. And a judge would, if applied to for the purpose of quashing, probably remit the case, and quash the indictment. Indictments have been quashed for such faults,¹ and in forgery.² However, in serious cases the judge will leave the defendant to demur.³ In cheating;⁴ false weights;⁵ extortion;⁶ forcible entry;⁷ nuisance,⁸ unless it be shown that the nuisance has been removed;⁹ indecency;¹⁰ disturbance in church;¹¹ a *qui tam* action;¹² overseers refusing to pay over to their successors, being, as the court said, a growing evil;¹³ offences against the Hawkers' Act;¹⁴ informations, *ex officio*,¹⁵ or by the master of the crown;¹⁶ an indictment for practising as an attorney, contrary to 6 & 7 Vict. c. 73;¹⁷ a plea in abatement.¹⁸ So, where a corporation was indicted for misdemeanor, the court discharged the rule for quashing the indictment, leaving the defendants to their demurrer, with liberty to plead over in the event of a decision against them.¹⁹ Moreover, the court will not quash sitting at *nisi prius*.²⁰ Nor, after demurrer, at the instance of the prosecutor.²¹ Nor after plea pleaded.²² Nor will the indictment be quashed at the request of the prosecutor where the defendant has been compelled to incur expense, unless he will indemnify the defendant for costs.²³ So, again, unless all things were replaced *in statu quo*, as in the case of an amendment, by

¹ *R. v. Bainton*, Str. 1088. *R. v. Bristow*, Say. Rep. 138.

² *R. v. Rigby*, 8 C. & P. 770. The judge ordered that new indictments should be preferred at the assizes.

³ 2 Hawk. c. 25, s. 146.

⁴ *R. v. Orbell*, 6 Mod. 42. *R. v. Gibson*, 11 Mod. 340. *R. v. Hanson*, Say. Rep. 229.

⁵ *R. v. Crookes*, 3 Burr. 1842. *R. v. Beechcroft*, 12 Mod. 255.

⁶ *R. v. Wadsworth*, 5 Mod. 13.

⁷ *R. v. Johnson and others*, 1 Wils. 325.

⁸ *R. v. Bishop*, Andr. 220. *R. v. Sutton*, 4 Burr. 2116. *R. v. Wigg*, cited, 1 Salk. 372. Id. *R. v. Belton*. *R. v. Hood*, Say. Rep. 161.

⁹ Cro. Car. 584.

¹⁰ *R. v. Rollo*, Say. Rep. 158.

¹¹ Stark. Cr. Pl. 303.

¹² *R. v. Jocamb*, Str. 953.

¹³ *R. v. King*, Id. 1268.

¹⁴ *R. v. Savage and another*, 1 Ld. R. 347.

¹⁵ *R. v. Stratton and others*, 1 Dougl. 239.

¹⁶ See the cases collected in 1 Ch. Burn, 458.

¹⁷ *R. v. Buchanan*, 1 Cox, 200.

¹⁸ *R. v. Clarke*, 1 Dowl. & R. 45.

¹⁹ *R. v. Birmingham and Gloucester Railway Company*, 1 Gale & D., 457.

²⁰ *R. v. Hepper*, Ry. & Moo. C. C. 210.

²¹ *R. v. Smith*, 2 Moo. & Rob. 109.

²² *R. v. Fry*, Leach, 111. *R. v. Hannam*, Id. 420, n. *R. v. Ellis*, Car. & M. 564. *R. v. Dunn*, 1 Car. & K. 730. See also *R. v. Wynn*, 2 East, 226, where the court enlarged the prosecutor's rule to quash a defective indictment, in order to give him time to prepare another.

²³ *R. v. Moore*, Str. 946. An indictment was removed by *certiorari* and the defendant paid costs for not going to trial, and then the prosecutor moved to quash. The court required him to pay costs.

which arrangement the defendant would receive his costs.¹ Nevertheless, the attorney-general has this advantage, that he may move to quash without costs.² And if the recognizance for the trial of an indictment removed by *certiorari* be forfeited, the court will not interfere for the defendant to quash.³ Two indictments were found against the same defendant: one for felony, and the second for misdemeanor. Both were removed, and it was moved to quash them upon affidavit that both related to the same transaction. But the court refused the application.⁴ One Dunn was indicted for perjury at the spring assizes, 1843. He then entered into a recognizance to try at the summer assizes, 1844. But another indictment was preferred against him at these assizes for the same offence, the former indictment having been found defective. The question arose, how this first indictment should be disposed of. Wightman, J., quashed it upon these conditions: That the prosecutor should pay to the defendant the costs of the traverse and recognizance, and that the defendant should proceed to trial on the second indictment without traversing. The defendant's right to have the first indictment disposed of before entering upon the second was admitted.⁵ A motion for leave to quash may be made on the last day of term.⁶ It is absolute in the first instance, even although the defendant has removed the indictment, and has neither appeared nor pleaded.⁷

The court of quarter sessions has the power of quashing indictments. And the Court of Queen's Bench, upon finding an indictment for forcible entry, assault, and riot, quashed at sessions, would not enter upon the question whether the indictment was properly quashed, but referred the defendants to their writ of errors. And it made no difference that the defendants had been held to bail twenty days before the sessions, and had given the prosecutor notice of their intention to appear there. For the statute 60 Geo. 3, and 1 Geo. 4, c. 8, s. 5, did not take away the common-law power of a criminal court to deal with an indictment properly before them.⁸

Striking out counts.] Where an assault was laid in twenty-one different ways, the court refused, after the finding by the grand jury, to strike out superfluous counts; but they added, that as the clerks in the Crown Office ought to draw the indictments, those officers might be punished for the vexation.⁹ There were counts for sedition, for attending a seditious meeting, and for riot. It was moved to quash the indictment, or put the prosecutor to his election. But the court refused to accede to the application.¹⁰

¹ *R. v. Webb*, 3 Burr. 1468. Sir Wm. Bl. 460. Stark. Cr. P. 300. S. P. *R. v. Glenn*, 3 B. & Ald. 373.

² *R. v. Fountain*, 1 Sid. 152, *ex officio*.

³ 2 Hawk. c. 25, s. 146; 1 Salk. 380.

⁴ *R. v. Stockley*, 3 Q. B. 238.

⁵ *R. v. Dunn*, 1 Car. & K. 730.

⁶ *R. v. Sheppard*. Say. Rep. 65. See 3 Chit. Burn, 443, 444.

⁷ *R. v. Stowel*, 5 Jur. 1010. 1 Dowl. (N. S.), 320.

⁸ *R. v. Wilson*, 6 Q. B. 620. Nor would the court enter into the motives which actuated the court at sessions.

⁹ *R. v. Pewtress*, Str. 1026.

¹⁰ *R. v. Fussell*, 3 Cox, 291.

Demurrer.] Should the court refuse to quash the indictment, the prisoner may demur; but still, as substantive objections may be urged in arrest of judgment, or before the court of appeal, or by writ of error, it is not usual to press them by demurrer,¹ because there is a chance of acquittal upon the merits.²

The demurrer admits the truth of the facts alleged, so that if it be overruled, the defendant stands convicted. But, in felony, he may be allowed to plead over.³ If the demurrer be determined in favour of the defendant, he is discharged, or where the objection is one of form, the indictment is quashed.⁴ Nevertheless, it is not of right that the defendant, in cases not capital, demurs and pleads over in felony,⁵ whilst, even in misdemeanor, the court will, in its discretion, permit the *respondent ouster*.⁶ In fact, the prisoner may demur and plead over in felony at the same time.⁷ Even although in the absence of his counsel he may have pleaded first.⁸ Upon these demurrers issue is joined by the prosecutor.⁹ In general, however, after plea, without surprise or advice, the prisoner must not recur to a demurrer. He must not withdraw his plea of "Not guilty" for the sake of a mere technical objection.¹⁰ And even supposing that the judgment should be for the prisoner,¹¹ where the indictment does not sufficiently charge the facts, this judgment will be no bar to a subsequent indictment for the same felony.¹²

Upon the removal of an indictment by *certiorari*, the superior court will, upon demurrer, look into the whole record in order to see whether judgment can be given upon it.¹³ There were some good and some questionable counts in an indictment, and it was objected before plea, that the latter counts, although bad upon demurrer, might be aided after verdict; upon this, the court allowed the case to go on, with an understanding that the supposed bad counts should be taken as if demurred to.¹⁴

¹ With respect to joinders in demurrer in misdemeanors, see *R. v. Johnson*, 6 East, 583. *R. v. Ryder*, Id. 587. *R. v. Broughton*, Id.

² 4 Com. 334.

³ See Leach, 603; 2 Hawk. c. 31, ss. 1, 5, 6, 7; 4 Com. 334. *R. v. Phelps*, Car. & M. 180. It has, however, been made a question whether the pleading over is not confined to capital cases, so that a judgment against the prisoner upon demurrer in felony would operate conclusively as in misdemeanor. *R. v. Bowen*, 1 Car. & K. 501. As to the time for joining in demurrer, see 6 East, 583.

⁴ 1 Ch. Cr. L. 441.

⁵ *R. v. Odgers*, 2 Moo. & Rob. 479.

⁶ *R. v. Birmingham and Gloucester Railway Company*, 6 Jur. 804.

⁷ *R. v. Adams*, Car. & M. 299. See *R. v. Phelps*, Id. 180.

⁸ *R. v. Purchase*, Car. & M. 617.

⁹ Steph. 285.

¹⁰ *R. v. Hunt*, 3 Cox, 215, Maule, J.

¹¹ *R. v. Odgers*, ut supra.

¹² *R. v. Richmond*, 1 Car. & K. 240.

¹³ *R. v. Fearnley*, Leach, 425. As to a bill of discovery charging a felony, see *Cartwright v. Green*, Leach, 952.

¹⁴ *R. v. Cordy and another*, 3 C. & P. 425.

Reading over the indictment.] The prisoner is entitled to have the indictment slowly read over. Thus, an indictment for perjury tried as a *nisi prius* record, has been read at length.¹ So, in *R. v. Dowling*, indicted under 11 & 12 Vict. c. 12, (an Act for the better security of the crown and government,) the indictment was once slowly read over.²

Confession.] If the accused confesses the indictment, the plea which follows the indictment is, of course, not reached. Confessions, formerly discouraged by the courts,³ and not without reason, are now, with equal reason, received, when they bear the test of sincerity. But when fear, menace, duress, weakness, or ignorance appear, the judges will not allow the plea of "Guilty" to be recorded.⁴

Defence in formâ pauperis.] When a person is allowed to defend *in formâ pauperis*, he has counsel and a clerk assigned to him by the court, and he is not liable to pay office fees.⁵ Some ground or circumstance, however, must be alleged. As upon an affidavit that the defendant is not worth 5*l.*⁶ beyond his necessary apparel and tools of trade.⁷ And it is no objection that the recognizance of the defendant has been estreated,⁸ nor that the indictment was removed at his instance from the sessions.⁹ Nevertheless, there must be a cause in court, so that an attachment for contempt will not warrant this proceeding.¹⁰ And, in order to enable a prosecutor to avail himself of this course, there must be very special circumstances. The court will refuse to a prosecutor the licence which they really award to defendants.¹¹ Then, as to a personal plea of this nature, the prisoner must, in general, plead in his own person in cases of felony. Nevertheless, under special circumstances, the Court of Queen's Bench will permit a plea by a clerk in court for an indictment removed by *certiorari*, upon condition, however, that error should not be brought upon the plea so taken.¹²

¹ *R. v. Newton*, cor. Atcherley, Serjt., 1 Car. & K. 469.

² *R. v. Dowling*, 3 Cox, 509; and see *R. v. Bernard*, 1 Fost. & F. 240.

³ See Steph. 281.

⁴ 2 Hawk. c. 31, s. 2.

⁵ 1 Ch. Cr. L. 413; and see *R. v. Page*, 1 D. P. C. 507.

⁶ *R. v. Page*, ut supra.

⁷ *R. v. Nicholson*, 8 D. P. C. 422.

⁸ *R. v. Wright and ux.*, Ca. Temp. Hardw. 253; and see *Id.* 211, 253, where the question of allowing this plea was very much

discussed. At first, the court refused the application, but subsequently acceded.

⁹ *R. v. Nicholson*, ut supra. The defendant was a prisoner in a debtor's prison when the indictment was removed.

¹⁰ *R. v. Pearson*, 2 Burr. 1039.

¹¹ *R. v. Clarke*, 3 Burr. 1309.

¹² *R. v. Penprase*, 4 B. & Adol. 573. *R. v. Blackburn*, *Id.* Whether a writ of error in felony can be sued *in formâ pauperis*, qu.?

CHAPTER IX.

PLEAS.

Pleas.] The prisoner may plead as many pleas as he likes, provided they be not repugnant.¹

The ordinary plea, both in felony and misdemeanor, is "Not guilty."² Another plea is "Guilty," and it is said, that you may even then give anything in evidence which justifies the fact, or proves the party to be not guilty, for the entry is, "*Non vult contendere cum Dominâ Regina, sed posuit se super gratiam curiæ.*" And it is not like the case of being found guilty by verdict.³ No special plea, however, can be allowed conjointly with "Guilty" or "Not guilty," because of the repugnancy.⁴

Withdrawal of plea.] The plea, as of "Guilty," cannot be withdrawn after sentence.⁵ And whether it be "Guilty" or "Not guilty," it cannot be withdrawn without leave of the judge. And the judge's discretion will not be discussed upon a case reserved.⁶ And although the plea be inadvertent, it must not be withdrawn in order to take a technical objection on demurrer.⁷ The prisoner having pleaded "Guilty," gave evidence against his fellow prisoner, and swore that he had himself uttered a forged instrument, but not knowing it to be forged. He was then allowed to withdraw his plea of "Guilty."⁸

To the jurisdiction.] A plea to the jurisdiction is rare, because when the objection appears on the face of the record, it may be taken advantage of by demurrer, in arrest of judgment, or by writ of error, and it is said, that under "Not guilty," it may at all events be called in aid.⁹ But Hawkins says, that this plea must be specially pleaded,¹⁰ *i. e.*, where the blot is not upon the face of the record.

¹ 2 Hawk. c. 73, s. 128. *Ashford v. Thornton*, 1 B. & Ald. 405. See, however, *R. v. Sheen*, 2 C. & P. 634, Burrough, J., where the pleas were repugnant. *R. v. Strahan*, post.

² 7 & 8 Geo. 4, c. 28, s. 1. And formerly, in felony, the prisoner was asked how he would be tried, but this is at an end. Steph. 291.

³ *R. v. Templeman*, 7 Mod. 40; 1 Salk. 55.

⁴ *R. v. Strahan and others*, 7 Cox, 85.

⁵ *R. v. Sell*, 9 C. & P. 346.

⁶ *R. v. Brown*, 17 L. J. M. C. 145; Den. 291. See the note, Id. 293.

⁷ S. C.

⁸ *R. v. Clouter and another*, 8 Cox, 237. But he was convicted, and the other acquitted.

⁹ Steph. 284.

¹⁰ 2 Hawk. c. 34.

Moreover, the court will not reject a prisoner's special plea for informality, but will assign counsel for the purpose of reducing it into form, and will postpone the trial accordingly.¹ The plea must disclose to the court some other jurisdiction under which the case may be tried.² And a conclusion that "the defendant prays judgment, and that he may not be compelled to answer," is good.³

The crown may demur or reply *instantly*, and if the plea be found against the defendant, the judgment is that he answer over. But in misdemeanor, it is a favour to allow of this pleading over, for in that case the decision, if unfavourable, operates as a conviction.⁴ Where a prisoner, having pleaded in chief, and being put upon his trial before a jury sworn, suddenly urged matter against the jurisdiction of the court, the attorney-general withdrew a juror, and suffered him to retract his plea. But the plea to the jurisdiction being overruled, and the prisoner being again put on his trial and convicted upon his plea of "Not guilty," it was urged in arrest of judgment that he could not be sentenced, inasmuch as the second arraignment was wrong, and he could not be twice placed in jeopardy for the same offence. And of this opinion was Wright, J.; but nine judges held, that as the prisoner had withdrawn his plea at his own prayer, and by his own consent, he had been legally convicted.⁵

In abatement.] A plea in abatement is that of misnomer, but since the statute which authorizes an immediate amendment,⁶ it seems almost idle to plead it. The judgment in treason and felony is that the defendant answer over. In misdemeanor it is final.⁷ The crown might reply and take issue, and the trial take place *instantly* before a jury of the same county.⁸ The plea must be verified by affidavit.⁹ Still, if bad, the court will not quash such a plea upon motion,¹⁰ nor will they suffer it to be amended.¹¹ Nevertheless, upon a *capias utlagatum*, it still seems that the defendant may come in and avoid the outlawry by a plea of misnomer.¹²

Pardon.] A plea of pardon is a plea in bar. If found against the defendant, he must, except in misdemeanor, answer over. If found against him in misdemeanor, the result is equivalent to a conviction.¹³ And this plea must be specially pleaded,¹⁴ unless there

¹ *R. v. Chamberlain and another*, 6 C. & P. 93.

² *R. v. Hon. R. Johnson*, 6 East, 583.

³ *R. v. Shakespeare*, 10 East, 83; *R. v. Westly*, Id. 85.

⁴ 1 Ch. Cr. L. 439.

⁵ *R. v. Kinlock*, 1 Wils. 157. The King, however, pardoned him.

⁶ 7 Geo. 4, c. 64, s. 19.

⁷ *R. v. Gibson*, 8 East, 107.

See *R. v. Earl of Devon*, Comb. 49;

8 East, 111, cited.

8 Steph. 287.

9 *R. v. Grainger*, 3 Burr. 1617.

10 *R. v. Cooke*, 2 B. & C. 618.

11 S. P. Id. 871.

12 2 Hawk. c. 50, s. 10. See further, 1 Ch. Burn, tit. "Abatement."

13 1 Ch. Cr. L. 470.

14 2 Curw. Hawk. 551.

be an amnesty under a public Act of parliament, in which case the court will notice it *ex officio*.¹ Regularly, a pardon should be under the great seal,² and the letters patent should be set out with a profert.³ But indulgence as to time will be given by the court at their discretion.⁴ And by 7 & 8 Geo. 4, c. 28, s. 13, the discharge out of custody in case of a free pardon, or the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon under the great seal. But the statute does not extend to civil rights; it only releases the punishment, and it must be pleaded. By 7 & 8 Geo. 4, c. 29, s. 69,⁵ the King may pardon for any offence under that Act, although the party be imprisoned for nonpayment of money otherwise than to the crown.⁶ Nevertheless, the endurance of the punishment for felony has the effect of a pardon under the great seal, yet not so as to interfere with any subsequent conviction.⁷ With respect to the time of putting in this plea, it may be upon arraignment, after verdict, in arrest of judgment, or even in stay of execution,⁸ with this notification, that the party must plead it at the first opportunity. And thus, it will not be sufficient for a person who has got a pardon before arraignment, to plead not guilty, and then endeavour to avail himself of the pardon.⁹ Although where an act of grace passed between the plea of not guilty and the conviction, the court held, that the defendant should have the benefit of it, paying, however, to the prosecutor, his full costs out of pocket.¹⁰

The plea may be *ore tenus* after judgment, and so likewise may be a demurrer to it.¹¹ There may be some grounds on the part of the crown for resisting this plea. There are also general objections as well as objections to the record. Of the first description, are:—An impeachment by the commons in parliament.¹² Committing a person to prison out of the realm, which incurs a *præmunire*.¹³ A common nuisance continuing. An offence against a penal statute, commenced by a private informer. But after the determination of the impeachment the pardon may issue, and, in the case of a nuisance, the fine may be subsequently remitted.¹⁴

Then, with respect to the record, a variance between the record of attain and the charter of pardon will be fatal.¹⁵ So the particular conviction or attainder upon which the pardon is claimed, must be carefully set out. For a pardon of all felonies will not include a conviction on attainder, nor a piracy.¹⁶ *A fortiori*, a

¹ 2 Hawk. c. 37.

² 2 Hawk. c. 37, s. 58. *R. v. Gully*, Leach, 98.

³ Steph. 290.

⁴ 2 Hawk. c. 37, s. 66.

⁵ *Gough v. Davies*, 2 Kay & J. 623; 25 L. J. Ch. 677.

⁶ To a party aggrieved, for example. The same, 7 & 8 Geo. 4, c. 30, s. 35.

⁷ 9 Geo. 4, c. 32, s. 3.

⁸ Steph. 290.

⁹ 2 Hawk. c. 37, s. 67.

¹⁰ *R. v. Haines*, Leach, 40. Information for mayhem.

¹¹ *R. v. Garside*, 2 Ad. & El. 266; 4 Nev. & M. 33.

¹² 12 & 13 Will. 3, c. 2.

¹³ 31 Car. 2, c. 2, s. 12.

¹⁴ Steph. 334, 335.

¹⁵ 2 Hawk. c. 37, s. 66.

¹⁶ 13 Ric. 2. st. 2, c. 1; confirmed as to the first part, which includes this, by 16 Ric. 2, c. 6,

pardon for felony in 1842, specially granted, will not bar an indictment for horse-stealing in 1841, for the felonies were distinct.¹

However, if there be no repugnance, any apparent difference on the record may be reconciled by proper averments.² And even in the absence of such averments, the court may give time, either to perfect the plea, or purchase a better pardon.³ So, where a proclamation promised a pardon, although the court could not receive this as a plea of pardon, they stayed execution in order to enable the prisoner to apply for a pardon according to the terms of the proclamation.⁴ In former days the law enabled justices to remand the prisoner who pleaded a pardon, till he should enter into a recognizance for a term not exceeding seven years,⁵ but this Act was not usually put in force, and was repealed by 19 & 20 Vict. c. 64.

Auterfois acquit.] The next pleas which will occupy our attention are those of *auterfois acquit*, *auterfois convict*, and *auterfois attain*. The last plea, however, is of no avail, unless the attainder be for the same offence as that charged in the indictment.⁶

*Auterfois acquit*⁷ alleges that the defendant was indicted on a former occasion for the same offence, and acquitted, and this must be proved by the record.⁸ Indeed the statute 14 & 15 Vict. c. 100, s. 28, ordains, that whether the plea be *auterfois convict*, or *auterfois acquit*, it shall be sufficient for the defendant to state that he has been lawfully convicted or acquitted of the offence charged in the indictment. And, therefore, by a jury. A judgment reversed on error without a jury does not warrant a plea of *auterfois acquit*.⁹ And, although this mode of stating a prior acquittal is not always successful, the test seems to be, that if the evidence brought forward on the second indictment would have sufficed to have convicted the prisoner on the first, the plea must avail.¹⁰ As where goods belonged to John Wilson, but in the indictment he was called William Carr. The judge having directed an acquittal, a second indictment was preferred, laying the goods in the right name, upon which a plea of *auterfois acquit* was offered, and, although Platt, B., doubted at first, he yielded to the authority of Hawkins,¹¹ and held the plea good.¹² It is no matter that the proper evidence was not brought forward on the first trial, for that is the very question which determines the validity or invalidity of the plea.¹³ And thus it is that an acquittal upon an insufficient

which, though it *may* be obsolete, is not repealed.

¹ *R. v. Harrod*, 2 Cox, 242.

² 2 Hawk. c. 37, s. 66.

³ *Id.*

⁴ *R. v. Garside*, 2 Ad. & El. 266; 4 Nev. & M. 33.

⁵ 5 Wm. & M. c. 13.

⁶ 7 & 8 Geo. 4, c. 28, s. 4; Steph. 290.

⁷ See *R. v. Parry*, 7 C. & P. 836; Leach, 711, 712. *R. v. Wildey*,

1 M. & S. 189; 2 Hawk. c. 35, s. 2; *Id.* c. 39, s. 13.

⁸ 1 Ch. Cr. L. 452.

⁹ *R. v. Drury*, 3 Car. & K. 193. See S. C. *post*.

¹⁰ And *vice versa*. *R. v. Pedley*, Leach, 720.

¹¹ 2 Hawk. c. 35, s. 3.

¹² *R. v. Austin*, 2 Cox, 59.

¹³ *R. v. Birchenough*, 1 Moo. C. C. 477.

indictment is no bar to a second indictment for the same offence. And, by parity of reasoning, an acquittal abroad, by a competent jurisdiction, purges any future liability, for there the evidence necessary to the proof of the case might have been brought forward.¹ An acquittal for larceny in the county where the goods are found may be pleaded in bar to an indictment for the same offence in the county where they were taken.² The jurat of an affidavit is not conclusive as to the place of swearing, and, therefore, in perjury, the same evidence as to the real place might have been given upon the first indictment, and, hence, the defendant's plea of *auterfois acquit* was allowed in a case where he was charged twice in Middlesex for the same perjury.³ An acquittal for murder will repel a charge for manslaughter, and *vice versâ*.⁴ And an acquittal for murder is an answer to a charge upon the coroner to question, and hence arises the usage of arraigining the prisoner upon both at once.⁵ A plea of acquittal upon an indictment for administering poison to a child was held good against a charge of poisoning the same child, although there were some variances in laying it, inasmuch as in substance and effect the indictment was similar.⁶ Four were for rape upon counts charging each as principal and the rest as accessories; upon their acquittal, it was proposed to try three of them on the next day for a rape upon the same woman. To this indictment, which, omitting the fourth prisoner, was the same as the other, there was a plea of *auterfois acquit*. The prosecutor replied, that the offences were different. The prisoner's counsel having begun upon this issue, put in the commitment and the former indictment, and the minutes of the former acquittal written on the indictment, upon which the jury found that the offences were the same, and it was held that the verdict was final, and the prisoners were discharged.⁷ But *auterfois acquit* was considered to be of no avail in the following instances, where the indictment was laid in the wrong county in the first instance.⁸ Where a crime charged as a felony was a misdemeanor, and so *vice versâ*,⁹ as if a party be acquitted of a larceny, and be then charged for the same act upon an indictment for obtaining money and goods by false pretences.¹⁰ Strictly speaking, *auterfois acquit* will not help an insolvent debtor who has been acquitted for omitting certain goods in his schedule upon an indictment charging him with omitting those goods *and others*. In point of law, a prosecutor might prefer an indictment for each omission, but the course would not be favoured.¹¹ And it will not answer an indictment for stealing other goods on

¹ 3 Keb. 785. *R. v. Hutchinson*, Leach, 135, n. He was acquitted of a murder in Portugal, and produced an exemplification of the record here.

² 2 Hawk. c. 35, s. 4.

³ *R. v. Emden*, 9 East, 437.

⁴ *R. v. Wigges*, 4 Rep. 45.

⁵ *R. v. Culliford*, 1 Salk. 382.

⁶ *R. v. Clark*, 1 Br. & Bing. 473.

⁷ *R. v. Parry and others*, 7 C. & P. 836. See 8 Ad. & El. 482.

⁸ 2 Hawk. c. 35, ss. 3, 4.

⁹ *Id.* s. 5.

¹⁰ *R. v. Henderson and another*, 2 Moo. C. C. 192.

¹¹ *R. v. Champneys*, 2 Moo. & Rob. 26.

the same day.¹ Where the party is acquitted as accessory, whereas he should have been charged as principal, the plea is no bar.² Though formerly, where the prisoner was acquitted as principal, he could not, subsequently, be charged as accessory before, though he might have been accessory *after* the fact.³ But, more recently, where one was acquitted of aiding and abetting in a murder, but convicted upon a second indictment as accessory before the fact, the judges held the conviction right.⁴ However, upon a verdict of "Not guilty," in a case of murder, upon proof of distinct and independent assaults, some of which did not conduce to the death, the plea of *auterfois acquit* was rejected by a majority of the judges.⁵

Auterfois acquit of a burglary actually committed cannot be pleaded to a charge of burglary with intent to commit felony. They are distinct offences.⁶ Yet, if one be acquitted of murder committed during a burglary, and he be then charged with burglary accompanied with violence, *auterfois acquit* will cover that part of the charge which relates to the violence, although the prisoner may still be convicted of the simple burglary.⁷ John Coogan was acquitted upon a charge of forging a will, beginning, "I, James Gibson, &c.;" it was held, that he could not substantiate his plea of *auterfois acquit* to a subsequent indictment, beginning, "Jas. Gibson, &c."⁸ Nor will an acquittal for stabbing, with intent to do grievous bodily harm, be available against an indictment for an assault, although the accused *might have been* convicted of an assault under 1 Vict. c. 85, s. 1.⁹ And *auterfois acquit*, pleaded to an indictment for an assault with intent, &c., will be rejected if the acquittal was for the rape itself.¹⁰ So upon a charge of administering poison, where the poisoner had been acquitted of murder with reference to the same fact, a plea by him of *auterfois acquit* was rejected, although he urged the statute 14 & 15 Vict. c. 100, s. 9, for the attempt under that clause would only be a misdemeanor, whereas this charge amounted to felony.¹¹

In considering a plea of *auterfois acquit* the court will not go beyond the record. As where the indictment laid the goods incorrectly

¹ Gouldsb. 132.

² 2 Hawk. c. 35, s. 11.

³ *R. v. Roberts*, Kel. 25. See Post. 360, 362.

⁴ *R. v. Birchenough*, 1 Moo. C. C. 477; S. C. 7 C. & P. 575, nom. *R. v. Plant*. But the statute has settled all these points.

⁵ *R. v. R. & S. Bird*, 20 L. J. M. C. 70; Den. & P. 94. By eight judges against six.

The indictment was for wounding with intent to do grievous bodily harm. Plea, *auterfois acquit*. For the conviction:—Pollock, C. B.;

Patteson; Coleridge; Wightman; Creswell; Erle; Williams; Talfourd, JJ.—Against: Lord Campbell, C. J.; Jervis, C. J.; Parker, B.; Alderson, B.; Maule, J.; Martin, B.

⁶ *R. v. Vandercomb and another*, Leach, 708; East, P. C. 519; overruling *R. v. Turner*, 1 Sid. 171, and *Jones v. Bever*, Kel. 52.

⁷ *R. v. Gould*, 9 C. & P. 364.

⁸ *R. v. Coogan*, Leach, 448; see *R. v. Vaux*, 4 Rep. 39.

⁹ *R. v. Gisson*, 2 Car. & K. 781.

¹⁰ Id.

¹¹ *R. v. Connell*, 6 Cox, 178.

in A., upon which a new bill was preferred, but, by possibility, the original indictment might have been amended by the judge. Here the court declined to go further than the record of acquittal, holding that the prisoner had never been in jeopardy, and they rejected the plea.¹ An indictment charging a prisoner singly as a receiver might be met by a plea of *aut. acq.*, stating that he had been previously tried with others for the same offence, although one of those others was convicted. For if the plea were not a bar, he might be convicted of the very offence committed jointly with that other person, and of which the latter was convicted.² A plea of *auter. acquit* of an offence committed in the reign of Geo. 3 will not apply to a charge made in the reign of Geo. 4, notwithstanding an averment of identity with respect to the offence.³

Nevertheless, a variance between the indictment and the record may be helped by proper averments; as with reference to the description of the prisoner, time, and place, &c.⁴ And further, it has been said, that the defendant must plead over to the felony at the same time when he says, *Auter. acquit*,⁵ and that in the event of the special plea being found against him, his plea of "Not guilty" will still avail.⁶ Yet these are distinct issues, and the jury could not be charged with both at once; for if the first finding were for the prisoner, it would, of itself, have been a bar.⁷ It may be added, that the trial of this issue is always by a jury, and the consequence of an adverse finding is, that the prisoner answer over, but in misdemeanor it is final.⁸

It seems that the plea may still be in writing, and in that case it would appear that the replication also must be written.⁹ The replication usually disputes the fact of the acquittal.¹⁰ Formerly, instead of a trial, it was competent for the crown to demur, and so it was in *Vandercomb and Abbott's case*.¹¹ And, in misdemeanor, in a case where the demurrer was sustained, final judgment was given against the defendant,¹² but the Act referred to has dispensed with these technicalities.

The replication or counterplea needs not to set out the tenor of the indictment. Defects in the original indictment are matters of error which are not to be taken advantage of in the counterplea.¹³ The prisoner might, again, reply to the counterplea, and time was given him for the purpose, as in the case of the plea itself.¹⁴ It seems that the prisoner should have averred that he had pleaded not guilty to the same indictment, and that the record of acquittal should have been referred to or vouched.¹⁵

¹ *R. v. Green*, 26 L. J. M. C. 17 ;
Dears. & B. 113.

² *R. v. Dann*, 1 Moo. C. C.
424.

³ *R. v. Taylor*, 3 B. & C. 502.

⁴ 1 Hawk. c. 35, s. 3.

⁵ Leach, 712, 713.

⁶ *R. v. Welch*, Car. Cr. L. 56.

⁷ *R. v. Roche*, Leach, 134.

⁸ Steph. 289.

⁹ Steph. 289.

¹⁰ 1 Ch. Cr. L. 461.

¹¹ Leach, 708.

¹² 3 B. & C. 502.

¹³ *R. v. Scott*, Leach, 401.

¹⁴ *R. v. Dean*, Id. 476.

¹⁵ *R. v. Hedgcock*, 4 Ch. Cr. L.
530.

Auterfois convict.] *Auterfois convict* states, that the prisoner has been already convicted of the offence charged against him.¹

This plea must be in writing.² An erroneous judgment is no bar, as that the prisoner was sentenced to transportation for ten instead of seven years.³ Such a plea can only be proved by the record.⁴ A plea of *aut. conv.* stated the proceedings up to conviction to have taken place at a session of the peace duly holden by adjournment on Friday the 5th of July. The record stated that the indictment was found at a session holden on the 1st of July, and adjourned till the 2nd, and that the court re-assembled on the 4th, &c. (not proceeding with adjournment), and then adjourned to the 5th, when the prisoner was convicted. This plea was held bad, because, from want of an adjournment from the 2nd to the 4th, the proceedings were *coram non judice*, and a nullity.⁵ If there be a difference in a second indictment, as "part" instead of "part or parts," *aut. conv.* cannot be sustained.⁶

If a verdict should pass for the prisoner upon this issue, it cannot, whatever be its demerits, be set aside. The rule applies both to *aut. acq.* and *aut. convict.* As where the jury found for the prisoners contrary to the opinion of the judge upon a plea of *aut. acq.*, and without sufficient evidence of the identity of the offence. Here the judges being requested to say, whether there was any evidence to justify and support the verdict, and if not, whether such verdict was final and operated as a bar to further proceedings by the crown upon the second indictment, expressed at once their opinion that they were not a court of appeal, and that they could do nothing but discharge the prisoners.⁷ A plea of *auter. convict* before justices for an assault, under 9 Geo. 4, c. 31, was held to be a bar to an indictment for feloniously stabbing, the transaction being the same.⁸ But if two articles belonging to the same person be stolen at the same time, *aut. conv.* cannot be pleaded as to one which was not the subject of the first indictment, although the prosecution for the second at a subsequent assize ought not, as it seems, to be proceeded with.⁹

The court will assign counsel to put an informal plea of *aut. conv.* into a proper shape, and will give time to prepare it.¹⁰

Highways and bridges.] Both a parish and a private person may plead the general issue to indictments for the non-repair of highways or bridges, but such a plea goes only to the repair or non-repair. If the parish would discharge itself, it must plead

¹ 14 & 15 Vict. c. 100, s. 28; Under the old law, see *R. v. Scott*, Leach, 401.

² *R. v. Clarke*, 1 Fost. & F. 654.

³ *R. v. Drury*, 3 Cox, 544.

⁴ *R. v. Bowman*, 6 C. & P. 101.

⁵ *R. v. Bowman*, *ut supra*.

⁶ *R. v. Phillips*, 1 Jur. 427. Coining.

⁷ *R. v. Lea and others*, 2 Moo. C. C. 9.

⁸ *R. v. Walker*, 2 Moo. & Rob. 446. *R. v. Stanton and others*, 5 Cox, 324, Erle, J.

⁹ *R. v. Brettel*, Car. & M. 609.

¹⁰ *R. v. Chamberlain*, 6 Cox, 93.

prescription, or *ratione venune*. And although a private person may, under the circumstances, show his non-liability, yet if he choose to plead specially, he must show in particular who ought to repair, adding a traverse of his non-liability. Where, however, an Act of parliament throws the burden on others than the parish, a plea of not guilty will suffice.¹

Puis darrein continuance.] A plea *puis darrein* continuance, embraces matters arising after the continuance, but it must be pleaded in time, and may be set aside if not so tendered. Thus, a plea pleaded after the first day of Michaelmas Term, and entitled of the term generally under a continuance from Trinity Term to the first day of Michaelmas Term, is not good, and the court, upon that occasion, ordered that it should be taken off the file.² An instance of this plea was where the judge discharged the jury.³

Particulars.] The defendant is entitled to have the particulars of the specific charges against him where there is a general count. This application will be granted upon proper affidavits; as in embezzlement,⁴ nuisance,⁵ conspiracy.⁶ In an indictment for conspiracy eight counts set out particular charges, and the ninth was general. The defendant was held entitled to particulars of the specific charges intended to be relied on in support of the general count.⁷ Proper affidavits are necessary to show the facts, but it does not seem to be the practice to require an affidavit that the defendant does not know on what charges the prosecutor means to rely.⁸

Similiter.] It is enacted by 7 Geo. 4, c. 64, s. 21, that no judgment after verdict shall (amongst other things) be stayed or reversed for want of a *similiter*.

¹ 3 Camp. 222.

² *Lyttleton v. Cross*, 3 B. & C. 317.

³ *R. v. Newton*, 3 Car. & K. 85; 13 Q. B. 716; 18 L. J. M. C. 201. It was not actually put in, as the specific facts required appeared on the record without it. "An entry on the record in a general form may be sufficient to warrant the remand of the prisoner, and yet the prisoner may want certain specific facts to appear on the record in order to raise some question hereafter." 3 Car. & K. 89. *Conway v. Reg.* (in error), 7 Irish Law Rep. 149, cited, 2 Car. & K. 87, note (c). Here the necessity for discharging the jury did not appear on

the record, and although judgment was, in the first instance, given for the crown, that judgment was reversed by the Court of Queen's Bench. Now, in *R. v. Newton* the necessity did exist, and it appeared on the record, inasmuch as Coltman, J., was obliged to go to the Hereford assizes.

⁴ *R. v. Hodgson*, 3 C. & P. 422. *R. v. Bootyman*, 5 C. & P. 300.

⁵ *R. v. Curwood*, 3 Ad. & El. 815.

⁶ *R. v. Hamilton and others*, 7 C. & P. 448.

⁷ *R. v. Alleyne and others*, Dears. 32, n. in Q. B. Mich. 1851, cited there.

⁸ *R. v. Probert and others*, Id. 32, n.

CHAPTER X.

OF CRIMINAL AND OTHER INFORMATIONS.

Informations.] The subject of informations, which differ but little from indictments,¹ remains to be considered. Informations are—1. On the complaint or relation of some private person, and these are not granted without the leave of the Court of Queen's Bench.² 2. Upon penal statutes, in which case, where half the penalty goes to the informer and half to the Queen, they are called *qui tam*. 3. *Ex officio*, by the attorney-general, or, in case of a vacancy, by the solicitor-general, for libels on the government, offences calculated to endanger the crown, offences against public morals, and nuisances. 4. In the nature of *quo warranto*, to try the right to a franchise or office, which last is usually considered to be rather a civil than a criminal proceeding,³ so much so, that it is excepted from the clauses of the Act 60 Geo. 3 and 1 Geo. 4, c. 4.⁴ It follows that no information will lie for a capital crime, nor for misprision of treason.⁵

The first species of information is granted upon affidavits disclosing all the facts of the case.⁶ But the courts watch these cases with jealousy, and will not permit the rule to go upon light or trivial grounds.

Informations have been granted for the following amongst other causes:—For bribery;⁷ cheating and frauds;⁸ conspiracies, whether with intent to defraud or otherwise;⁹ extortion;¹⁰ malversa-

¹ 2 Hawk. c. 26, s. 4. See the statute 60 Geo. 3 & 1 Geo. 4, c. 4.

² 4 & 5 Wm. & M. c. 18, ss. 2, 6.

³ Steph. 269, 271.

⁴ Sect. 10.

⁵ 2 Hawk. c. 25, s. 3.

⁶ 4 Com. 312, n. 15, by Ryland.

⁷ *R. v. Mead*, 4 Jur. 1014. *R. v. Mayor of Tiverton*, 8 Mod. 186. Even although the complainant be equally culpable. Indeed, an information will then go against him. *Id. R. v. Taylor*, 12 Mod. 314. *R. v. Vaughan*, 4 Burr. 2494.

⁸ *R. v. Parris and others*, 1 Sid. 431. Anon. 7 Mod. 40. *R. v.*

Worrall, Skin. 108. *R. v. Knight*, 1 Salk. 375. *R. v. Hatcher*, 12 Mod. 355. *R. v. Pargiter*, Skin. 109. — *v. Deer*, 12 Mod. 325. *R. v. Hathaway*, Id. 556. Anon. Id. 495. *Pocock v. Thornicroft*, Id. 454.

⁹ Anon. 12 Mod. 248. *R. v. Sterling and others*, 1 Lev. 125; *R. v. Thorp*, Comb. 456; 5 Mod. 218, 221. *R. v. Blackie and another*, 7 Mod. 39. *R. v. Delaval and others*, 3 Burr. 1434. *R. v. Pierson and others*, Andr. 310.

¹⁰ *R. v. Roberts*, Carth. 226; 1 Show. 389; Holt's Ca. 363.

tions in office;¹ riot,² and breach of the peace;³ nuisance⁴; a rescous or rescue;⁵ a challenge to fight.⁶ However, if the prosecutor be the first sender of the challenge, the court will leave him to his ordinary remedy,⁷ although the challenge may be sent by the prosecutor to a *third person* connected with the party against whom he moved, and into a foreign country, so that no intention appeared to break the peace here.⁸ Assault,⁹ although the prosecutor had given his assailant into custody.¹⁰ The rule, however, was refused upon the granting of a *warrant* at his instance.¹¹

Libel¹² and slander.¹³ But, as in the case of challenges, the libellous attack must not appear on the other side, for, if so, the prosecutor will be left to the common remedy.¹⁴ A libel reflecting upon a verdict was inserted in a newspaper. A juror animadverted upon this libel, and sent copies of his letter to the other jurors, who had not expressed any disapprobation. It, moreover, appeared, that the jury might have expressed their dissent from the letter before its publication, which was signed by the foreman "for self and fellows." Under these circumstances, the court would not grant a criminal information, either on behalf of the foreman or of the jury.¹⁵ So where the prosecutor put himself into communication with the defendant in order to retort upon him, or obtain redress, the court would not interfere.¹⁶ Indeed, the court will not encourage retaliation,¹⁷ and if there be any doubt the court will not interfere. As where a magistrate assaulted an attorney who had previously conducted some proceedings against

¹ *R. v. Stukely*, 12 Mod. 493. *R. v. Borough of Abingdon*, Id. 308. *R. v. Chapman*, 6 Mod. 152. *R. v. Norman*, 1 Wils. 7. *R. v. Moravia*, 5 Vin. Suppl. 97; 14 Vin. Ab. 411, pl. 29.

² *R. v. Abraham and others*, Holt's Ca. 361; Comb. 141. *R. v. Prynn*, 5 Mod. 459. *R. v. Corporation of Bewdly*, Holt's Ca. 353.

³ *R. v. Sir J. Knight*, 3 Mod. 117. *R. v. Chaloner*, 12 Mod. 377.

⁴ *R. v. Clark*, 12 Mod. 615; Anon. Id. 398. *R. v. Taylor*, [Keeping gunpowder,] Str. 1167.

⁵ *R. v. Jourdan*, 14 Vin. Ab. 412, pl. 38; 12 Mod. 256. *R. v. Tracy*, Id. 556.

⁶ *R. v. Dove*, Comb. 477. *R. v. Chappel*, 1 Burr. 402. *R. v. Younghusband*, 4 Nev. & M. 850. C. delivered a message as from A. The court granted the rule against C., but not against A.

⁷ *R. v. Hankey*, 1 Burr. 316. *R. v. Larrieu*, 7 Ad. & El. 277.

⁸ *R. v. Larrieu*, ut supra.

⁹ *R. v. Gwilt*, 11 Ad. & El. 587; 8 D. P. C. 476. *R. v. Sir C. Holloway*, 8 Mod. 283.

¹⁰ *R. v. Gwilt*, ut supra.

¹¹ *Ex parte* gent. one, &c. 4 Ad. & El. 576, n.

¹² *R. v. Williams*, Comb. 18. *R. v. Sanders*, Tho. Raym. 201. *R. v. Staples*, 1 Sir Wm. Bl. 294; Andr. 228. *R. v. Waite*, 1 Wils. 22. *R. v. Benfield and another*, 2 Burr. 980. *R. v. Jolliffe*, 4 T. R. 284.

¹³ *R. v. Darby*, Carth. 14. And a refusal to grant such an information is no bar to an action for the same cause. *Wakley v. Cooke*, 11 Jur. 377.

¹⁴ *R. v. Nottingham Journal*, 9 D. P. C. 1042.

¹⁵ *R. v. Lawson*, 1 Q. B. 486; 1 Gale & D. 15.

¹⁶ *Ex parte Beauclerk*, 7 Jur. 373.

¹⁷ See *R. v. Peach and others*, 1 Burr. 548. And *post*, where the point is further examined.

him for an assault. It was suggested, that this assault had been committed from motives of revenge, but the court declined to grant the extraordinary remedy.¹ So, in a similar case, where a magistrate was concerned in an assault upon an attorney, the court decided in like manner, taking the distinction that the assault had not been committed by the defendant *qua* magistrate.² Certain resolutions were agreed to at a public vestry. G. was the chairman. They imputed sacrilege and felony to the clergyman with reference to some stones. The rector took steps to exculpate himself, and succeeded. A second meeting was called, when the imputation was withdrawn. But the rector moved for an information against G. The court said, that the whole parish might be indicted if they were to sanction the rule, and it was refused.³

An information will lie for disturbing a leet,⁴ but not for arresting a juror at the leet.⁵

It will lie against foreigners for hiring a boat in order to go abroad to assist the King's enemies.⁶ For writing a seditious letter.⁷ For kidnapping.⁸ For printing an obscene book.⁹ For an illegal impressment.¹⁰ For refusing leave to the coroner to come aboard a ship in order to take an inquisition.¹¹ For not taking oaths and acting as an alderman.¹² But, in such a case, too long a delay will favour the defendant, and, at all events, the town clerk is not the proper person to prosecute for neglect, because he ought to have been the first to discover the error.¹³ Again, for refusing the office of sheriff.¹⁴ But not that of common councilman, because of the byelaw.¹⁵

Informations on behalf of and against magistrates have been already adverted to.¹⁶ They deserve, however, a separate mention. If a magistrate neglects his duty in any particular, he is liable, as if he refuse to administer an oath where an Act requires it.¹⁷ So if he send a man to prison without due cause,¹⁸ or deny a warrant when it should be granted. But the court will make allowances for the justice, and if the prosecutor's intent be malicious, and with a tendency to hurt and disgrace the justice, the court will make the former pay the costs.¹⁹

¹ *R. v. Arrowsmith*, 2 Dowl. (N. S.), 704.

² *Ex parte Lee*, 7 Jur. 441.

³ *Ex parte Doveton*, 7 Cox, 16.

⁴ *Anon. Latch.* 198.

⁵ *Id.*

⁶ *R. v. Cowper and others*, Skin. 637; 5 Mod. 206.

⁷ *R. v. Laurence*, 12 Mod. 311.

⁸ *R. v. Willmore*, Skin. 47.

⁹ *R. v. Curl*, Str. 788; 1 Barnard, K. B. 29.

¹⁰ *R. v. Drew*, Str. 404.

¹¹ *R. v. Soleguard*, Andr. 231; Str. 1097.

¹² *R. v. Haines*, Skin. 583.

¹³ *R. v. Mayor and Burgesses of Malmesbury*, 8 Mod. 55.

¹⁴ *R. v. Larwood*, 1 Salk. 167.

¹⁵ *R. v. Hungerford*, 11 Mod. 142. But a *mandamus* would have been granted. See *Anon. Skin.* 114.

¹⁶ *Supra.*

¹⁷ *Smith v. Langham*, Skin. 60. *R. v. Newton*, Str. 413.

¹⁸ *R. v. Okey*, 8 Mod. 45. *R. v. Jones*, 1 Wils. 7.

¹⁹ *R. v. Nicholls*, 8 Mod. 337. *R. v. Thomas*, 1 Jur. 984.

An information will lie against a justice for a voluntary absence from the sessions, it not being competent to hold such sessions without him.¹ Justices held a petty sessions to search for vagrants. One confessed himself settled at A. They removed him thither. He returned the same day, when one of the justices present at the sessions convicted him without summons or oath. The court granted an information.² So it is if bail be improperly refused. But the impropriety does not consist in an erroneous judgment, but in acting from corrupt motives, as partiality, resentment, &c.³ Or from manifest misconduct, as the rejection of undoubtedly good bail on the score of political opinions. A rule was granted on this latter ground in a case of misdemeanor.⁴ Of course, it will be at the magistrate's peril if he should dissuade persons from becoming bail.⁵ So, under the old poor law, if justices removed a sick person to the endangering of his health.⁶ But not for the *bonâ fide* exercise of a legal right, whatever the mistake may be.⁷ Nor for the omission to administer an oath, or to give a caution to a dying man before the taking of his examination, nor for a mere display of temper.⁸ A county-court judge asked a defendant if he was ready to pay. The defendant was entering into an explanation of his circumstances when the judge ordered his immediate committal, but the court would not grant an information.⁹

On the other hand, in favour of magistrates, where the justice is the person aggrieved, it by no means follows that this criminal process is allowed. For words, as "He is an old rogue for sending his warrant for me." But the court thought that the speaker of them deserved to be bound to his good behaviour.¹⁰ The defendant called a magistrate a liar, and accused him of misconduct, because he had absented himself from an election of clerk to the magistrates, and he even threatened to repeat such conduct, but the court declined to interfere unless an intention to provoke a breach of peace could be detected.¹¹ Words unwritten, not spoken whilst the justice was acting, although they might have imputed malversation, fell within the same rule.¹² The distinction obtains, if words of such a nature or of an indecorous character are addressed to the justice when he is discharging his duty.¹³

Upon a dispute with a corporation concerning the taking of a tax from persons living out of the corporation as a contribution towards the building of a bridge, the court granted an information

¹ *R. v. Fox*, Str. 21.

² 5 Supp. to Viner, 98, pl. 8.

³ Fear or favour. *Re Fentiman*, 2 Ad. & El. 127; 4 Nev. & M. 128.

⁴ *R. v. Badger*, 6 Jur. 994. *R. v. Saunders*, 2 Cox, 249.

⁵ *R. v. Saunders*, ut supra.

⁶ Corruptly. *R. v. Edwards*, 8 Mod. 326.

⁷ *R. v. Blurton*, 8 Jur. 33.

⁸ *R. v. Barton*, 4 Cox, 353.

⁹ *Anon. in re*, 16 Jur. 995.

¹⁰ *R. v. Lee*, 12 Mod. 514. But an indictment lay, *Id.* *R. v. Pocock*, Str. 1157.

¹¹ *Chapman, ex parte*, 4 Ad. & El. 773. *Duke of Marlborough, ex parte*, 5 Q. B. 955; Dav. & M. 720.

¹² *Chapman, ex parte*, ut supra.

¹³ *Ex parte Mayor of Great Yarmouth*, 1 Cox, 122.

upon the ground of its being the more convenient method of trying the question.¹

The remedy for inducing paupers to remove to another parish is by indictment, not information.²

However, if overseers move a person whose condition will not allow of the removal, the information will be granted.³

Moreover, an information *qui tam*, or by the attorney-general, will lie for disobedience to an Act of parliament.⁴ But the statute to which the information applies must be properly recited.⁵ And it is to be observed, that the cases quoted respect statutes which give a penalty to the informer, or which the attorney-general may prosecute. For there cannot be an information of this kind where a statute barely prohibits the doing of any act.⁶

Generally speaking, "information lies for any offence against the public good, or against the first and obvious principles of common honesty."⁷ Again, informations will not be granted where a civil suit is depending for the same cause.⁸ And it is not an answer that the prosecutor is willing and offers to discontinue the action, as for an assault.⁹ But as, in the case of assault just referred to, the defendant thought fit to use violent language towards the prosecutor, the court bound him to his good behaviour.¹⁰

Mode of proceeding on either side.] In the case of a justice the court will not grant the information until they have the conviction before them,¹¹ nor unless it has been quashed.¹² Nor at the suit of the attorney-general, because he may file it *ex officio*.¹³

A private individual cannot move in person for a criminal information. It must be made by the law officers, or by a barrister.¹⁴ And the court refused an information against the proprietor of a newspaper for articles in his journal tending to encourage volunteering to serve in a foreign legion.¹⁵ The grounds for an information may be sufficient, and yet the proceedings may be imperfect, or the prosecutor may have so conducted himself as to preclude him from this remedy.

¹ *R. v. Mayor of Tenterden*, 8 Mod. 114. See also *R. v. The Surgeons' Company*, 1 Salk. 374.

² *R. v. Jennings*, 2 Dowl. & L. 741. *R. v. Overseers of Storwood*, 9 Jur. 448.

³ *R. v. Edwards*, 8 Mod. 326.

⁴ Anon. Skin. 110. *Leonard v. Beech*. *R. v. Galle*, Carth. 465; 1 Salk. 372; Holt, Ca. 363. *R. v. Lord Stafford*, Skin. 52.

⁵ *R. v. Dove*, Comb. 477.

⁶ *R. v. Crofton*, 1 Ventr. 63.

⁷ 2 Hawk. c. 86, s. 1.

⁸ *R. v. Phillips and others*, Ca. Temp. Hard. 241.

⁹ *R. v. O'Gorman Mahon*, 4 Ad. & El. 575.

¹⁰ 5 Ad. & El. *ut supra*.

¹¹ *R. v. Heber*, Str. 915.

¹² Cowp. 645, Aston, J.

¹³ *R. v. Phillips and others*, 3 Burr. 1564. *R. v. Philipps*, 4 Burr. 2089; 2 Hawk. c. 26.

¹⁴ *R. v. JJ. of Lancashire*, 1 Ch. Rep. 602.

¹⁵ *Crawshay, ex parte*, 8 Cox, 356.

The mode of proceeding varies in a slight degree upon different occasions. In libel, the affidavit denies the charge,¹ and, usually, the very words of the charge.² At all events, the applicant must disconnect himself from the subject-matter of the libel.³ And slanderous words in the affidavit will be fatal to the applicant.⁴ Yet, if other persons be attacked, the court will not forbear to grant the information, although the character of the principal party attacked be impeached upon showing cause.⁵ In libel, the publication must be sworn to, and it is not sufficient if the affidavits on the other side admit such publication.⁶ It is no objection that there are two distinct libels on two persons respectively, as on a son and daughter, with intent to disturb the father and them.⁷ Again, where the complaint is against a magistrate for an improper conviction, there must be an exculpatory affidavit on the magistrate's part, denying the charge.⁸ And a magistrate must have six days' notice. It is not enough that six days have elapsed between the notice and the application, if the notice contemplates an earlier application.⁹ And it makes no difference, as to notice, that other misconduct is charged against the justice in another capacity.¹⁰

Nevertheless, the rule concerning exculpatory affidavits must be read with this modification. If the person libelled is abroad or at a great distance, or is charged generally with misconduct, as with treason or theft, or with criminal language in parliament, the court will not require the affidavit.¹¹ "It would be absurd to require a prosecutor to swear that he was not a traitor or a thief."¹²

In libel, the affidavit upon which the information was founded described the defendant, the publisher of a newspaper, differently from the form contained in the affidavit at the stamp office, and although the rule had been twice enlarged, the court discharged it, and would not allow time to amend.¹³ There must be a correspondence in those particulars, and it extends to every other description.¹⁴

In libel, although all matters correspond according to the pro-

¹ *R. v. Miles*, Dougl. 284. *R. v. Haswell and another*, Id. 387, and *post*.

² Steph. 269.

³ *R. v. Taylor*, 1 Jur. 53.

⁴ *R. v. Byrne*, 2 Nev. & P. 152.

⁵ *R. v. Gregory*, 1 Per. & D. 110; 8 Ad. & El. 907.

⁶ *R. v. Baldwin*, 8 Ad. & El. 168; 3 Nev. & P. 342. An affidavit of printing and inserting a libel in a newspaper, a copy of which is annexed, is not a sufficient publication to warrant a rule nisi.

⁷ *R. v. Benfield and another*, 2 Burr. 980.

⁸ *R. v. Webster*, 3 T. R. 388.

⁹ *R. v. Fentiman*, 2 Ad. & El. 127; 4 Nev. & M. 126.

¹⁰ *R. v. Heming*, 5 B. & Adol. 666; 2 Nev. & Man. 477.

¹¹ *R. v. Haswell and another*, Dougl. 387. *R. v. Jennison*, Id. 390, cited.

¹² Id. 390, Lord Mansfield.

¹³ *R. v. Francis*, 4 Nev. & M. 251.

¹⁴ *Mayne v. Fletcher*, 9 B. & C. 382.

visions of the particular law which applies, as the 6 & 7 Will. 4, c. 76, s. 8, yet if the rule be not drawn up upon reading the newspaper, or if the newspaper be neither annexed to the affidavit, nor filed, the proceeding will not be good either at common law nor by the statute, and the court will not suffer the newspaper to be shown to them upon moving to make the rule absolute.¹ Upon an application for sending a challenge, if copies of the letter are verified, the court will grant the rule without having the original before them.² Of such verification there must be good evidence, such as might warrant a grand jury in finding a true bill. The information, therefore, of other persons will not suffice to prove handwriting, the party swearing not being able to speak from his own knowledge.³ Nor can affidavits be read which do not relate to the same information, as an affidavit in a motion against another, because, if false, the swearer cannot be prosecuted.⁴

Informations are filed in the Queen's Bench only, excepting when they relate to the revenue, and then they are brought in the Exchequer.⁵

When.] The court does not encourage delay. As if a whole term should be permitted to intervene between the fact and the application.⁶ Or in libel, with full knowledge, if the second term after the publication should be allowed to pass.⁷ Indeed, the motion should be made within a reasonable time after such second term has commenced.⁸ Unless, indeed, the prosecutor swears that he had no knowledge of the libel so as to enable him to take the earlier course.⁹ And in the case of a magistrate, it is a rule to apply sufficiently early in the second term to enable the justice to show cause in the course of that term.¹⁰ At one time, the intervention of an assize would prevent this application in the second term.¹¹ But more recently another doctrine has prevailed, and the motion was granted after the assize, time being allowed to show cause in the same term.¹² Twelve months are too late, although the prosecutor should swear that he had not heard of the fact till just before the application.¹³ And the last day of term is usually too late.¹⁴ Although it seems that at one time the court would grant the rule for misconduct during the term at the end

¹ *R. v. Woolmer*, 12 Ad. & El. 422; 4 Per. & D. 137.

² *R. v. Chappel*, 1 Burr. 402.

³ *Ex parte Williams*, 5 Jur. 1133.

⁴ *R. v. Mayor of Thetford*, 11 Mod. 141.

⁵ 1 Ch. Cr. L. 844.

⁶ *R. v. Hext*, 4 Jur. 339.

⁷ *R. v. Jollie*, 4 B. & Adol. 867; 1 Nev. & M. 483.

⁸ *R. v. Jollie*, ut supra.

⁹ *R. v. Jollie*, ut supra.

¹⁰ 13 East, 322. *R. v. Marshall and another*; and *R. v. Thomas*, is cited there to the same effect. *R. v. Morice and others*, Id. 270, n.

¹¹ *R. v. Harries and another*, 13 East, 270.

¹² *R. v. Saunders*, 10 Q. B. 484.

¹³ *R. v. Bishop*, 5 B. & Ald. 612.

¹⁴ *Ex parte Tanner*, 3 Jur. 10.

of the term in the case of magistrates, although not for misconduct before the term.¹ But the reporter adds, that a similar application for misconduct was refused almost immediately afterwards.²

With respect to the material circumstance of knowledge, there is a distinction between the case of a magistrate and an individual. For this want of knowledge will help the prosecutor where he charges one who is not a magistrate, even if he should delay beyond the second term, provided he do not procrastinate too long.³ Whilst, on the other hand, where the knowledge had been full early in Easter Term, but the party neglected to move against the magistrate till the last day but three of Trinity Term, the court refused the rule.⁴ A libel appeared in May; the party heard of it in July, but took no notice till November, and did not move till January. The libel affected the character of the applicant, and the court held, that he should have vindicated it more speedily.⁵ Nor will the information be granted should the prosecutor have adopted another mode of redress, as in the case of a county court judge, where the prosecutor sent in a memorial to the lord chancellor to remove the judge.⁶

Affidavit and jurat.] The correctness of the affidavit must be attended to, for the court will not encourage additional affidavits. The county in which a deponent is sworn must appear in the affidavit as well as the jurat. Moreover, the court will refuse to enlarge the rule in order that the affidavit may be resworn.⁷ However, according to an observation of Patteson, J., it would seem to be sufficient if the affidavit should contain the county, though not the jurat,⁸ although the court has, more than once, refused to allow additional affidavits, or to reswear affidavits.⁹ The judges will view a false affidavit differently. The rule for a criminal information being discharged upon the strength of an oath swearing to the truth of a libel, the party was, subsequently, indicted for perjury, and he absconded. Upon this the court granted another rule *nisi*, and made it absolute.¹⁰

Certain requisitions must be complied with under the statute.

¹ *R. v. Smith*, 7 T. R. 80.

² *R. v. Beavis and others*, Id. 242.

³ *R. v. Jollie*, ante. See *R. v. Hartley*, 4 B. & Adol. 869, n.

⁴ *R. v. Harris*, 8 Jur. 516.

⁵ Rule refused. *R. v. Murray*, 1 Jur. 37. However, in a case where the rule was discharged, the prosecutor was not thereby debarred from bringing an action in another court for the publication of the same libel. *Wakley v. Cooke*, 16 Mees. & W. 822.

⁶ *R. v. Marshall*, 24 L. J. Q. B.

242.

⁷ *R. v. Cockshaw*, 2 Nev. & M. 378.

⁸ 2 Nev. & P. 152; 1 Jur. 657.

⁹ *R. v. Francis*, 4 Nev. & M. 251. *Ex parte Williams*, 5 Jur. 1133. *R. v. Smithson*, 4 B. & Adol. 861.

¹⁰ *R. v. Eve*, 5 Ad. & El. 780; 1 Nev. & P. 229.

Thus by 4 & 5 Wm. & M. c. 18, s. 2, the clerk of the crown in the Court of Queen's Bench for the time being shall not, without express order, to be given by the said court in open court, exhibit, receive, or file any information for any misdemeanor, or issue out any process thereupon, before he shall have taken or shall have delivered to him a recognizance from the person procuring such information to be exhibited, with the place of his abode, title or profession, to be entered, to the person against whom such information is to be exhibited, in the penalty of 20*l.*, that he will effectually prosecute such information, and abide by and observe such orders as the said court shall make; which recognizance the said clerk of the crown, and also every justice of any county, city, franchise, or town corporate (where the cause of any such information shall arise), are hereby empowered to take; after the taking whereof by the said clerk of the crown, or the receipt thereof from any justice, the said clerk of the crown shall make an entry thereof upon record, and shall file a memorandum thereof in some public place in his office, that all persons may resort thereunto without fee; and in case any person against whom any information for any of the causes aforesaid shall be exhibited shall appear thereunto, and plead to issue, and the prosecutor of such information shall not, at his own proper costs and charges, within one whole year next after issue joined, procure the same to be tried, or if upon such trial a verdict pass for the defendant, or in case the said informer procure a *noli prosequi* to be entered, then in any of the said cases the said Court of Queen's Bench is hereby authorized to award to the said defendant his costs, unless the judge before whom such information shall be tried shall, at the trial of such information, in open court, certify upon record that there was a reasonable cause for exhibiting such information; and in case the said informer shall not within three months next after the said costs taxed, and demand made thereof, pay to the said defendant the said costs, then the said defendant shall have the benefit of the said recognizance to compel him thereunto: provided by sect. 6, that nothing in this section contained shall extend to any other information than such as shall be exhibited in the name of Her Majesty's coroner or attorney in the Court of Queen's Bench for the time being (commonly called the Master of the Crown Office).

This certificate of the judge must be entered upon the *postea*.¹ Costs will not be required beyond the provisions of the Act. Therefore, an additional security for costs upon the granting of a criminal information against magistrates has been refused.² And the defendant is only entitled to the amount of the prosecutor's recognizance, either when he succeeds, or in the event of there being no trial.³ After information filed, it seems too late to re-

¹ Comb. 345; Holt, C. J.

190. See *R. v. Filewood and another*, Id. 145.

² *R. v. Brooke and others*, 2 T. R.

³ *R. v. Savile*, 18 Q. B. 703.

quire security for costs.¹ A rule *nisi* was served, but it did not reach the defendant till the day before argument; the court enlarged the rule.²

Should there be an information *ex officio*, proceedings upon a prior information against the same individual for the same offence will be stayed.³

Defendant's answer.] The information being granted *nisi*, it remains for the defendant to show cause. He may do this successfully by disproving the offence attributed to him to the satisfaction of the court. Or he may say that he has been acquitted upon an indictment for the same cause. Or that it is intended to try a civil right. Or that the complaint is trifling, vexatious, or oppressive.⁴ Or that the parties prosecuting are confederated in a common act of illegality, as where the applicant and the defendant were common cheats.⁵ Or that the applicant has been equally violent or guilty with the defendant. But the affidavits in answer should be carefully purged from any angry matter, for the court, to say the least, will then censure the defendant for his want of temper.⁶

There is a difference between public interests and private animosity. In a case of bribery, it appeared that the only material affidavit which the defendant had not contradicted was that of his being a *particeps criminis*, and *R. v. Peach* was relied on for him. But the court took the distinction above noticed, and made the rule absolute upon the ground of public policy.⁷

The rule being granted, the applicant should not be hasty in his prosecution, especially if he knows that there is to be an opposition by the defendant. A prosecutor obtained a rule to show cause why he should not be at liberty to enter an appearance and sign judgment. He did this because the rule had been enlarged upon the conditions of the defendant appearing and pleading immediately. But the defendant had not had time to instruct his London solicitors, and the court said, that he ought to have been allowed a reasonable time. However, they made the rule absolute, but awarded costs against the prosecutor.⁸ The

¹ 4 & 5 Wm. & M. c. 18; 12 Mod. 325. Perhaps the matter might have been pleaded. Holt, C. J.

² *R. v. Hely*, 10 Jur. 1009.

³ *R. v. Alexander*, 3 Ch. Burn, 458. And see *Att.-Gen. v. Brooksbank*, 1 Y. & Jer. 439.

⁴ 2 Hawk. c. 26, s. 8.

⁵ See *R. v. Peach and others*, 1 Burr. 548.

⁶ *R. v. Burn*, 1 Jur. 657.

⁷ *R. v. Steward*, 2 B. & Adol. 12. The affidavits upon showing cause

may be entitled thus: *The King v. A.* (the defendant). *R. v. Jones*, Str. 704. They may, according to some authorities, be entitled, or not. *R. v. Robinson*, 5 Suppl. 10 Viner, 99, pl. 7, in the note. *R. v. Harrison and others*, 6 T. R. 60. According to others, they must be entitled in order to show a cause in court. *R. v. Pierson*, Andr. 312. And see *King, q. t. v. Cole*, 6 T. R. 640. *Clark v. Cawthorne*, 7 T. R. 321.

⁸ *R. v. Muntz*, 2 Jur. 538,

better way is to serve a copy upon the defendant, and to show him the original, and then an affidavit of service can safely be made, without which the rule cannot be absolute.¹

The information being now on foot, the court will not quash it on motion. The defendant must demur, although there be a fault in the body of it.² But it is said that when the attorney-general files an information *ex officio*, it may be quashed, for the crown pays no costs, whereas it is different in the case of a private person.³ Nevertheless, in the matter of the attorney-general, there are authorities the other way.⁴ The attorney-general, however may amend on payment of costs,⁵ yet, if the defect be as to the jurisdiction, the court will quash the information.⁶ And, by consent, the court has been known to quash informations for perjury.⁷ Supposing that a *nol.-pros.* be entered in consequence of the defendant's absence, there cannot be another information without a new rule. And the new rule will only be granted upon payment of costs.⁸

Five several rules cannot be followed by a *joint* information against five several defendants.⁹

As to the time of pleading, it is said, that in Middlesex a defendant shall have all the term to plead, where he is bound by recognizance to appear on the first day of term. In any other county he shall have till the next term to plead.¹⁰

By 60 Geo. 3 and 1 Geo. 4, c. 4, s. 8, in all prosecutions for misdemeanors instituted by the attorney or solicitor general, the court shall, if required, make order that a copy of the indictment shall be delivered after appearance, upon application, and free from expense, unless he or his attorney shall have previously had a copy.

Pleading.] Regularly, the same accuracy is required in an information as in an indictment.¹¹ Therefore, where there was an information against a foreigner for extortion, the charge of extorting from divers of the King's subjects was held too general and uncertain, for a single offence should have been laid and ascertained, and, for want of this, judgment was arrested.¹² But in the case of a riot, *riotose et routose* was deemed sufficient without saying

¹ Steph. 269.

² 14 Vin. Ab. 415, pl. 1.

³ *R. v. Fountain*, 1 Sid. 152. The crown pays costs under the informations and proceedings particularly mentioned in 18 & 19 Vict. c. 90, but not otherwise, therefore not here. The cases decided upon that Act do not relate to *these* informations. They are, 26 L. J. M. C. 111; 27 L. J. Ch. 511; Id. 837.

⁴ *R. v. Gregory*, 1 Salk. 372.

⁵ *Attorney-General v. Ray*, 11 Mees. & W. 464; 1 Dowl. & L. 278.

⁶ *R. v. Williams*, 1 Burr. 385.

⁷ *R. v. Green*, *R. v. Roper*, Str. 1072.

⁸ *R. v. Warburton*, 12 Mod. 319; Anon. Id. 325.

⁹ *R. v. Heydon and others*, 3 Burr. 1270.

¹⁰ Anon. 2 Salk. 514. See *R. v. Hertford Town*, Carth. 503; 1 Salk. 374.

¹¹ 2 Hawk. c. 26, s. 4.

¹² *R. v. Roberts*, Carth. 226. Comb. 193.

that the defendants assembled with the intent to commit a riot.¹ The word "wilfully" must not be left out, when the offence is for misapplying monies.²

In informations upon statutes, it is usual to set out everything requisite to bring the offence within the particular Act,³ and the words "*contra formam statuti*," will not aid substantial defects.⁴ Moreover, if there be any exceptions in the enacting clause of a statute, the information should negative all the exceptions. As where certain persons were, by virtue of a statute, permitted to buy raw hides. The defendant was convicted upon an information for disobeying the statute, but the information did not negative the exceptions in favour of certain persons, and the court quashed the conviction.⁵

And if an exception be negatived when the statute does not require it, that part of the information will be surplusage.⁶

If A. be in prison for defrauding the revenue, this imprisonment is no satisfaction to the crown, so as to prevent another information against B. for the same offence, as for unshipping goods. If a defence at all, it should have been pleaded *puis darrein continuance*.⁷

A criminal information is not an "action depending" within 1 Will. 4, c. 22. Therefore an order for the examination of a witness upon interrogatories will not be made in such a matter.⁸

It is said, that even after evidence given, the King's counsel may withdraw the information, and try it over again without the consent of the party.⁹

In an information at the suit of the crown, notice of trial was given in Trinity Term, 1838, but it was afterwards countermanded.

The defendant obtained a rule in Hilary Term, 1842, and set down the cause for trial at the sittings after Easter Term, but the court discharged the rule.¹⁰

In an information by the attorney-general, a tales may be prayed by the crown, although the attorney-general be not present, and in the absence of his warrant, but it is not so in the case of the defendant.¹¹ A criminal information was moved against W. by E.; W. in answer filed affidavits containing fresh charges. E. also sued C. for libel, and C. pleaded a justification similar to

¹ *R. v. Soley*, 11 Mod. 117. For further cases, see 14 Vin. Ab. 415, E. 4, 417, F. pl. 7, 8, 11. Information upon 8 & 9 Will. 3, c. 20, s. 63; 5 Vin. Supp. 100, F. pl. 1. Information on 10 Ann. c. 17, s. 21, for mooring a merchant ship.

² *Carpenter v. Mason*, 12 Ad. & El. 629; 4 Per. & D. 439. Information on 4 & 5 Will. 4, c. 76, s. 97. Misapplication of monies by overseers.

³ See *Holden, q. t. v. Weedan*, Bunb. 177. See other informa-

tions upon statutes. 14 Vin. Ab. 417, F. pl. 1, 2, 4, 5, 6.

⁴ *R. v. Rook*, Hardr. 20.

⁵ *R. v. Pratten*, 6 T. R. 559.

⁶ *R. v. Hall*, 1 T. R. 322.

⁷ *Attorney-General v. Popplestone*, Bunb. 311.

⁸ *R. v. Upton St. Leonard's*, 17 L. J. M. C. 13.

⁹ Anon. 1 Ventr. 28.

¹⁰ *R. v. Ray*, 9 Mees. & W. 760.

¹¹ *Attorney-General v. Parsons*, 2 Mees. & W. 23; 2 Cr. & J. 279.

W.'s fresh charges. The court would not stay hearing the argument against W. till the action against C. had been tried.¹

Sometimes the court considers it a sufficient punishment to inflict costs, as in a case where the charge was for carrying a challenge. The defendants entered into an undertaking to this effect.² There is no appeal from the Court of Queen's Bench under the Common Law Procedure Act in *criminal cases*.³

Informations upon penal statutes.] Under penal statutes, it is necessary that the whole or part of the penalty should be given to him who will sue for it,⁴ although, as to the offence itself, an immediate damage to the party connected with an injury to the public peace will warrant an information *qui tam*.⁵ The King may sue for the whole of a penalty, if the common informer has not commenced his suit *qui tam*.⁶ And where a statute gives a penalty to the King and to him who will sue for it, the informer cannot sue if the King has already exhibited his information.⁷ And yet, in general, the proceeding is carried on by a mere informer, who claims the penalty prescribed by the Act.

If an informer should sue, another informer cannot sue for the same thing,⁸ and it is said, that if there be two informations on the same day for the same offence, the court cannot give judgment upon either.⁹ And herein consists the difference between informations by the attorney-general, and those *qui tam* by an informer. In the former case the pendency of the first information would be no plea to the second.¹⁰

By 21 Jac. 1, c. 4, s. 1, the proceedings on a penal statute are declared to be by action, bill, plaint, information, or indictment, and the information must be confined to the county where the offence has happened, whether the trial be before justices of assize, &c., or justices of quarter sessions. And the same process is to be awarded as in an action of trespass *vi et armis* at common law. And, moreover, all other informations, either by the attorney-general or a common informer, or otherwise, are to be void. Where the forfeiture is given to the crown alone, two years were the prescribed limit for bringing the information; but where the informer or other person is to participate, it must have been brought within one year.¹¹ But the statute of Elizabeth is repealed in this respect of limitation,¹² and it seems, that whether the crown or the

¹ *R. v. Willmer*, 15 Q. B. 50.

² *R. v. Morgan and another*, Dougl. 314.

³ *R. v. Leatham*, 8 Cox, 498. The court discharged a rule for a new trial after a conviction upon a criminal information filed by the attorney-general. The right to appeal was at once denied.

⁴ 2 Hawk. c. 26, s. 17.

⁵ *Id.*

⁶ *R. v. Hymen*, 7 T. R. 536.

⁷ *R. v. Clark and others*, cited, *Id.* *Attorney-General v. —*, Hardr. 201.

⁸ *R. v. Harris*, Cro. El. 261. *Green v. Edwards*, *Id.* 326. *Chalchman v. Wright*, Noy. Rep. 118. Anon. Styl. 417. *Hutchinson v. Thomas*, 2 Lev. 141.

⁹ *Pie v. Cook*, Hob. 128.

¹⁰ Dougl. 240.

¹¹ 31 El. c. 5, s. 5, Godb. 158.

¹² 11 & 12 Vict. c. 43, s. 36.

party be a participator, the time is confined to six calendar months from the time when the matter of complaint arose.¹ But should the informer make default, it is still competent for the crown to prosecute within two years,² and so it is if the time as to the informer has lapsed. In the last case the King shall have judgment for his part.³ A party grieved, however, is not bound to the year, for the restraint affects common informers only.⁴ The legislature requires an oath previously to the exhibition of the information that the offence was committed within the year.⁵ There must be likewise a special note of the day, month, and year of exhibiting the information.⁶

The prosecution of an offence at common law remains as before,⁷ and so it is with regard to a party grieved.⁸ None but the party grieved can sue in a case where, but for the grief, he could not, by reason of some misdemeanor by him committed, "follow or pursue any suit upon any penal statute."⁹ Notwithstanding the above-mentioned statute of James the First, the courts, looking to the 18 El. c. 5, have determined that the proceedings *qui tam* are confined to the Court of King's Bench, where the liberty given is to sue in a court of record, and that, in such a case, they cannot be brought before justices of assize, of oyer and terminer, or justices of the peace.¹⁰ On the other hand, where there is a concurrent jurisdiction, the jurisdiction of the superior courts is excluded.¹¹ The stat. 21 Jac. 1, c. 4, restrains actions under 18 El. c. 5, from being brought at Westminster, unless for offences arising in Middlesex, where these courts sit.¹² The contrary was once holden.¹³ The proceedings in these courts are by indictment or information.¹⁴ It is said that this statute of 21 Jac. 1, is confined to such statutes as were in being when it was made;¹⁵ that it gives no jurisdiction to the inferior courts where

¹ 11 & 12 Vict. c. 43, s. 11, and see s. 10, at the end.

² 31 El. c. 5, s. 5.

³ 2 Hawk. c. 26, s. 46.

⁴ *Broughton v. Prince*, 3 Leon. 237.

⁵ 21 Jac. 1, c. 4, s. 3.

⁶ 18 El. c. 5, s. 1, which in this particular does not seem to have been repealed by 11 & 12 Vict. c. 43, s. 36. See also rules and orders of the Exchequer, 5 Vin. supp. 100, E. pl. 11.

⁷ 2 Hawk. c. 26, s. 44.

⁸ *Id.* s. 47.

⁹ 31 El. c. 5, s. 1. This is not repealed.

¹⁰ "Pœnal Leys," Sir Wm. Jones, 193. *Pheasant v. Finch*, Tho. Raym. 394. *Shipman, q. t. v.*

Henbest, 4 T. R. 109; 1 Saund. 312, (note 1,) citing other cases.

¹¹ *Jeffery, q. t. v. Coles*, Willes, 634; and see 635, note. "The true rule is, that in all penal laws antecedent to 21 Jac. 1, where the justices of assize and superior courts had a concurrent jurisdiction, the suit must be commenced before justices of assize and sessions, and not before the justices at Westminster." *Id.* 635, note (2). This was an action to recover a penalty under 5 & 6 Ed. 6, c. 14, and judgment of nonsuit was entered.

¹² 1 Saund. 312, (note 1,) citing several cases.

¹³ *Id.* citing the cases.

¹⁴ *Id.* citing the cases.

¹⁵ 1 Saund. 312, *n.* citing the cases.

they had none before;¹ that where the informer has an election, he may sue for the penalty in the inferior courts;² but that the informer cannot sue for the penalty, unless the election is clearly given, in the superior courts.³ The form of a declaration as for 20*l.* given by a statute has no weight when the jurisdiction is express, as to the amount of 20*l.* before justices, and beyond 20*l.* to the courts at Westminster.⁴ The informer must have then exhibited his suit in his own person, and so pursue it, or by his attorney in court,⁵ but now any complaint or information may be laid or made by the complainant in person, or by his counsel or attorney, or other person authorized in that behalf;⁶ whereas the defendant may appear by attorney,⁷ that is to say, if he be a natural-born subject, or a denizen.⁸ Neither an infant nor a corporation can sue as a common informer.⁹ In the Exchequer, if the defendant be in custody, he may have a *habeas corpus* to enable him to defend in person.¹⁰

Venue.] Unless for champerty, buying titles, extortion, usury, &c., the venue must be laid in the county where the offence happened.¹¹ If, upon the general issue, the offence shall not be so proved, the defendant shall be acquitted;¹² and although the assizes or sessions are mentioned, there may be an information in the King's Bench or Exchequer for an offence happening in the same county *where those courts are sitting*.¹³ But oath must be made concerning the county,¹⁴ or the court will set aside the process, although they will not deem the whole proceedings erroneous,¹⁵ yet they will not do *this* after verdict.¹⁶ And no jurisdiction is given by the 21 Jac. 1, c. 4, to courts which had no jurisdiction before.¹⁷ Indeed, if any clause of a previous statute (as 18 El. c. 5), should give a remedy in any court of record, the informer may sue in Westminster Hall, notwithstanding the statute,¹⁸ and the course by *certiorari* or writ of error is not taken away.¹⁹ Nor will the return to a writ of *certiorari* containing amendments purge the original errors, but proceedings will be stayed.²⁰

¹ 1 Saund. 312, *n.* citing the cases.

² *R. v. Ferris*, *Id.*, near the end.

³ *R. v. Ferris*, 1 Saund. 312.

⁴ *Fleming, q. t. v. Bailey*. See generally 1 Wms. Saund. 312, note 1, in *R. v. Kilderby*.

⁵ 18 El. c. 5, s. 1.

⁶ 11 & 12 Vict. c. 43, s. 10, at the end.

⁷ 2 Hawk. c. 26, s. 53; 29 El. c. 5, s. 21, not repealed.

⁸ 31 El. c. 10, s. 20, at the end, not repealed.

⁹ 2 Hawk. c. 26, s. 51.

¹⁰ *Attorney-General v. Cleave*, 2 D. P. C. 668.

¹¹ 31 El. c. 5, s. 4, not repealed; 21 Jac. 1, c. 4, s. 1.

¹² 21 Jac. 1, c. 4, s. 2.

¹³ 2 Hawk. c. 26, ss. 30, 34.

¹⁴ 21 Jac. 1, c. 4, s. 3.

¹⁵ 2 Hawk. c. 26, s. 38.

¹⁶ *Leigh, q. t. v. Kent*, 3 T. R. 362, overruling *White, q. t. v. Boot*, 2 T. R. 274.

¹⁷ 2 Hawk. c. 26, s. 36.

¹⁸ *Id.* s. 39.

¹⁹ *Id.* s. 37.

²⁰ 5 Vin. Supp. 89, E. 6, citing *R. v. Holmes*, 1 Burr. Qu.?

Other matters.] If the plaintiff has put in his information, the penalty becomes appropriated to him, although the party is not served with process to answer it.¹ It has been said, that the structure of informations is much the same with that of indictments.² But it may be observed, that the informer may have judgment for as much of the information as is well laid,³ provided there be no repugnancy so as to affect the general charge.⁴ The very sum due to the informer should be demanded, although a mistake in this respect will not deprive the King of his share.⁵ The conclusion need not to be "against the peace," &c.,⁶ and if it say, "to the great damage," &c. without adding "of the plaintiff," it is still good.⁷

Answer.] In answer to the charge, the defendant should plead *nil debet* to the informer, and also to the King.⁸ And possibly, not guilty may be a good plea;⁹ but, if there be more than one defendant, the pleas should be several.¹⁰ And if the offence be alleged from a matter of record, such a plea will not suffice.¹¹ Moreover, there cannot be double pleading in *qui tam*, for the statute, 4 Ann. c. 16, does not extend to penal suits.¹² But by 21 Jac. 1, c. 4, s. 4, the defendant may plead the general issue, and give the special matter in evidence;¹³ and *non est factum* and conditions performed have been allowed in the Exchequer upon an information of debt upon a bond.¹⁴

A conviction, an acquittal, and a *bona fide* release are, if well pleaded, answers to this action.¹⁵ So, a pardon by the King unless the informer has actually commenced his suit before the King, in which case the King cannot interfere.¹⁶ But the King may not bar the suit of the party grieved, nor proceed in it after the death of the plaintiff.¹⁷ A plea of priority of suit should be placed upon the record,¹⁸ and then the plaintiff may reply *nul tiel* record, so that if the defendant should be desirous of showing a recovery against him at another time, the exact day of such recovery must be set forth.¹⁹

Another answer is, that a penal suit is depending for the same offence, but this is a plea in abatement.²⁰ It is no objection to this

¹ Godb. 158.

² See *ante*, 2 Hawk. c. 26.

³ Id. c. 26, s. 19.

⁴ Id.

⁵ Id. s. 21.

⁶ Id. c. 25, s. 92.

⁷ Id. c. 26, s. 21.

⁸ Id. c. 26, s. 66; and note, that the modern rules of pleading do not apply to 21 Jac. 1, c. 4, so that *nil debet* continues to be a good plea. *Earl Spencer v. Swannell*, 3 Mees. & W. 154; 6 D. P. C. 326.

⁹ *Coppin, q. t. v. Carter*, 1 T. R. 462.

¹⁰ 2 Hawk. c. 26, s. 67.

¹¹ 2 Hawk. c. 26, s. 68.

¹² *Morgan v. Luckup*, Str. 1044. *Heyrick v. Foster*, 4 T. R. 701. *Law v. Crowther*, 2 Wils. 21.

¹³ 2 Hawk. c. 26, s. 69.

¹⁴ *Attorney-General v. Snow*, Bunb. 96.

¹⁵ 2 Hawk. c. 26, s. 64.

¹⁶ Id.

¹⁷ Id.

¹⁸ *Breden, q. t. v. Harman*, Str. 701.

¹⁹ *Jackson, q. t. v. Gisling*, Str. 1169.

²⁰ 2 Hawk. c. 26, s. 63.

plea that the offence in the subsequent suit is laid on a subsequent day, nor is a mistake of the day material, if the first suit has been really commenced.¹ It is said, indeed, that two informations on the same day may mutually abate each other.²

By 4 Hen. 7, c. 20, a plea of recovery in a former suit, which recovery shall turn out to be fraudulent or covinous, shall subject the defendant to two years' imprisonment, and the plaintiff, if he has sued *bonâ fide*, shall recover.³ With respect to the replication, the attorney-general is entitled to make it to a special plea at Westminster. Before justices of assize, the clerk of assize shall plead it.⁴ So it is in the case of the general issue in the courts of King's Bench and Exchequer.⁵ Although, if the attorney-general refuse, the informer himself may plead it.⁶ And it seems, that he may demur without mentioning the attorney-general.⁷ In actions the replication is made by the plaintiff only.⁸

The attorney-general has the liberty of amending his information, provided that he do not harass the subject.⁹ He must also sign a demurrer to a plea, and it is not necessary that a matter of law should be stated in the margin.¹⁰

With respect to the information *ex officio*, the attorney-general is not bound to proceed either upon oath or motion, but he usually acts upon affidavits. Nor needs he, nor a witness for the crown, to enter into a recognizance to prosecute with effect.¹¹ And there are no costs on either side.¹²

The time of proceeding is, by 60 Geo. 3 and 1 Geo. 4, c. 4, s. 8, limited, for in case any prosecution for a misdemeanor, instituted by Her Majesty's attorney or solicitor general, shall not be brought to trial within twelve months next after the plea of not guilty shall have been pleaded therein, it shall be lawful for the court in which such prosecution shall be depending, upon application to be made on the behalf of any defendant in such prosecution, of which

¹ 2 Hawk. c. 26, s. 63.

² Id.

³ See 2 Hawk. c. 26, s. 64.

⁴ Id. s. 72.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.; and see 2 Curw. Hawk. 387. As to the issue and trial, see 2 Hawk. c. 26, s. 73, *et seq.*; 14 Vin. Ab. 417, F. pl. 3. The costs, 2 Hawk. c. 26, s. 56, &c. *R. v. Heydon*, 3 Burr. 1304. The verdict, 2 Hawk. c. 26, s. 75. The judgment, Id. s. 76; as to compounding, s. 77.

⁹ *R. v. Holland*, 4 T. R. 457. As to informations in the Exchequer, see 14 Vin. Ab. 419, pl. 10; 5 Vin. Supp. E. 100, pl. 10. As to

the information of intrusion, see *Nannge v. Rowland*, ap. *Ellis and others*, Cro. Jac. 212; 14 Vin. Ab. 413, c. 3. *Att.-Gen. v. Parsons*, 2 Mees. & W. 23; 5 D. P. C. 165. See also Tancred on *Quo Warranto*. As to particular penalties, see *Marks v. Benjamin*, 2 M. & Rob. 225, on 25 Geo. 2, c. 36, s. 2. Masquerades, &c. Bail. by Scott. 7 Mees. & W. 93. [Pilot Act.] 6 Geo. 4, c. 125, s. 70. *R. v. Tuddenham*, 9 D. P. C. 937. Lotteries. *Ex parte Higginbotham*, 9 D. P. C. 200. Papers without printer's name.

¹⁰ *R. v. Woollett*, 3 D. P. C. 694. See Hil. T. 4 Will. 4, Rule 3.

¹¹ 1 Ch. Cr. L. 846.

¹² Steph. 316. See also *R. v. Phillips and others*, 3 Burr. 1564.

application twenty days' previous notice shall have been given to Her Majesty's attorney or solicitor general, to make an order, if the court shall see just cause so to do, authorizing such defendant to bring on the trial in such prosecution; and it shall thereupon be lawful for such defendant to bring on such trial accordingly, unless a *noli prosequi* shall have been entered in such prosecution. The court will not stay proceedings upon a suggestion that a statute is about to pass which will relieve from the penalties;¹ nor on account of a false description of the plaintiff's abode, for the defendant is not thereby prejudiced; but the parties guilty of the fraud may be punishable for contempt.²

Compounding.] A penal action cannot be compounded for without the consent of the attorney-general, where the crown is entitled to part of the penalty,³ nor unless the defendant has pleaded.⁴

The court will not set aside a verdict for the defendant as being against evidence,⁵ although they will do this if the jury have misapprehended the law, though there be no misdirection by the judge.⁶ If counsel appear, being retained, and claim to proceed, the plaintiff cannot be nonsuited.⁷

Entry of records.] The records, we speak in cases of misdemeanor, shall be taken in the order of entry. The attorney-general may make his election, but in the case of a private prosecutor the defendant's record, if entered first, shall be tried first.⁸

Issue.] In any case, issue being joined between the crown and the defendant, the legal consequence of the appearance must be the discharge of bail where there is suretyship. The prosecutor must himself appear generally. In misdemeanor, if he appear, he cannot question the proof of notice of trial. The defendant may prove notice by affidavit, and must be acquitted if the prosecutor do not appear, and if the defendant's proof fail the court may adjourn the trial.⁹

Discretion of judge as to trying indictment.] The judges will not try an indictment which is manifestly bad, *i. e.* in the opinion of the judge;¹⁰ and the objection must come from the court, for counsel will not be permitted to argue upon the invalidity of the indictment in the first instance, although they may make a suggestion.¹¹

¹ *Grant, q. t. v. Ridley*, 5 Man. & Gr. 201.

² *Smith v. Bond*, 11 Mees. & W. 326.

³ *R. v. Gibbs*, 3 D. P. C. 345.

⁴ *R. v. Collier*, 2 D. P. C. 581.

⁵ *Preston v. Collins*, 2 Jur. 329.

⁶ *Gregory v. Tuff's*, 1 Cr. M. & R. 310; 2 D. P. C. 711.

⁷ *Marks v. Benjamin*, 2 Moo. & Rob. 225.

⁸ *R. v. Halse*, Ry. & M. N. P. C. 20. See 2 Salk. 652; 2 East, 206, *n.*

⁹ *R. v. Hobby*, Ry. & M. N. P. C. 241.

¹⁰ *R. v. Tremearne*, Id. 147. *R. v. Hepper*, Id. 210.

¹¹ *R. v. Abraham*, 1 M. & Rob. 7.

CHAPTER XI.

OF JURIES, CHALLENGES, AND OTHER INCIDENTS.

Petty jury.] The petit, or petty jury, are now sworn subject to the challenges of the crown or of the prisoner.

Challenges.] The challenge may be to the whole array,¹ or to the poll. For example, if the sheriff be the prosecutor, the challenge is to the pannel, and it is called a principal challenge, and it must be taken advantage of in this way, and not in arrest of judgment.² Upon particular statutes certain requisites are required before a challenge can be made. As under 7 & 8 Geo. 4, c. 31, s. 3, a party damnified by rioters, in certain cases, must within seven days after the offence go before a justice for the purpose of stating the circumstances of the case, and of being bound over to prosecute, or he cannot recover against the hundred. Under the old Act, 9 Geo. 1, c. 22,³ which was similar, it was held necessary to show, where the sheriff was an inhabitant of the hundred, that the preliminary requisites had been complied with, and the judges held, that, in default of doing so, the challenge to the pannel was properly withdrawn by the prisoner's counsel.⁴

There is also a challenge for favour.⁵ As if the sheriff be a subscriber to a society who prosecute the defendant for libel.⁶

The array cannot be challenged after any of the jurors are sworn.⁷ Such a challenge also must be clear, and not too general. It is insufficient to say "that the sheriff has not chosen the pannel indifferently and impartially as he ought to have done, and that the pannel is not an indifferent pannel."⁸ Lord Denman inclined to think the following challenge sufficient; that the jurors' book had not been completed according to 3 & 4 Will. 4, c. 91,⁹ that the names of qualified persons had been fraudulently omitted from the list in order to prejudice the defendants. No specific accusation was alleged against the sheriff or other officer.¹⁰

¹ The challenge must be in writing, 1 Ch. Cr. L. 546. When there are two sheriffs, and an objection exists as to one by reason of affinity, the *venire* shall go to the other, and not to the coroner. *R. v. Warrington*, 12 Mod. 22; 1 Show. 327.

² *R. v. Sheppard*, Leach, 101.

³ Sect. 8.

⁴ *R. v. Savage*, 1 Moo. C. C. 51.

⁵ Steph. 298.

⁶ *R. v. Dolby*, 1 Car. & K. 238. Three special jurors appeared, and

the defendant challenged the array of the tales. Two triers being appointed by the court, they found for the challenge, and the cause was made a remark, whether the sheriff, whose array is challenged, can be a witness to prove his impartiality.

⁷ 2 Hawk. c. 43, s. 1.

⁸ *R. v. Hughes*, 1 Car. & K. 235.

⁹ An Irish Act.

¹⁰ *O'Connell v. Reg.* (in error), 11 Cl. & F. 155.

Challenges to the polls are for honour, on account of some defect, for favour, for disqualification, as by reason of crime, and there is the *peremptory challenge*. The Queen must assign a cause for challenge as soon as the pannel has been exhausted.

By 6 Geo. 4, c. 50, s. 29, whether before the Queen's Bench or courts of oyer and terminer, or gaol delivery or sessions of the peace, the truth of the challenge shall be inquired of according to the custom of the court; but no person arraigned for treason or felony may challenge peremptorily above the number of twenty. And by 7 & 8 Geo. 4, c. 28, s. 3, if any person, indicted for treason or felony, shall challenge peremptorily a greater number than he is entitled by law to challenge, every such peremptory challenge shall be entirely void, and the trial shall proceed as if no such challenge had been made. But the cause needs not to be assigned till the pannel is gone through.¹

The first challenge to the poll is where a peer is called to be sworn on the trial of a commoner.² He may challenge himself, and a member of the House of Commons will be discharged upon his own request, especially if parliament be sitting, although he may not be challenged.³

Instances of the second kind are, amongst others, alienage,⁴ or non-age, or want of property, &c.⁵ And this would include incapacity, as idiotcy, old age, &c.⁶

With respect to the want of qualification, which is a sufficient cause of challenge, it is enacted, that want of freehold shall not be a good cause if the person be otherwise qualified.⁷ But special jurors are excepted by the proviso.

In capital cases, the juror must be such as may serve in civil cases, and, for this purpose, he may be examined.⁸

The third ground, for partiality, contains many incidents, as eating and drinking at the expense of the parties, relationship within the ninth degree, the connection of master and servant, the expression of ill-will, or the contrary, on the part of the jurymen.⁹ The expressions, however, must be duly proved. A jurymen may not be asked questions in order to found a challenge.¹⁰ And it is no cause of challenge that a jurymen has convicted others upon the same indictment.¹¹

¹ 2 Hawk. c. 43, s. 10. *R. v. Parry and others*, 7 C. & P. 836. Since the Jury Act, 6 Geo. 4, c. 50.

² 6 Geo. 4, c. 50, s. 2; Steph. 299.

³ Steph. 299.

⁴ *R. v. Sutton and others*, 8 B. & C. 417. But it is probable, that since 6 Geo. 4, c. 50, s. 27, this ground of challenge is taken away in the case of a special juror, because the party has had an earlier opportunity of making the objection.

⁵ 6 Geo. 4, c. 50, s. 3; Steph. 299; 2 Hawk. c. 43, s. 12, &c.

⁶ See 6 T. R. 531. *R. v. Tre-mearne*, 5 B. & C. 254.

⁷ 6 Geo. 4, c. 50, s. 27.

⁸ Id. s. 50.

⁹ See Steph. 299. It will be remembered, that the crown can challenge as well as the prisoner.

¹⁰ Anon. 1 Salk. 153. *R. v. Edmonds*, 4 B. & Ald. 471. See other instances, 2 Hawk. c. 43, ss. 28, 30.

¹¹ 2 Hawk. c. 43, s. 29. *Marsh v. Coppock*, 9 C. & P. 480.

The prosecutor may challenge a jurymen for having been active in the commission of the same offence which he is called upon to try, as a riot.¹ It is not a cause of challenge that a juror is the tenant of a nobleman whose interest in the borough is supposed to be affected.² And the mistake, if any, concerning partiality should be early discovered. It is too late to allege relationship after the jury have been sworn, at all events, during the trial. The jury cannot be discharged.³

The fourth species of challenge includes outlawry, excommunication, and, of course, felonies, or any infamous crime.⁴ And it is said, that such exceptions are not salved by a pardon.⁵

But the fifth challenge is the more usual, and this is the peremptory challenge. The crown is entitled to this challenge until the pannel has been gone through, and this cause must be shown.⁶

We have shown, that, in felony, the prisoner is limited to the number of twenty, and in treason to thirty-five.⁷ The privilege belongs to all felonies, whether capital or not.⁸ So, at least, it has been held by the judges, although the statute 33 Ed. 1, st. 4,⁹ ordains, that if they who sue for the King will challenge, they shall assign of their challenge a cause certain. And by the same opinion, the peremptory challenge survives to the crown until the pannel has been exhausted, notwithstanding 6 Geo. 4, c. 50, s. 29.¹⁰

Having challenged, however, the prisoner cannot withdraw a challenge in order to make an exchange, as where the prisoner had challenged twenty, and then desired to make an alteration.¹¹

There is no challenge in misdemeanor, nor on collateral issues.¹²

However, in treason and felony the prisoner may challenge for cause upon condition of showing his cause forthwith,¹³ and if his challenge be disallowed, he may then challenge peremptorily.¹⁴ In a case of an exhausted pannel, owing to the peremptory challenges of the prisoner and the challenges of the crown, the course is to call over the whole of the pannel in the same order as before,

¹ *R. v. Swain*, 2 Moo. & Rob. 112.

² *Marsh v. Coppock*, 9 C. & P. 480.

³ *R. v. Wardle*, Car. & M. 647.

⁴ 6 Geo. 4, c. 50, s. 3. See 2 Hawk. c. 43, s. 25.

⁵ 2 Hawk. *ut sup.*; 2 Hale, 578.

⁶ At least, such was the opinion of the court in *R. v. Mansell*, (*infra*), and, in this light, the old authorities must now be viewed. Anon. 1 Anders. 299; Co. Litt. 156, 161; Anon. 1 Ventr. 309; 21 Vin. Ab. (Trial), 275; and several cases in the state trials.

⁷ See also 6 Geo. 4, c. 50, s. 29;

2 Hawk. c. 43, s. 7, &c. In misprision of treason, *qy.*? See Steph. 300.

⁸ *Gray v. Reg.* (in error), an Irish case, 11 Cl. & Fin. 427. The Irish and English law agree in this respect.

⁹ Only repealed as to Ireland, 3 & 4 Will. 4, c. 91, s. 50.

¹⁰ *Mansell v. Reg.* 26 L. J. M. C. 137. Confirmed in the Exchequer Chamber, 27 L. J. M. C. 4.

¹¹ *R. v. Parry and others*, 7 C. & P. 836.

¹² *R. v. Ratcliff*, 1 Sir Wm. Bl. 3.

¹³ 2 Hawk. c. 43, s. 16.

¹⁴ *Id.*

omitting those whom the prisoner has challenged peremptorily. The counsel for the prosecution should then state their cause of challenge, and, if there be no good cause, each juror is sworn till the full number be complete, unless, indeed, the prisoner, not having challenged twenty previously, should go on with his challenges.¹

The question of the exhaustion of the pannel was very much considered in 1857. The prisoner was tried in 1856 before Bramwell, B. The pannel of jurymen contained the name of Wm. Ironmonger. The prisoner challenged sixteen peremptorily, then two were sworn, and another was challenged by the prisoner, and then followed Ironmonger, who was challenged for the crown. The prisoner's counsel then insisted that cause should be shown forthwith, but the objection was overruled. Several others were then challenged by the crown, subject to the same objection. There was, at this time, another jury who had retired to consider the case of one Chapman, and three jurymen being wanted to complete the twelve to try Mansell, Ironmonger was called again, and was again challenged by the crown, notwithstanding the renewal of the objection. The other jury then returned with their verdict, and the counsel for the crown prayed that they should be called in their order to fill the vacancies. It was insisted, on the other side, that the pannel should be gone over again, and that one Jacobs was the next person in order after Ironmonger. It was, however, resolved that an election should be made from the other jury. Accordingly, Perry, Philpott, and Paston were called. Philpott said that he had conscientious objections against capital punishment, upon which he was challenged, and upon cause being demanded, the judge advised him to withdraw. There were then some other challenges on both sides, and the three jurors having been elected, tried, and sworn, the trial proceeded, and the prisoner was convicted. Errors were assigned upon these facts. It was argued, that jurors were improperly prevented from being sworn; that the peremptory challenge of the crown was illegal; that the crown could only challenge for cause; that the statutes of 33 Ed. 1, st. 4, and 6 Geo. 4, c. 59, s. 29, ordained thus much, that, at all events, the crown must show cause when the pannel is exhausted, and that is when the names have been called over, and before the clerk of arraigns commences the second calling of the pannel; that, in the absence of a full jury, the right of the crown ceases after such exhaustion, even admitting the original right; that the return of the other jury was too late to be efficient, although the judge had not, at that moment, decided as to Ironmonger; that the court had no power to order Ironmonger to "stand by" for the second time without cause shown; that the names of the second jury were not called over in order, but from different parts of the pannel;² that Philpott ought not to have withdrawn; it was too late; and that

¹ *R. v. Geach*, 9 C. & P. 499. ² See *R. v. Frost*, 9 C. & P. 137.
R. v. Blakeman, 3 Car. & K. 97.

it was not stated that the jurors were good and lawful men of the county.

The court gave judgment for the crown. They held that the object of 33 Ed. 1, was to prevent the crown from exercising its power of peremptory challenge, so as to make the trial go off while there were twelve returned upon the pannel who could not be proved to be liable to a valid objection. This, they said, was supported by the current of authorities. And *R. v. Frost* was cited, where Tindal, C. J., is reported to have laid down that doctrine with great earnestness, to which Parke, B., and Williams, J., assented. The court held likewise that the pannel was not exhausted, for it did not occur that there were no more jurors on the pannel whose attendance could be procured. It was the same thing as if the twelve jurymen had been in court and answered to their names when the pannel was first called over. As to Philpott, the court thought, that the judge was bound, on the prayer of the crown, to order him to "stand by." They viewed the matter as a challenge by the crown without a reference to anything said by Philpott or the judge. And they held the return of the pannel right, for the sheriff must be presumed to have obeyed the mandate he received in the *venire*. And they denied the dictum in *Brownlow*,¹ and declined to give any opinion as to the correctness of the dictum of Patteson, J., in *Whitehead v. The Queen, i. e.*, that the caption of the indictment was bad, for want of showing that the indictment was found by good and lawful men of the county.²

In *R. v. Geach*, it was decided that there was no cause of challenge where the juror was a client of the prisoner, who was an attorney, nor that the juror had visited the prisoner in gaol as a friend. And it was likewise held, that although the prisoner had gone through his challenges, he might still examine a jurymen as to his qualification.³

Upon the trial of a previous conviction there can be no challenge, because the jury cannot be legally resworn.⁴

All these five challenges may be made verbally,⁵ but the prisoner, not his counsel, must make them.⁶ Whether a challenge can take place on another issue than the plea of not guilty has been questioned.⁷ It has, however, been allowed on the trial

¹ A person eighty years old, prayed to be excused. The court said it would be error, as he had appeared. But he was discharged by consent. Mich. 5 Jac.

² *Mansell v. The Queen*, 26 L. J. M. C. 137; Dears. & B. 375. Confirmed in the Exchequer Chamber, 27 L. J. M. C. 4; Dears. & B. 409. The rules in civil cases do not apply. The prisoner must be brought up to the court, pray over

of the record, and assign errors, and he must be present during the argument. The counsel representing the attorney-general may orally join in error, immediately upon the assignment of errors delivered.

³ *R. v. Geach*, 9 C. & P. 499.

⁴ *R. v. Key*, Den. & P. 347; 21 L. J. M. C. 35.

⁵ Steph. 301.

⁶ 2 Hawk. c. 43, s. 4.

⁷ Id. s. 6.

of a counter-plea, where the replication was "*Nul tiel record.*"¹ The time for making the challenges to the polls is the same with the array, *i. e.* between the appearance and the swearing of the jury.² If challenges are made before the appearance of a full jury, they are irregular,³ although a challenge has been allowed after the swearing of the jury, but before they were charged.⁴

Thus, alienage is not a good objection after verdict, because the point might have been made earlier.⁵ And, after the striking of a special jury, alienage cannot be allowed as a ground of challenge.⁶

Counsel will not be allowed to ask a question of a jurymen in order to elicit the expediency of challenging him.⁷

Trial of the challenge.] As to the trial. The court has the discretion, whether the challenge be for favour or otherwise.⁸ And the opposite party may not only plead but demur, and the court may immediately decide upon demurrer.⁹ If the array be quashed, a new *venire* issues to the coroners or to elisors upon the application of the prosecutor.¹⁰ If a challenge, however, be improperly disallowed, no new trial can be had. A *venire de novo* is the right course.¹¹ The challenge also must be put upon the record, in order that there may be a demurrer, counter-plea, or denial, in which latter case alone triers are to be appointed.¹²

A peremptory challenge, of course, needs no trial, and the challenge for the cause is determined by the court; but the challenge to the poll for favour is referred to two persons, who are sworn in court, and are called triers.¹³ As, however, these triers are, in point of fact, to be jurymen, it follows that their office, as such, will cease after two of the jury have been sworn; and should the challenge be of the first party proposed as a juror, some persons not on the pannel should be selected as jurors. Then, as soon as a jurymen is sworn, he is joined with the triers in determining the

¹ *R. v. Scott*, Leach, 404.

² 2 Hawk. c. 43, s. 1.

³ *R. v. Edmonds and others*, 4 B. & Ald. 471. *R. v. Lacey and others*, 3 Cox, 517.

⁴ *R. v. Flint*, 3 Cox, 66. So was 2 Hawk. c. 43, s. 1; And by consent even after the jury are charged. *Id.*

⁵ *R. v. Sutton and others*, 8 B. & C. 417.

⁶ *R. v. Despard*, 1 Man. & Ry. M. C. 444.

⁷ *R. v. Stewart and others*, 1 Cox, 174.

⁸ Steph. 301.

⁹ *Id.*

¹⁰ *Id.* 302.

¹¹ 4 B. & Ald. 471.

¹² *R. v. Edmonds and others*, 4

B. & Ald. 471. In this same case the court held, that there cannot be any challenge to the array for unindifferency where the jury are nominated by the master of the Crown Office; that he was right in selecting from the freeholders' list those who had the title of esquire, &c., but wrong in selecting the grand jurymen who had found the bill of indictment, although there was no ground for imputing partiality. And, because the sheriff's officer had neglected to summon one of the twenty-four special jurymen returned, it was, nevertheless, not deemed any ground of challenge for unindifferency. See *R. v. Burridge*, Str. 593; *R. v. Johnson*, *Id.* 1000.

¹³ 2 Hale, 275.

next challenge; and when the second jurymen accedes, the triers are at an end, and the jury themselves become the judges of the matter.¹ The proposed juror himself, when challenged, may be examined on the *voir dire* by the triers.²

Some persons are not allowed to make challenges. As a peer, who may not challenge any of his peers.³ And as, notwithstanding his privilege, he can be indicted by a grand jury of commoners.⁴

So, if one prisoner challenge a juror, others indicted with him upon a joint process shall be bound likewise, because there is only one pannel.⁵ So, in the case of principal and accessory, the prisoners cannot insist upon severing their challenges.⁶ Where depositions disclose statements by one prisoner implicating another, the judges are not unanimous as to the rule. On one occasion the judge declined to allow a severance.⁷ But upon another, upon the application of the prisoners' counsel, where the statements were evidence for the prosecution, the severance was permitted.⁸ Yet, before justices of gaol delivery, the prisoners may sever the pannel if they deem it expedient. Upon a gaol delivery the consequence of an exhaustion of the pannel by reason of challenges is, that a new pannel must be awarded, whereas in the Court of Queen's Bench a tales may be prayed upon indictments or informations,⁹ by the warrant of the attorney-general.¹⁰

Upon one occasion, the judge finding that the jury could not agree, discharged them, and ordered a new pannel of seventy-two to be summoned. Fifty-six names were called from the new pannel by reason of challenges before the jury were sworn, and the prisoner was convicted. Upon a question reserved as to the propriety of this new pannel, the conviction was held right.¹¹

As to the tales, the defendant may challenge such a number as will complete his original number, and no more; and it follows that a jurymen challenged upon the original pannel cannot be sworn upon the tales.¹² And, so far from its being indispensable that the talesmen shall be taken from the bystanders, they may be selected from persons previously appointed by the sheriff to be in attendance.¹³

In *ex-officio* informations the tales may be prayed in the absence of the attorney-general, but not in the absence of the defendant.¹⁴

¹ 2 Hale, 275; Steph. 302.

² Steph. 302.

³ 1 Hawk. c. 43, s. 4.

⁴ Id.

⁵ Id.

⁶ *R. v. Fisher*, 3 Cox, 68. Platt, B., did not approve of *R. v. Seeley*, cited by Cole, *amicus curiæ*.

⁷ *R. v. Blackburn and others*, 6 Cox, 333.

⁸ *R. v. Jackson and another*, 7 Cox, 357.

⁹ Steph. 302.

¹⁰ *R. v. Jones*, cited, 6 Mod. 246.

¹¹ *R. v. Cropper*, 2 Moo. C. C. 18. Patteson and Coltman, JJ. *dub.*; absent, Lord Abinger, Park, J., Gurney, B.

¹² Steph. 303.

¹³ *R. v. Dolby*, 2 B. & C. 104; 6 Geo. 4, c. 50, s. 37.

¹⁴ Steph. 303, citing 1 Ch. Cr. L. 551.

Justices of gaol delivery may reform the pannel of jurors.¹

Jury.] In proceeding of speaking of jurors, it is observable that the 27th section of 6 Geo. 4, c. 50, has a proviso declaring that nothing therein contained shall extend to any special juror. An action was brought to recover a penalty of 500*l.* for bribery. The cause was to be tried by a special jury, and the attornies on both sides had given to the associate a list of names of certain common jurors whom, if a tales were prayed, they did not wish to be called. There were not sufficient common jurors to make up a full jury when a tales had been prayed, omitting those who did not appear, and it was urged that the case should stand over. But the court ordered all the common jurors to be called over in the usual way, and said that no challenge should be allowed, except for cause.²

It being premised, that a peer, upon his petition or otherwise, should be tried by his peers, or the court of the lord high steward, for treason or felony, or misprision of either, and that for other crimes he must be tried by a jury,³ we proceed to the trial *per pais*, or the country, *i.e.*, upon the oaths of twelve men. These persons are in general to come from the body of the county where the offence has been committed.⁴ And so, upon a special commission, to try indictments for offences in A. which have been found in B., the trial shall be by jurors of B.⁵ But this point has been discussed in a previous page concerning venue.⁶

Qualification of jurors.] The qualification of jurors is provided for by 6 Geo. 4, c. 50, s. 1. The person, being between the ages of twenty-one and sixty, and residing in England, must possess a freehold, copyhold, or customary tenement to the amount of 10*l.* per annum, or a leasehold estate of 20*l.* annually, or a house rated to the poor on a value of 30*l.* in Middlesex, and 20*l.* in any other county, or a house as occupier, containing fifteen windows. And, independently of certain exemptions which are referred to in the note,⁷ no man, not being a natural-born subject, nor any one

¹ *Attorney-General v. Parsons*, 2 Mees. & W. 23.

² *Marsh v. Coppock*, 9 C. & P. 480.

³ See Steph. 221-223.

⁴ 2 Hawk. c. 40, s. 1.

⁵ *Id.* s. 5.

⁶ *Ante.*

⁷ Sect. 2. Peers; judges of the courts of Westminster; clergymen; Roman Catholic priests; dissenting preachers; serjeants, and practising barristers; doctors of law, and advocates; attornies; solicitors; proctors; officers belonging to courts; coroners; gaolers; keepers of houses

of correction; members of the college of physicians, and licentiates; surgeons, being members of the colleges of London, Edinburgh, and Dublin; certificated apothecaries; officers of the army and navy on full pay; licensed pilots; the King's household servants; officers of customs and excise; sheriffs' officers; high constables; parish clerks; the inhabitants of a hundred exempted by immemorial custom from serving on juries. *R. v. Pugh*, Dong. 188. [In the liberty of St. Alban, the age of exemption is seventy, instead of sixty, by charter.] The

attaint of treason or felony, nor convicted of any infamous crime, unless he should have obtained a free pardon, nor any one under outlawry or excommunication, shall be qualified.¹

However, an alien is entitled to a jury *de medietate lingue*, except in treason,² and there shall be no challenge for want of freehold or other qualification.³ Unless the alien, being a female, be married to a natural-born subject. In that case, the statute 7 & 8 Vict. c. 66, applies. By sect. 16, any woman married, or who shall be married to a natural-born subject or person naturalized, shall be deemed and taken to be herself naturalized, and shall have all the rights and privileges of a natural-born subject. This matter was discussed at length upon one occasion, when it was urged that the prisoner, who had been convicted of murder, should be deemed naturalized as to the possession of all rights and privileges of a natural-born subject, but not to the deprivation of her rights as a foreigner.⁴

Quaker.] A Quaker is still disabled from serving on criminal trials. It was so held where a prisoner had been convicted and sentenced for murder.⁵

A jurymen may, however, be sworn according to the form of his own particular religion, as in the case of the Scotch covenanters, who was allowed to hold up his hand instead of kissing the book.⁶ If a jurymen be sworn by a wrong name, it seems that a mis-trial will be the consequence.⁷

Jury process.] The jury process in an indictment for conspiracy was made returnable on one of the three days before full term. On the same day a new continuance by *venire* was awarded. This was not considered erroneous, because it was conformable to the statute 1 Will. 4, c. 3, s. 2, and the court, although not sitting for the despatch of business before full term, might award the con-

exemption claimed by the Barbers' Company, under the charters of 1 Ed. 4 and 7 Car. 1, and 18 Geo. 2, c. 15, is confined to the local courts of London, as those of the mayor, sheriff, and coroner, and does not extend to the Central Criminal Court. *Re White*, Car. & M. 189.

¹ Sect. 3. London and other cities and boroughs are subject to other provisions, sect. 50. And see Steph. 295.

² 4 Com. 352. *R. v. Sidoli*, 1 Lew. C. C. 244.

³ 6 Geo. 4, c. 50, s. 47.

⁴ *R. v. Manning*, Den. 467. The prisoner was executed. 2 Car. & K. 887. Whether, if an alien be indicted jointly with a British sub-

ject, he is ousted of this privilege. Qu. ? *Sembl.* aff. 13 Jur. 962. See *R. v. Barre*, Mo. 557. Whether the proper time to pray for a jury *de med. lingue* is not before the award of the *venire facias*, and whether it is not necessary to enter a suggestion of the fact, that the party who prays for the jury is an alien before the award of *venire facias*, according to the ancient form, qu. ?

⁵ *R. v. Channen*, 1 Moo. C. C. 374.

⁶ *R. v. Walker*, Leach, 498. As to the Central Criminal Court juries, see *ante*.

⁷ *R. v. Metcalfe and another*, 3 Cox, 220.

tinuance on the return days. Had there been a discontinuance, the plea of guilty would have cured the fault.¹

Under the 11 & 12 Vict. c. 12, the Act for the better security of the crown and government, the prisoner is not entitled to a copy of the jury pannel.²

Mis-trial.] Upon an indictment for perjury one J. W. being called on the common-law pannel, his son, R. H. W., was sworn and served. R. H. W. was not on the pannel, was under age, and not qualified. A rule was obtained for a new trial, and the court made it absolute.³ Aaron Mellor was sentenced to death for murder. But it transpired that J. H. T. had been called as one of the jury, and a person had been duly sworn as J. H. T. But it appeared on the next day that W. T. had, by mistake, answered for J. H. T., and that the prisoner had been offered his challenge to the supposed J. H. T. The judge reported that the prisoner might have had ground of objection to W. T. though not to J. H. T., and he thought, that notwithstanding *Hill v. Yates*, he ought to reserve the point. After argument, and some doubt whether the court had jurisdiction under 11 & 12 Vict. c. 78, the judges gave their opinions *seriatim*, not being by any means unanimous. Five were of opinion that there had been a mis-trial. Six were of the contrary opinion. Seven thought that they had no jurisdiction under the statute to entertain the question. On the whole, eight being in favour of the conviction, it was affirmed.⁴ Lord Campbell did not lay much stress on *Hill v. Yates*,⁵ but rather relied on *Norman v. Beaumont*,⁶ and the *Juryman's case*.⁷ He took the distinction between misnomer and one person serving instead of another, and *Dovey v. Hobson*⁸ was also mentioned by Lord Campbell to illustrate the

¹ *Wright v. Reg.* (in error), 14 Q. B. 148; 2 Cox. 91.

² *R. v. Dowling*, 3 Cox, 509.

³ *R. v. Tremearne*, 5 B. & C. 254. See *Hill v. Yates*, 12 East, 229.

⁴ *R. v. Mellor*, Dears. & B. 468; 27 L. J. M. C. 121. That there had been a mis-trial, but that the court had jurisdiction: Lord Campbell, C. J., Cockburn, C. J., Coleridge, J., *dub.*, Martin, B., *dub.*, Watson, B.—*Contra*, Erle, Crompton, Crowder, Willes, J. J., Channell, B., Byles, J. That there was no jurisdiction: Pollock, C. B., Erle, Williams, Crompton, Crowder, Willes, J. J., Channell, B. Wightman, J., who tried the case, was absent.

⁵ 12 East, 229. The son of a juryman summoned and returned,

answered to his father's name, and served. The defendant moved for a new trial, but Lord Ellenborough refused the rule.

⁶ Willes, 484; Barnes, 453. R. S., not summoned, answered when R. G., who was on the pannel, was called. This was held to be a mis-trial. R. S. was no juryman at all.

⁷ 12 East, 230, *n.* R. C. being summoned, answered to the name of J. C., who was not summoned, although J. C. was at one time, but not then, resident within the town or county. The judges held this to be a mere misnomer. *Cor. Eyre*, B., at Newcastle.

⁸ 6 Taunt. 460. A person not summoned was sworn instead of one summoned, and to whose house he had succeeded. The objection was raised before verdict.

distinction between personation and misnomer, and *R. v. Tre-mearne*¹ was likewise cited.²

Special jury.] A special jury, which is frequently had recourse to in cases of misdemeanor, and which, indeed, belongs to every criminal case, except felony, is only where the prosecution is by indictment or information in the Queen's Bench at Westminster, and, therefore, not at the assizes. It may be allowed upon the application of either party, and the attorney-general usually prefers it upon an application *ex officio*.³ The defendant shall have every means of knowing his prosecutor before the striking of the jury, although a list may not be granted.⁴ But the defendant must plead before he applies for the prosecutor's name.⁵

Juries are impannelled by a writ of *venire facias*,⁶ as in civil cases.⁷ The *venire* upon the traverse of an inquisition must be made returnable on a general return day and not on a day certain.⁸

Trials for misdemeanors are at *nisi prius*; for felonies, in the Queen's Bench, at bar; and a misdemeanor, if it be a case of great difficulty and importance, may also be tried at bar.⁹ Yet, where the prosecutor is a private person, the trial at bar is not *de jure*, and in capital cases the defendant must be present at the application.¹⁰

The time of trial has already been adverted to in some degree in treating of traverses,¹¹ although we may observe that the attorney-general has the option, subject to the statute 60 Geo. 3 and 1 Geo. 4, c. 4, s. 9, of bringing forward his informations at what time he thinks proper. And, in the case of a special jury, where the plaintiff or prosecutor has withdrawn his record, the defendant may take down his record by proviso, and claim a common jury.¹² So, upon informations in the Crown Office, filed by the master, the prosecutor must proceed to trial within a year after issue joined, or enter a *nol. pros.*, upon pain of costs.¹³ And either of the parties might proceed to trial upon such informations after notice at the next sittings after traverse,¹⁴ and this rule applied also to indictments in the Queen's Bench.¹⁵ However, care must be

¹ *Supra*.

² See also *Fermor v. Dorrington*, Cro. El. 222. *Hasset v. Bayne*, Id. 256. *Bond v. Devys*, Willes, 493. *R. v. Metcalfe*, 3 Cox, 220. A case of personation. Maule, J., would not pronounce judgment, but ordered another indictment to be preferred.

³ See Steph. 295. For the mode of choosing the jury, see 6 Geo. 4, c. 50, ss. 31, 32.

⁴ *R. v. Nicholson*, 8 D. P. C. 422.

⁵ S. C. *R. v. Richardson*, 4 Jur. 319.

⁶ See, as to this, 6 Geo. 4, c. 50, ss. 4-25.

⁷ As to process for compelling the attendance of jurors, see 2 Hawk. c. 41. As to joining several defendants in one *venire*, see Id. ss. 8, 9.

⁸ *R. v. Roberts*, 1 Wils. 77.

⁹ 4 Com. by Ryland, 309, n. 14.

¹⁰ *R. v. Hales*, Str. 816.

¹¹ *R. v. Johnson*, Id. 824.

¹² *Ante*.

¹³ *R. v. Derbyshire*, 1 Moo. & Rob. 307.

¹⁴ Steph. 296.

¹⁵ Id.

taken to distinguish between prosecutions by the crown or by individuals as to the trial by proviso. Where the attorney-general prosecutes the defendant cannot so deal with his record, although the crown should countermand notice of trial.¹

Special juries must be taken in their order. Where two special juries were struck by the prosecutor in two cases, against different parties to the same transaction, and the defendant entered them as common-jury cases, it was held, that the prosecutor could not, by withdrawing the record, reverse the order of trial. In such a case the judge will order the common-jury case to be called first.²

Where a case goes off for default of jurors, a special jury having been struck, a rule for striking a new jury will not be granted. The cause must be tried by the first jury, with the addition of talesmen, should default be made.³ The attorney-general prays the tales,⁴ and the talesmen come from the pannel of jurors summoned to try the other causes, and not from the bystanders.⁵

With respect to the costs of a special jury, unless the judge certify, these costs cannot be allowed to the prosecutor, nor the costs of a reference and award, although the cause having been referred to arbitration, the arbitrator found the defendant guilty.⁶ The judge's power to certify upon a criminal trial is given by 6 Geo. 4, c. 50, s. 34.⁷

It is not a mis-trial if a special juror have sat on the grand jury. This fact was discovered upon an indictment for misdemeanor, and it was proposed that the juror should leave the box, but the defendants objected, and they were convicted. A new trial was refused.⁸ Where the defendant persisted in challenging the array after the striking of a jury by consent, the court granted an attachment.⁹

By 7 Geo. 4, c. 64, s. 21, no judgment after verdict for any felony or misdemeanor shall be stayed or reversed by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion, nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, nor because any person has served upon the jury who has not been returned by the sheriff or other officer.

The jury being charged are impannelled. In a case of murder,

¹ *R. v. Dyde and another*, 7 T. R. 661. *R. v. Macleod*, 2 East, 202. *R. v. Sir Jacob Banks*, 6 Mod. 245. See Willes, 535.

² *R. v. Houlditch and another*, 1 Stark. 63. The cases were *R. v. Houlditch*, and *R. v. Houlditch and another*. Park proposed to withdraw the first, but Lord Ellenborough said he should call on the common juries, and then *R. v. Houlditch* would come first, as in the original order. Both cases were at length taken together by consent.

³ *R. v. Franklin*, 5 T. R. 454, cited there by Buller, J. *R. v. Perry and others*, 1d. 453.

⁴ *R. v. Lambe*, 4 Burr. 2171.

⁵ *R. v. Hill*, 1 C. & P. 667.

⁶ *R. v. Moate*, 3 B. & Adol. 237.

⁷ *R. v. Pembridge*, 6 Jur. 1037. Indictment for non-repair of a highway, see 5 & 6 Will. 4, c. 50, s. 98.

⁸ *R. v. Sullivan*, 1 Per. & D. 96; 8 Ad. & El. 831.

⁹ *R. v. Burroughs*, 11 Mod. 385.

a witness not having arrived, but being expected by a railway train, the judge ordered that the jury should be locked up, and proceeded to other business with another jury.¹

Illness of juror.] Many instances have occurred where the jury have been discharged from giving a verdict. Amongst these may be enumerated illness or disagreement. And whatever might have been the rule formerly,² it is now competent for the judge to order another jury to be sworn, and without the prisoner's consent.³ In one case, a juror fell down in a fit, and Lord Kenyon, informing the prisoner that the circumstance would not work his acquittal, asked his consent to have another jurymen sworn with the eleven, and to have the evidence delivered to the new jury. The prisoner assented, and another jurymen was sworn, the prisoner making no challenge, and a conviction ensued.⁴ In 1795, at York, a jurymen was seized with a fit, and Lawrence, J., discharged the jury, and ordered another jury to be sworn, and the other eleven jurors served upon this new pannel. It was a charge of murder, and the prisoner was convicted and executed.⁵ In 1812, at Monmouth, a similar occurrence happened, and Wood, B., pursued the same course. The prisoner was convicted, and the judges cited authorities in favour of the practice.⁶ So, where the prisoner fell down in a fit, the second Middlesex jury were discharged from him, and the first Middlesex jury were charged with him on the following morning.⁷ Yet the prisoner may have his challenge, not only to the new jurymen, but also again to the other eleven.⁸ In this case also, the evidence was, by consent, read from the judge's notes, and the witnesses for the crown were asked whether it was true.⁹ So it was where, after a plea of not guilty, the prisoner was evidently insane.¹⁰ The judge might direct the jury to be discharged of him, in order that he might be tried after the recovery of his understanding.¹¹ In a case in Ireland, there was a disagreement amongst the jury, and they were discharged, and another jury being sworn,

¹ *R. v. Foster*, 3 Car. & K. 201.

² 2 Hawk. c. 47, s. 1. *R. v. Jeffs*, Str. 984. *R. v. Lord Delamere*, 4 St. Tr. 232. *R. v. Joyce*, Leach, 621, n.

³ See 2 Hale, P. C. 295. *R. v. Ferrars*, Tho. Raym. 84; Fost. 31, *et infra*.

⁴ *R. v. Joyce*, Leach, 621, n. *R. v. Deane*, 5 Cox, 501.

⁵ *R. v. Scalbert*, Leach, 620. *R. v. Horner*, Id. cited by Lawrence, J., where Buller, J., ruled the same way in the case of intoxication of a juror.

⁶ *R. v. Edwards*, 3 Camp. 207; Russ. & Ry. 224; Leach, 621, n. *R. v. Beere*, 2 Moo. & Rob. 472. *R. v. Gould*, 3 Ch. Burn, 528.

⁷ *R. v. Stevenson*, Leach, 546.

R. v. Meadows, Fost. 76. *R. v. Streeks*, 2 C. & P. 413.

⁸ *R. v. Edwards*, 3 Camp. 208.

⁹ Id. See *R. v. Newton*, 18 L. J. M. C. 201; 3 Car. & K. 85; 13 Q. B. 716.

¹⁰ 1 Hale, 34. But now the trial would proceed, and the prisoner would be acquitted on the ground of insanity, and detained.

¹¹ 1 Hale, 34; Russ. & Ry. 431, n. This could not now happen, because of the *acquittal* on the ground of insanity, unless the judge were to discharge the jury, which he would not now do.

the prisoner was convicted at the same assizes.¹ And, in forgery, the judge, after discharging the jury for want of agreement, summoned a new pannel of twelve jurors, forty-eight of the old pannel having been challenged at the first trial, and upon a *different charge* of forgery. The judges held the conviction right.² Again, the judge has discharged the jury upon an indictment for forcible entry, the indictment being plainly bad upon the face of it, although the defendant might have demurred, or moved to quash it.³ And, generally, if agreeable to justice, and the prisoner desires it, the jury may be discharged at his instance.⁴ So, again by 14 & 15 Vict. c. 100, s. 12, no person tried for misdemeanor, which turns out to be felony, shall be again prosecuted, unless the court shall discharge the jury, and direct a prosecution for felony.

But the jury may not be discharged in order that a witness may be instructed in the nature of an oath. As in rape, where the party injured, an adult, was ignorant of religion. The opinion of the judges was, that he had done wrong in discharging the jury.⁵ Such a state of ignorance, however, may be a good ground for postponing the trial before the jury are charged.

The dispersion of the jury by leave of the court is not a discharge. Such a separation was held to form no ground for granting a new trial, there being no suspicion of any improper communication.⁶ Upon retiring, the jury must not take any evidence with them without leave of the court or consent of the parties.⁷ To do so would be a great contempt. Nor, without consent, can the jury have a view.⁸ And, after the jury have been sworn, the judge will not allow an adjournment.⁹

¹ *R. v. Seery*. And it being a case of maliciously shooting with intent to murder, the prisoner was executed. See *R. v. Newton*, ante; *R. v. Dawson*, 2 Fost. & F. 250; *Conway v. R.*, 7 Irish Rep. 149.

² *R. v. Cropper*, 2 Moo. C. C. 18. Absent, Lord Abinger, C. B., Park, J., Gurney, B.; *dub.* Coltman, J., Patteson, J.

³ *R. v. Deacon and others*, Ry. & Moo. N. P. C. 27.

⁴ *R. v. Stokes*, 6 C. & P. 151.

⁵ *R. v. Wade*, 1 Moo. C. C. 86.

⁶ *R. v. Kinnear and others*, 2 B. & Ald. 462; 1 Ch. Rep. 401. *R. v. Woolf*. *R. v. Canning*, *Eliz.*, 19 Howell, St. Tr. 671.

⁷ *R. v. Burdett*, 1 Ld. Raym. 148; 2 Salk. 645.

⁸ *R. v. Redman*, Say. Rep. 303. The power of the court to order a view is confined to civil actions, Dennison, J. As to a view, see 1 Price, 130; 2 Ch. Rep. 422.

⁹ *R. v. Tempest*, 1 Fost. & F. 381.

CHAPTER XII.

OF COUNSEL.

Counsel.] Counsel are heard, in the first instance, for the prosecution. And it is the duty of a counsel to confine himself to the facts he means to prove, nor can he offer declarations in evidence, unless he previously mention them in his opening.¹ Should there be counsel for the prisoner, it is expected that counsel for the prosecution should open the case, but, unless there should be some peculiarity in the charge,² not otherwise, and declarations, *not being confessions*, ought to be opened.³ In opening a case of murder, the counsel may suppose that an attack may be made upon the character of a witness for the crown, and he may state that he is prepared to rebut such attack.⁴ He may also read to the jury the general observations of a learned judge concerning circumstantial evidence made in a case tried some years before, but he must adopt them as his own opinions, and make them part of his own address to the jury. It is the duty of the prosecuting counsel to assist the court,⁵ and not to be the counsel of any particular party.⁶ A counsel to whom the depositions are handed is, however, to combine the duties of assisting the judge with those of counsel for the crown.⁷

Till the reign of Will. 4, the counsel for the prisoner could not address the jury on his behalf upon the general issue, although, in cases of felony, he might do so upon a collateral question, whilst, in misdemeanor, the defendant was always entitled to that assistance. But it is well known, that cross-examinations were, as now, allowed, and the judges permitted counsel to instruct the prisoner with reference to such questions.⁸

By 6 & 7 Will. 4, c. 114, s. 1, all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto, by counsel learned in the law, or by attorney in courts where attornies practise as counsel.

By sect. 3, all persons who, after the passing of this Act, shall be held to bail or be committed to prison for any offence, shall be entitled to require and have, on demand, (from the person who shall have the lawful custody thereof, and who is hereby required

¹ *R. v. Orrell*, 1 Moo. & Rob. 468.

² *R. v. Gascoine*, 7 C. & P. 772, 362.
Park, J.

³ *R. v. Orrell*, ut supra. *R. v. Hartel*, 7 C. & P. 773. *R. v. Davis*, Id. 785. As to conversations, see *R. v. Deering and another*, 5 C. & P. 165.

⁴ *R. v. Courvoisier*, 9 C. & P.

⁵ Id.

⁶ *R. v. Hursfield*, 8 C. & P.

⁷ *R. v. Littleton*, 9 C. & P. 269.
671.

See Steph. 304.

to deliver the same,) copies of the examinations of the witnesses respectively upon whose depositions they have been so held to bail or committed to prison, on payment of a reasonable sum for the same, not exceeding three halfpence for each folio of ninety words: Provided, that if such demand shall not be made before the day appointed for the commencement of the assize or sessions at which the trial of the person on whose behalf such demand shall be made is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the judge or other person to preside at such trial shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such judge or other person who shall preside at such trial, if he shall think fit, to postpone such trial on account of such copy of the examination of witnesses not having been previously had by the party charged.

And by sect. 4, all persons under trial shall be entitled at the time of their trial to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had.

The stat. 11 & 12 Vict. c. 42, s. 27, re-enacts the provisions of 6 & 7 Will. 4, c. 114, s. 3, as to the copies of depositions. And the provision given by 6 & 7 Will. 4, c. 114, as to a subsequent grant of such depositions upon application to the judge, although not re-enacted, is said not to be affected by this Act of Victoria.¹ These copies of depositions are only to be had when the case is ripe for trial, not upon remand.² And they are not grantable where there can be no trial at all, as in the case of surety of the peace.³ Nor can fresh evidence be communicated which has been obtained since the committal, nor can the prisoner have a list of the fresh witnesses, but he or his counsel may look at the bill, and even at the back of the bill with consent, which should hardly be refused.⁴

The coroner is not bound to return his depositions to the court, but should he do so, the court, in their discretion, will allow the prisoner to have copies.⁵ And the prisoner is not entitled, under 6 & 7 Will. 4, c. 114, s. 3, to a copy of his own statement.⁶ Nor can a defendant be allowed access to collateral matters, as the report of a board of inquiry in India. It was so decided in an information filed by the attorney-general for delinquency.⁷ At the meeting of the judges for choosing the spring circuits in 1837, twelve of their lordships came to certain resolutions con-

¹ Archb. Jervis's Acts, 80.

² *R. v. Mayor of London*, 5 Q. B. 555. *Ex parte Fletcher*, 1 Dowl. & L. 996.

³ *Ex parte Humphrys*; *R. v. Herefordshire*, JJ., 19 L. J. M. C. 189. If the depositions be refused, the course is to apply for a *mandamus*.

⁴ *R. v. Conner and another*, 1 Cox, 233.

⁵ *Ex parte Greenacre*, 8 C. & P. 32. *R. v. White*, 5 Cox, 562.

⁶ *R. v. Aylett and another*, 8 C. & P. 669.

⁷ The rule was refused. *R. v. Holland*, 4 T. R. 691.

nected with this statute, 6 & 7 Will. 4, c. 114, which we will here subjoin :—

1. That, where a witness for the crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and that such deposition must be read as part of the evidence of the cross-examining counsel.

2. That, after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and, after the prisoner's counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the court may direct it to be read, and the counsel for the prosecution will be entitled to the reply upon it.

3. That the witness cannot, in cross-examination, be compelled to answer, whether he did or did not make such or such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event the counsel for the prisoner may proceed with his cross-examination; and if the witness admits such statement to have been made, he may comment upon such omission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

4. If the only evidence called, on the part of the prisoner, is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper so to do.

5. In cases of public prosecutions for felony, instituted by the crown, the law officers of the crown, and those who represent them, are, in strictness, entitled to the reply, although no evidence is produced on the part of the prisoner.¹

The right of the judges to make these resolutions has been questioned,² but it seems that they are now acted upon generally;³ and the judge may put a question to the witness as to any differences which appear between his evidence and the deposition, subject, perhaps, to a reply on the part of the counsel for the prosecution.⁴

If the counsel for several persons cannot agree as to their

¹ 1 Moo. C. C. 495. See 7 C. & P. 676; Law Mag. xvii. 470.

² 8 C. & P. 28.

³ 8 C. & P. 31.

⁴ *R. v. Edwards and others*, 8 C. & P. 26.

seniority, or as to their order of addressing the jury, the court will look to the order in which the names of the prisoners stand in the indictment, and will call upon counsel accordingly.¹ If there be no counsel for some of the prisoners, counsel shall have the preference, although it was once thought otherwise, but all the counsel must address the jury before any witnesses are called.² However, in one case, A. was principal; B., accessory after the fact. A. had no counsel, but was allowed to address the jury first.³ And yet Martin, B., seems to have ruled the contrary, and to have allowed the receiver, who was defended by counsel, to make his defence first.⁴ The prisoner's counsel should forbear from giving the prisoner's account of the transaction as part of his address. It might produce a reply from the counsel for the prosecution.⁵ In fact, he must not speak concerning any matter not in proof, or which he is not about to prove;⁶ and he must not read law cases to the jury, as part of his address, for the law flows from the judge.⁷

Queen's counsel.] If a Queen's counsel be desired on the prisoner's behalf, there must be a licence from the crown, and not merely a certificate from the secretary of state;⁸ and the same law applies to criminal informations. An application to the secretary, to which no answer has been returned, is insufficient, even admitting that a letter of licence would suffice.⁹

Addresses by prosecutor or prisoner.] The prosecutor must not at any time state his case and address the jury.¹⁰ Lord Ellenborough once allowed a prosecutor to address the jury, compelling him, however, to waive giving evidence in the case; but he afterwards felt that he had done wrong. Even with the waiver it was not the right course.¹¹ Again, the prisoner or defendant may not address the jury by himself and also by his counsel, unless under very special circumstances.¹² Yet there may be occasions when the prisoner will be allowed to make a statement, and one upon which his counsel may comment,¹³ provided it be not considered a pre-

¹ *R. v. Barber*, 1 Car. & K. 434; 1 Cox, 62, S. C. nom. *R. v. Richards and others*.

² *R. v. Richards and others* was overruled, as to the first point, by *R. v. Hazell and another*, 2 Cox, 220, Williams, J.

³ *R. v. Thomas*, 3 Jur. (N. S.), 272.

⁴ *R. v. Belton*, 5 Jur. (N. S.), 276. So was *R. v. Martin*, 3 Cox, 56.

⁵ *R. v. Butcher*, 2 Moo. & Rob. 228. *R. v. Beard*, 8 C. & P. 142.

⁶ *R. v. Beard*, ut sup.

⁷ *R. v. Parish*, 8 C. & P. 94.

⁸ *R. v. Jones*, 9 C. & P. 401.

⁹ *R. v. Burtlett*, 2 Car. & K. 321.

It is said, that the crown has no precedence in a criminal court, only in criminal cases in the Court of Exchequer. *R. v. Landon*, 1 Fost. & F. 381.

¹⁰ *R. v. Brice*, 2 B. & Ald. 606; 1 Ch. Rep. 352.

¹¹ *R. v. Milne*, 2 B. & Ald. 606, n.

¹² *R. v. Boucher*, 8 C. & P. 141. *R. v. Burrows*, 2 Moo. & Rob. 124. *R. v. Rider*, 8 C. & P. 539.

¹³ *R. v. Malings*, 8 C. & P. 242. A case for doing grievous bodily harm, the prosecutor and the prisoner being the only persons present. *R. v. Manzani*, 2 Fost. & F. 64.

cedent.¹ But Alderson, B., has commented very strongly upon the injustice arising from such a rule, and has admitted the right of the prisoner to speak, and of his counsel to comment.² Whilst, on the other hand, Byles, J., refused, in 1859, at York, to allow counsel for the prisoner to address the jury after the prisoner's statement.³ Again, if the defendant should persist in reserving to himself the right of addressing the jury, the court will not allow counsel to cross-examine for him, although they may suggest questions or argue points of law.⁴ And in the case of a prisoner, the court left it to him to choose whether he would make his own defence or leave it to his counsel, as both could not be heard. This was at the close of the case, and after the cross-examination of the witnesses for the prosecution.⁵ Should any new fact transpire during the trial, the prosecutor's counsel is not to claim a speech in order to lay those facts before the jury.⁶

The rule concerning hostile witnesses called for the prosecution is thus stated by Alderson, B. "If you are obliged by law to call a witness, you may contradict him; if you create the contradiction, you cannot remove it, but if it arises in the course of the case, you may. You may always contradict a *fact* stated by your witness, but you cannot prove that he said something else at another time."⁷

When witnesses are called for the prisoner the counsel for the prosecution may reply.⁸ The rule seems to be, that if prisoners be jointly indicted, and call witnesses, there may be a *general reply*; but if the offences are separate, and if the prisoners might have been separately indicted, the reply must be confined to the case of him who has called the witnesses.⁹ Three were indicted for murder: witnesses for the defence were called for one only: the counsel for the crown, nevertheless, might reply generally upon the whole case, although the evidence for the one prisoner did not affect the other two. But if the evidence in the case affects the prisoners with different offences, as larceny and receiving, and one only calls witnesses, there is no right of reply against both.¹⁰ But where a witness was called to prove an *alibi* for one prisoner, and the other called no witness, a general reply upon the whole case was allowed.¹¹

Again, if a witness be called merely to character, the prosecutor's counsel may reply upon the whole case,¹² but it is a very unusual

¹ *R. v. Walkling*, 8 C. & P. 243.

² *R. v. Dyer*, 1 Cox, 113. *R. v. Williams*, Id. 63.

³ *R. v. Taylor*, 1 Fost. & F. 535. Nor would he allow the counsel for the crown in a mint case to reply, no evidence having been called for the prisoner.

⁴ *R. v. White*, 3 Campb. 98. *R. v. Parkins*, Ry. & M. N. P. C. 166; 1 C. & P. 548.

⁵ *R. v. Teste*, 1 Fost. & F. 294.

⁶ *R. v. Courvoisier*, 9 C. & P. 362.

⁷ *R. v. Carpenter*, 1 Cox, 72.

⁸ There were instances in former days of replies without such testimony. See Peake, 236, n., and *post.*

⁹ *R. v. Hayes*, 2 Moo. & Rob. 155. See also *R. v. Jordan*, 9 C. & P. 118.

¹⁰ *R. v. Blackburn*, 3 Car. & K. 330.

¹¹ *R. v. Briggs*, 1 Fost. & F. 106.

¹² *R. v. Whiting*, 7 C. & P. 771. *R. v. Corfell*, 1 Cox, 123.

course, and ought rarely to be exercised.¹ So, if the judge should insist upon a deposition being read in favour of the prisoner, there may be a reply. If, notwithstanding the resolutions of the judges,² the judge himself thinks fit to cross-examine a witness as to any discrepancy between his deposition and evidence, whether, new facts being elicited, the prosecutor's counsel can reply, is made a question.³ Again, if new facts be opened by the prisoner's counsel, although not proved by him, the reply is let in.⁴ If a counsel commence his reply *per incuriam*, and propose to put in a statement, he shall not be hindered from doing so. So, if the issue be material, as where, in answer to the prisoner's witnesses, he proposed to give in the prisoner's statement before the justice, containing a different account of the transaction.⁵

It has been said, that there can be no reply unless the prisoner calls witnesses. As in *R. v. Lord Abingdon*, it was in vain urged that counsel for the crown always had that privilege, that it was common on the circuit, and of usual occurrence. Lord Kenyon would not permit it.⁶ Yet two years afterwards, it is strange to say that, according to a note in Peake, Lord Kenyon allowed this reply, also in libel, although his decision in *R. v. Lord Abingdon*, was cited to him by the defendant's counsel.⁷ But the noble chief justice admitted the undoubted right of the attorney-general. The attorney-general has extensive powers, as in the instance just cited, where he may reply in the absence of witnesses for the defence.⁸ And the same privilege adheres to a counsel who appears as the representative of the attorney-general.⁹ Although some judges have expressed a wish that the privilege had never been conceded, and it is strictly confined to the attorney-general of England. The attorney-general of a county palatine cannot claim it. He has been refused at Liverpool.¹⁰ So again, at York, the crown counsel was refused upon the assertion of a similar claim.¹¹

Again, in collateral issues the attorney-general may reply with new matter, although no witnesses are called on the other side.¹² In a case which followed, *R. v. Marsden*, the full right was allowed, no witnesses being called for the defence.¹³ Again, the attorney-general said, that he appeared as the counsel and private friend of the lord chancellor, whom the defendant had libelled, and in this case he did not reply. No witness had been called for the defendant.¹⁴ Where

¹ *R. v. Stannard*, 7 C. & P. 673, Patteson and Williams, JJ.

² See 7 C. & P. 676; Roscoe on Ev. 220. *R. v. Brooks*, 1 Cox, 7.

³ *R. v. Edwards*, 8 C. & P. 26, 27. Case at Monmouth.

⁴ *R. v. Bignold*, 4 D. & Ry. 70.

⁵ *R. v. White*, 2 Cox, 192.

⁶ *R. v. Peake*, N. P. C. 236. Libel.

⁷ *R. v. Smith*, Id. 236, n.

⁸ *R. v. Lord Abingdon*, sup. *R. v. Marsden and others*, Moo. & Malk. 439.

⁹ *R. v. Gardener*, 1 Car. & K. 628.

¹⁰ *R. v. Beckwith*, 7 Cox, 505.

¹¹ *R. v. Christie*, Id. 506; 1 Fost. & F. 75.

¹² *R. v. Radcliffe*, 1 Sir W. Bl. 3.

¹³ Moo. & Malk. 439.

¹⁴ *R. v. Bell*, Moo. & Malk. 440.

the crown is the defendant in error, and the really *litigant party*, the counsel for the crown is, in this case, not entitled, *ex jure*, to the reply.¹

Counsel will be assigned to a prisoner at his request where there is a doubt, whether, in point of law, the facts charged maintain the indictment; whether the witnesses are legal, the jurors lawful, or the indictment and process right. The prisoner must first propose the point, and then counsel will be assigned to argue it.² The court, however, will not hear more than two counsel upon a point of law.³ By leave of the court, counsel may assist the prisoner as well in as out of prison.⁴ But the request must come from the prisoner.⁵ The peers will not permit counsel to argue a question concerning parliamentary proceedings.⁶ In error, when there are separate writs, there may be separate counsel, and each counsel is entitled to a reply, although the writs have proceeded from one indictment only.⁷

The judges will hear counsel for the crown under 11 & 12 Vict. c. 78, although there be no counsel for the prisoner.⁸

If counsel be an interpreter he must be sworn.⁹

¹ *O'Connell v. Reg.* 11 Cl. & Fin. 155. As to cross indictments for assaults where there is no reply on either side, see *R. v. Wanklyn*, *R. v. Vaughan*, 8 C. & P. 290.

² 2 Hawk. c. 39, s. 4.

³ *R. v. Bernard*, 1 Fost. & F. 240.

⁴ 2 Hawk. c. 39, s. 7.

⁵ *R. v. Yscuado*, 6 Cox, 386.

⁶ 2 Hawk. c. 39, s. 6.

⁷ *O'Connell v. Reg.* (in error), 11 Cl. & F. 155.

⁸ *R. v. Martin*, Den. 398; 18 L. J. M. C. 137.

⁹ *R. v. Kelly and another*, Id. 75.

CHAPTER XIII.

OF ELECTION.

Election.] Amongst other preliminary matters which occur to the mind of counsel, that of requiring the prosecutor to elect upon what charge, if there be two or more, he may choose to proceed upon, is not unfrequent.¹ This idea is founded upon the supposition that the case extends to more than one charge, and that the prisoner is likely to be embarrassed in his defence.² For long, the prosecutor could only proceed upon one charge of larceny in one indictment, and the same rule still applies in most cases of felony.

By 24 & 25 Vict. c. 96, s. 5, it shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed thereon for all or any of them.

By sect. 6, if upon the trial of any indictment for larceny it shall appear that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six months from the first to the last of such takings.

In misdemeanor, the prosecutor is confined to two or more charges,³ according to the number of counts which allege the offence to have been committed on different days. Where one was indicted for an indecent exposure of his person, and there were two counts, Parke, B., confined the proof to two instances, *i. e.*, either one on each of two separate days, or two separate instances on the same day.⁴ And several misdemeanors may be tried upon the same indictment, as libels, assaults, &c., and various frauds are allowed to be given in evidence under the same prosecution.⁵ And where there were several counts which stated the commission of several misdemeanors of the same nature, and naming the same day in each count, the prosecutor was not confined to that day, but was allowed by Abbott, C. J., to introduce evidence of the charge upon other days, notwithstanding the

¹ See 3 T. R. 106, Buller, J.; 8 East, 41.

² *R. v. Trueman*, 8 C. & P. 727.

³ See, in felony, *R. v. Smith and another*, Ry. & Moo. N. P. C. 295.

⁴ *R. v. Rowbattel*, 1 Lew. C. C. 83.

⁵ *R. v. Jones*, 2 Campb. 132.

omission of the words, "divers other days and times."¹ But two indictments for the same transaction cannot be maintained. There must be an election.² There was a joint offence of stealing in the county of Gloucester, where the booty was distributed, and the shares were carried off into Worcestershire in separate bags. Upon an indictment in Worcestershire against four persons jointly for this offence, the judge put the prosecutor as to his election as to which prisoner he would proceed against, and the trial then proceeded upon one case only.³ And where two were charged with conspiracy and libel, and it turned out that there was evidence against both with regard to the conspiracy, but, as to the libel, against one only, Coleridge, J., compelled the prosecutor to elect before he would suffer the defence to be entered into.⁴

The rule in felony may be easily illustrated. There were two indictments, one for stabbing, the other for an assault, and the judge put the prosecutor to his election, expressing his disapprobation of the double charge.⁵ So, where there was a count for burglary, and one for larceny, with a former conviction appended, the same rule prevailed.⁶ Counts for rape, and the assault with intent, &c., have been ranged under the same law.⁷ So it is in the case of robbery, and the assault with intent to rob.⁸ Again, where there were indictments against the prisoner for night poaching and for stealing a coat, the court refused to allow evidence of the coat having been found in the prisoner's house to prove his identity upon the poaching charge, unless the prosecutor would consent to an acquittal upon the indictment for larceny.⁹ Where the prisoner was tried for forging navy receipts, it was not considered necessary that the prosecutor should be directed to point out the particular receipt upon which he intended to proceed, because the indictment charged him with uttering all the receipts at one and the same time.¹⁰ So, the custom of allowing counts for forging and uttering to be proceeded with, is founded upon the supposition that the same man might forge a bank note or other negotiable instrument, and utter it on the very instant it was forged, so as to constitute one continuous act.¹¹ But the judges, upon the consideration of this case, directed that the clerk of assize should not put both charges into the same indictment.¹² So it is with respect to the forgery of a bill with the acceptance

¹ *R. v. Levy and others*, 2 Stark. 458.

² *R. v. Britton*, 1 M. & Rob. 297.

³ *R. v. Barnett and others*, 2 Russ. C. M. 118.

⁴ *R. v. Murphy*, 8 C. & P. 297.

⁵ *R. v. Smith*, 3 C. & P. 412, Vaughan, B. *R. v. Doran*, Leach, 538, Eyre, C. B.

⁶ *R. v. Holmes*, 1 Lew. C. C.

149. Bolland, B., after consulting with Lord Denman. *R. v. Bland*, 1d.

⁷ Anon. Id. 276.

⁸ *R. v. Gough*, 1 Moo. & Rob. 71.

⁹ *R. v. Westwood*, 4 C. & P. 547.

¹⁰ *R. v. Thomas*, Leach, 877.

¹¹ By the recorder in *R. v. Galloway*, 1 Moo. C. C. 236.

¹² 1 Moo. C. C. 236.

and indorsement. No election was required.¹ So, where a gun was fired off, and one count charged the intent to have been to kill the husband, and the other the wife, Park, J.; held that the prosecutor need not elect.² And in a case of shooting, the prosecutor need not elect to proceed against the prisoners as principals in the first or second degree.³ So, where there were two indictments, one for shooting at a gamekeeper, and the other for night poaching, both arising out of the same transaction, no election was necessary.⁴ So, upon an indictment for poisoning, and a conspiracy to poison, the same doctrine obtained.⁵ So under 1 Vict. c. 85, no election is needed as to the respective offences of stabbing and wounding, maiming and disabling, &c., although the judgment is different. It is for the jury to decide to which count the evidence applies.⁶ So, where there were several houses in a row, and the prisoner stood charged with firing the whole, (for it was one transaction,) no election was necessary.⁷ So, in a case of robbery of two persons, one shilling was taken from one, and two from the other; if the whole was one transaction, no election accrues.⁸ So, upon an indictment for housebreaking, the property being laid in different persons in several counts, it was held, that there might be as many counts for stealing as receiving, and that the prosecutor need not elect.⁹ So, where two persons were driving furiously, the one inciting, and the other using the whip, there was no election.¹⁰ The judge will hear the facts of one continued transaction, and then, if necessary, will require the prosecutor to elect upon what facts he means to rely.¹¹ It is in the discretion of the judge to confine the prosecutor to one proof of felony, or to allow him the liberty of proving acts which are all parts of the same transaction. So, that where the evidence respecting felonies of the same character cannot be separated without inconvenience, the judge may admit the double evidence without requiring election.¹² There were counts for sedition, for attending seditious meetings, and for a riot. The court refused an application that the prosecutor should make an election.¹³ If all the articles missed might have been stolen at once, the prosecutor needs not to elect, although the probability may be the other way.¹⁴ Seventy sheep

¹ *R. v. Young*, Russ. & R. 280, n. Le Blanc, J.; Peake, Add. Ca. 228.

² *R. v. Butter*, 1 Lew. C. C. 86. *R. v. Voke*, Russ. & Ry. 531.

³ *R. v. Towle*, Russ. & R. 314; 3 Price, 145.

⁴ *R. v. Handley and another*, 5 C. & P. 565.

⁵ *R. v. Maudsley and another*, 1 Lew. C. C. 85; and see *R. v. Folkes and another*, 1 Moo. C. C. 354.

⁶ *R. v. Strange*, 8 C. & P. 172.

⁷ *R. v. Trueman*, 8 C. & P. 727.

⁸ *R. v. Giddins*, Car. & M. 634.

⁹ *R. v. Beeton*, Den. 414; 2 Car. & K. 960; 18 L. J. M. C. 117. The counts for receiving were under 11 & 12 Vict. c. 46.

¹⁰ *R. v. Swindall and another*, 2 Cox, 141. Manslaughter.

¹¹ *R. v. Hart*, 7 C. & P. 652; Littledale, J. Uttering a forged bill.

¹² *R. v. Hinley*, 1 Cox, 12.

¹³ *R. v. Fussell*, 3 Cox, 291.

¹⁴ *R. v. Dunn*, 1 Moo. C. C. 146.

were put on a common on June 18th, and were not missed till November. The prisoner was in the possession of four of the sheep in October, and of nineteen in November. Bayley, J., would not compel the prosecutor to elect.¹ The discretion as to election lies with the judge.²

We are now about to proceed with the consideration of witnesses and evidence. Anterior to this, we may just mention, that the prisoner's place is at the dock, or bar of the court, if the charge be for felony. In cases of misdemeanor the defendant may sit with his counsel. The consent of the prosecutor cannot alter the rule in a case of felony.³ This inconvenience may, however, be mitigated. The prisoner may have friends to stand by him. As at the request of a captain in the army who was charged with murder in a duel.⁴ The circumstance of the party being a foreigner makes no difference. As where a merchant of London was indicted for slave dealing, his counsel applied that the prisoner might sit by him, not because of his rank in society, but because several documents connected with the trial were in a foreign language, but the court refused the application,⁵ whereas, upon a charge of sedition, the defendant was suffered to sit at the table of the court.⁶

¹ *R. v. Dewhirst*, 2 Stark. Ev. 614.

² *R. v. Jones*, 2 Russ. C. M. 185.

³ *R. v. St. George*, 9 C. & P. 483.

⁴ *R. v. Douglas*, Car. & M. 193.

⁵ *R. v. Zulueta*, 1 Cox, 20; 1 Car. & K. 215; Maule and Wightman, JJ.

⁶ *R. v. Lovett*, 9 C. & P. 462.

CHAPTER XIV.

OF EVIDENCE.

Evidence.] The evidence¹ against the prisoner is now gone into; and this involves two subjects: first, with respect to the witnesses, and, secondly, the testimony which is to be adduced. The competency or disqualification of parties formed at one period a considerable portion of the law concerning witnesses. Recent Acts of parliament, however, have very much modified the objections to competency. There used to be four main branches of disqualification upon this head:—1. Want of understanding. 2. Want of religious belief. 3. Infamy. 4. Interest. The two former objections are still retained, the two latter have been abolished by an Act of the legislature.

Want of understanding.] With reference to the first class—idiots, deaf and dumb persons, lunatics, and children are included. But if the deaf and dumb can communicate by signs, or if the lunatic should have lucid intervals, the one is entirely admissible,² and likewise the other during his term of sanity. And even in the case of a delusion upon a particular subject, if the lunatic is sane in other respects his testimony is admissible; the weight of it is for the jury to determine. So it was when the lunatic was called to prove that the prisoner threw down the deceased.³ He was first examined on the “*voir dire*,” and it lay with the judge to determine upon his admissibility.⁴ The reception of an infant’s testimony lies in the discretion of the court. And this discretion will be exercised according to the capacity of the child to distinguish between good and evil. Even in cases almost of necessity. As where a rape had been committed. The infant’s testimony ought not to have been received, as she could not comprehend the nature of an oath, and hence it follows that such an infant must be sworn.⁵ It has been held that instructions given merely for the purposes of trial are insufficient.⁶ Nor can the child’s information be given to other persons with that view, for that would be to dispense with the best evidence.⁷ But the trial may be postponed so that the infant may be instructed generally,

¹ See an instance of a committal at sessions, where the judges of criminal appeal declared that there was not a scintilla of evidence. *R. v. Walker and another*, Dears. 280. The witness need not be sworn by the clerk of the peace; if sworn in open court, as by the crier, it is sufficient. 24 L. J. M. C. 62. *R. v. Tew*, Dears. 429.

² *R. v. Ruston*, Leach, 408. Where the party, *mutus et surdus*

nativitate, was examined through an interpreter, his own sister.

³ *R. v. Hill*, Den. & P. 254; 20 L. J. M. C. 222.

⁴ S. C. Whether he could be objected to on the ground of insanity after his examination in chief, qu. ? *Sembl.* not. S. C. acquitted.

⁵ *R. v. Powell*, Leach, 110, n. *R. v. Steward*, Str. 701. *R. v. Travers*, Id. 700.

⁶ *R. v. Williams*, 7 C. & P. 320.

⁷ *R. v. Brasier*, Leach, 199.

although this cannot be done in the case of an adult.¹ Nor, indeed, can it be done when the infant is quite young, for example, only six years of age.²

If a person examined before a magistrate is of weak intellect, the magistrate's questions and the answers of the witness as to the capacity of the proposed witness to take an oath, should be written down by the clerk.³

Want of religious belief.] Secondly, a difference in religious belief from that which is recognized as the law of the land, will sometimes interfere with the witness. The test is the credit which the party attaches to future rewards and punishments, and even if the belief be of a retribution in this world, it is said that the person will not be incompetent.⁴ Ignorance, again, arising independently of wilful unbelief, will have a disqualifying effect. As when one sworn on the *voir dire*, said he had heard of a God, and believed that liars would come to the gallows, but acknowledged that he had never learned the catechism, that he was altogether ignorant of the obligation of an oath, or of a future state of rewards and punishments, or of the existence of another world, or of what became of wicked people after death. He was rejected.⁵ We may, therefore, conclude that the questions put by Buller, J., to the witness were correct, when he asked—1. Whether he believed in God? 2. Whether he admitted the obligation of an oath? 3. Whether he believed in a future state of rewards and punishments?⁶ The reason formerly for excluding Quakers was, because they scrupled to take an oath, not through an imputation of any defect in religious principles. Now, however, by 9 Geo. 4, c. 32, and 3 & 4 Will. 4, c. 49, s. 1, Quakers or Moravians who may be required to give evidence, may, instead of an oath, make their solemn affirmation, in all places, and for all purposes, where an oath can be required either at common law or by Act of parliament, both in civil and criminal cases, and, in case of falsehood, they are rendered liable to the penalties of perjury. And a similar relief is afforded to Separatists by 3 & 4 Will. 4, c. 82. By 1 & 2 Vict. c. 77, persons who *have been* Quakers or Moravians are permitted to make a solemn affirmation and declaration in lieu of an oath, being liable, in cases of falsehood, to the penalties of perjury.⁷ And by 1 & 2 Vict. c. 105, in any case where an oath may be lawfully administered to any person, either as a jurymen or a witness, or a deponent in any proceeding civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in

¹ *R. v. Wade*, 1 Moo. C. C. 86.

² *R. v. Nicholas*, 2 Car. & K. 246.

³ *R. v. Painter*, 2 Cox, 244; Willes, 549.

⁴ Willes, 549.

⁵ *R. v. White*, Leach, 430.

⁶ *R. v. Taylor*, Peake, N. P. C.

11. Erskine wished the test to be, whether he believed in Jesus Christ, or in the Holy Gospels of God.

⁷ Providing for the difficulty in *R. v. Doran and another*, 2 Moo. C. C. 37.

such form, and with such ceremonies, as such person shall declare to be binding, subject as aforesaid to the pains of perjury in case of false swearing.¹ However, before this Act the Scotch covenant was sworn by the holding up of his hand instead of touching or kissing the book.² And by 24 & 25 Vict. c. 66, s. 1, if any person called as a witness in any court of criminal jurisdiction in England or Ireland, or required or desiring to make an affidavit or deposition in the course of any criminal proceeding, shall refuse or be unwilling, from alleged conscientious motives, to be sworn, it shall be lawful for the court or judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration, in the words following; *videlicet*, "I, A. B., do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare," &c. Which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form. By sect. 2 an affirmation or declaration wilfully false will subject the witness to the penalties of perjury. So a Mahometan upon the Koran.³ A Jew and a Gentoo. And a Jew may be sworn upon the New Testament, although he has not formally renounced his ancient religion.⁴ So, again, a Chinese might be sworn according to his custom.⁵ And where a witness, a negro, stated that he was a christian, and had been baptized, Platt, B., would not allow him to be asked any further question as to his competency.⁶

Infamy and interest.] The difficulties which arise from infamy and interest have been very considerably removed and abated. By 6 & 7 Vict. c. 85, s. 1,⁷ no person offered as a witness shall be excluded by reason of incapacity, from crime or interest, from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter in question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person, having by law, or by consent of parties, authority to hear, receive, and examine evidence. But any person so offered may and shall be admitted to give evidence on oath, or solemn affirmation, in those cases

¹ See the Mutiny Acts.

² Leach, 412. *R. v. Mildrone*.

³ Id. 54. *R. v. Morgan*.

⁴ 1 Esp. 285. *R. v. Gilham*.

If the witness should take an oath in the usual form, it is no objection that he is of another religion, or that some other form of swearing is more binding on his conscience. If he swear falsely under such circumstances, he may be punished

for perjury. *Sells v. Hoare*, 3

Brod. & Bing. 232, Richardson, J.

See also 2 Hawk. c. 46, s. 147, &c.

⁵ Car. & M. 248. *R. v. Entrehman*.

⁶ 2 Car. & K. 53. *R. v. Serva and another*.

⁷ See the preamble. The stat. 27 Geo. 3, c. 29, is repealed by 24 & 25 Vict. c. 101.

wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding, in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence. A proviso follows, that no person individually named in the record, suit, &c., shall be competent, nor any lessors of the plaintiff, nor the husband nor wife of any of the persons above mentioned. But this is repealed by 14 & 15 Vict. c. 99, s. 1. By sect. 2 of that Act, all parties may be admissible witnesses. Only by sect. 3, they shall not be compellable to criminate themselves. Nor shall any husband be "competent or compellable" to give evidence against his wife, and *vice versa*. Nor in civil cases, neither, by any inference.¹ Nor can a wife prove desertion.²

Under sect. 2, a defendant upon an information under the revenue laws may give evidence in his own favour.³

The phrase, "any party to any proceeding individually named in the record," soon came to undergo consideration. Two persons were charged with larceny, and a third as receiver. One pleaded guilty, and judgment was respited. He was then tendered as a witness for the prosecution, and was admitted. Upon argument before the judges, it was submitted,—1, that, independently of 6 & 7 Vict. c. 85, he should not have been so admitted; 2, that proceeding meant "criminal" as well as civil; 3, that the witness was a party to the proceeding. The judges were clear against the first objection. As to the second, Alderson, B., remarked that the witness was not a party to the issue. And as to the third objection, the judges were unanimous that the witness was admissible at common law.⁴

No provision, however, of the Statute of Wills⁵ shall be repealed by the Act. By 14 & 15 Vict. c. 99, s. 3,⁶ no person can give evidence for or against himself,⁷ either upon a charge by indictment or upon summary conviction, nor need he answer any question tending to criminate himself, nor need he, nor can he give evidence for or against his wife, nor needs nor can the wife give evidence for or against her husband. Hence, upon a charge under the game laws, the defendant was not allowed to give evidence on his own behalf.⁸ The Act, however, does not interfere with the rules laid down by the judges respecting accomplices and king's evidences. Confirmation of the stories of those persons is

¹ Nor in civil proceedings. *Alcock v. Alcock*, 21 L. J. Ch. 856. *Barbat v. Allen*, 21 L. J. Ex. 155. *Stapleton v. Croft*, 21 L. J. Q. B. 247, Erle, J., *diss.*

² 14 & 15 Vict. c. 99, s. 4. *Pyne v. Pyne*, 27 L. J. Prob. 54.

³ *Att.-Gen. v. Radloff*, 10 Exch. 84; 23 L. J. Exch. 240. Platt, B., and Martin, B., *acc.*; Pollock, C.B., and Parke, B. *diss.*

⁴ *R. v. Hincks and others*, Den. 184. *R. v. Drury*, 3 Car. & K. 190. *R. v. Gerber*, 1 Temp. & M. 647. *R. v. Arundel and another*, 4 Cox, 260.

⁵ 1 Vict. c. 26.

⁶ *Ante*.

⁷ See Taylor on Ev. 1096. *R. v. Stevenson*.

⁸ *Cattell*, appellant, *Ireson*, respondent, 27 L. J. M. C. 171.

still required by the court, and the admission of a king's evidence lies still in the discretion of the judge. And the interest consequent upon the relationship of husband and wife survives as a disqualification. The statute affects pecuniary interest alone.

We will, therefore, advert to the subjects of accomplice, king's evidence, and interest by relationship. And first, concerning accomplices. The accomplice is admissible whether separately indicted or not, and he need not plead guilty in either case, nor is it usual indeed to include him in the indictment, when it is intended to make use of his testimony. The promise of pardon or reward may operate as a blow to his credit, but it does not touch his competency. *A fortiori*, a *particeps criminis* in an information against whom no evidence is given, and who has even been left out for the purpose, may appear, although a recovery against the defendant will discharge himself.¹ So a person who has received a bribe at an election may be a witness against the defendant.² However, although the admissibility of confederates is not destroyed by their union in crime, it is scarcely necessary to repeat that their testimony is received with a sufficient degree of suspicion. And although, in strictness, the evidence of a confederate accomplice is of itself enough to convict a prisoner,³ the court will frequently direct an acquittal unless part of the story be confirmed by other evidence.⁴ Although, latterly, the question has been considered to be one for the jury.⁵ The rule extends to a woman who appears before the jury as a consenting party to her husband, who has committed an unnatural offence with her. She is an accomplice, and her story must be confirmed.⁶

Then the questions arise as to what part this confirmation should extend, and how far. As to the first point, it seems that the accomplice should be confirmed not only as to the circumstances of the crime, but also as to the person of the prisoner, although the rule was much more lax formerly.⁷ The jury may be told that they may convict on unsupported testimony, but the judge will advise them not to act upon it.⁸ A conviction at Durham upon unsupported evidence as to one of three was affirmed, but the court intimated their disapprobation of the ruling, although they

¹ 2 Hawk. c. 46, s. 100.

² *Post*.

³ Leach, 464. *R. v. Atwood and another*, 2 Campb. 132. *R. v. Jones*. In this last case, however, Lord Ellenborough said he considered that the accomplice had been amply confirmed.

⁴ Leach, 479, n. *R. v. Smith and another*. See 5 C. & P. 326. *R. v. Noakes*.

⁵ *R. v. Hastings and another*, 7 C. & P. 152. The reporters affirm that this is a distinct decision in favour of the question so much contended for: that there needs not

to be any confirmation of the testimony of the accomplice. *Id.* 153, n. The verdict, however, was Not guilty.

⁶ *R. v. Jellyman*, 8 C. & P. 604.

⁷ See *R. v. Atwood and another*, Leach, 464; 7 T. R. 609. *R. v. Hyde*, cited, 7 T. R. 710. *R. v. Durham and another*, Leach, 478. *R. v. Jones*, Leach, 466, n.; 2 Campb. 132, 133. *R. v. Dawber*, 3 Stark. 34. *R. v. Webb and another*, 6 C. & P. 595. *R. v. Farler*, 8 C. & P. 106. *R. v. Dyke*, *Id.* 261.

⁸ 25 L. J. M. C. 16. By Parke, B., as his practice, and Jervis, C. J.

could not interfere.¹ The confirmation in the case of prisoners charged with the same offence should extend to all. It would not be safe to convict those of whose guilt there is no confirmation.² The right rule is to recommend the jury to acquit the prisoner when the accomplice, as to him, is not supported.³ A confirmation by the wife of the accomplice is of no value.⁴ Where the offences are distinct, as in the case of principal and receiver,⁵ a confirmation as to one will not affect the other.⁶ *A fortiori*, where the confirmation failed as against the principal felon, and was very slight as to the receivers.⁷

Secondly, as to the point how far the confirmation should extend, it is laid down that it need not apply to the whole of the evidence, because in that case there would be no use in calling the accomplice.⁸ Nor will it apply to certain offences, as in the instance of a prize fight, to prove which persons present were called as witnesses.⁹ In another case the accomplice proved that the prisoner stole certain sheep, and, in confirmation of this story, evidence was given that a certain quantity of mutton was found in the prisoner's house, which corresponded with portions of the stolen sheep. This testimony was held sufficient.¹⁰

An accomplice may likewise appear for the defendants.¹¹ And since the statute 6 & 7 Vict. c. 85, it makes no difference, as formerly, whether he appear before or after judgment against him.

Where the evidence against a prisoner is very slight, the court will occasionally direct an acquittal as to him, in order that his fellow prisoners may have the benefit of his testimony.¹² Two persons were charged with house-breaking. One pleaded guilty, but sentence was not passed; (and since the statute this makes no difference;)¹³ the other went to trial, and desired that his fellow prisoner might appear as a witness in his behalf. And the judge allowed his request.¹⁴ So it was, where it was proposed to call the prisoner, who had pleaded guilty, as a witness for the prosecution. It was urged, but in vain, that he was a party to the record.¹⁵ So

¹ *R. v. Stubbs*, 25 L. J. M. C. 16; S. C. 7 Cox, 48.

² *R. v. Field*, Dick. Q. S. 520.

³ S. C.

⁴ *R. v. Moore and another*, 7 C. & P. 270.

⁵ *R. v. Wells and others*, Moo. & M. 326.

⁶ *R. v. Jenkins and another*, 1 Cox, 177.

⁷ *R. v. Wells*, ut supra.

⁸ *R. v. Hargrave*, 5 C. & P. 170.

⁹ *R. v. Birkett*, 8 C. & P. 732.

As to principal and accessory, see *R. v. Lyons*, 9 C. & P. 555.

¹⁰ See Anon. 1 Lew. C. C. 324, Alderson, J. *R. v. Slogrove*, Id. 325.

¹¹ *R. v. Fletcher*, Str. 633, Pratt, C. J. *R. v. Sherman*, Ca. Temp.

Hardw. 303. See *R. v. Lafone and others*, 5 Esp. 154.

¹² *R. v. Teal and others*, 11 East, 309, 310; 2 Hawk. c. 46, s. 98. *R. v. Careinion Castle*, 8 East, 77; Id. 78, Lord Ellenborough; Id. 79, Lawrence, J. *R. v. Lyons*, 9 C. & P. 555.

¹³ Although upon such an occasion, Erle, J., thought it the most proper way to pass sentence first. *R. v. Jackson and another*, 6 Cox, 525.

¹⁴ *R. v. George*, Car. & M. 111. *R. v. Archer*, 3 Cox, 228.

¹⁵ *R. v. King and another*, 1 Cox, 232, and the above case was cited; so was *R. v. Williams*, cor. ten judges, 1 Cox, 289.

in informations, such of the defendants as are not affected by the evidence may be acquitted in order to be witnesses for the rest.¹ It is almost a matter of right that a prisoner, who is not touched by the testimony for the prosecution, should be acquitted in order that he may give evidence.² On the other hand, the prosecutors may insist upon the acquittal of a defendant in order that he may be a witness for the crown.³ Indeed it is customary to intrust the matter to the counsel for the prosecution as one for their discretion, and so it was held in a case of rape, where the application was acceded to, notwithstanding the opposition of the counsel for the prisoners.⁴ Thus, the principal felon may be witness against the receiver,⁵ or against one charged with taking a reward to help to the recovery of stolen goods.⁶ A prisoner pleaded guilty, but his evidence against others was not received until after the corroboration of his intended testimony.⁷

By 16 Vict. c. 30, s. 9, a secretary of state or judge may, upon affidavit, issue a warrant to bring up any prisoner under sentence, or commitment, or otherwise, (except civil process,) before any court, &c., to be examined as a witness in any case, civil or criminal. Such witness shall be dealt with in all respects as though he had been brought up by *habeas corpus*.

King's evidence.] The practice of admitting a person to give evidence on behalf of the crown is very nearly related to the subject of accomplices. It is done by an application commonly made before the trial, and the usual course is for counsel to state that he has read the depositions, and that, in his opinion, there is not evidence sufficient without that of the accomplice.⁸ But it rests with the judge to allow the proceeding or not. In general, it seems objectionable to suffer two persons to go before the grand jury.⁹ But where the learned judge was acquainted with the fact that two persons were to give evidence on two separate indictments for different offences, although arising out of the same transaction, he permitted them to go.¹⁰ And it is not usual to suffer a man who stands charged with another felony, to be a witness for the crown.¹¹ Yet if he be so admitted, he may still be tried for the other felony.¹² Indeed, the king's evidence is not

¹ 2 Hawk. c. 46, s. 98.

² East, P. C. 313, n. The Bounty.

³ Ry. & M. N. P. C. 401. *R. v. Rowland and others*.

⁴ 9 C. & P. 83. *R. v. Owen*. Rape and murder. Three were charged, and it was sought to acquit one, that he might appear against the two others.

⁵ Leach, 418. *R. v. Haslam*, East, P. C. 782. *R. v. Patram*, Leach, 419, n.; East, *ut sup.* *R. v. Price*, Leach, 419, n.

⁶ *R. v. Wild*, Leach, 17, n.

But whether a person charged as principal in the same indictment with the accessory is a competent witness against the accessory, without being first acquitted or confessing, and suffering his punishment, is made a question? 9 C. & P. 555.

⁷ *R. v. Sparks*, 1 Fost. & F. 388.

⁸ 1 C. & P. 87. *R. v. Barnard*.

⁹ 1 Lew. C. C. 5. *R. v. Barnsley Rioters*, per Park, J.

¹⁰ Id.

¹¹ 2 C. & P. 411, per Park, J.

¹² S. C.

entitled, *ex debito justitiæ*, to a pardon for the offence which he has volunteered to disclose against his fellow prisoner, although the usage is in favour of lenity, and the party has an equitable recommendation to the mercy of the crown.¹ And he is certainly not so entitled in respect of other offences not connected with the particular matter at issue.² Therefore, it is not very uncommon to find convictions of witnesses of this description for other offences. For forgery,³ burglary,⁴ sheep-stealing,⁵ or for the same, as the accomplice refused to go before the grand jury.⁶ In the case of sheep-stealing the judges considered that it lay properly in the breast of the judge to order execution or not, according to his discretion.⁷ Murder is not an exception to the rule of admitting a king's evidence.⁸ But when a receiver gave important evidence as to another robbery, Coleridge, J., advised that he should not be prosecuted.⁹

There is still a disqualifying interest, although not pecuniary.¹⁰ But a father may appear for or against his son; a brother may give evidence where his brother or sister may be concerned, and should any bias be suspected upon such occasions, it is rather the credibility of the witness than his competency which is affected. It is the rule respecting husband and wife with which we have chiefly to do in this place; and it is not so much the tie of relationship which renders the husband and wife incompetent witnesses for each other, as the principle of law which recognizes them as one. This rule is maintained with some strictness. As where a joint offence is charged, and it is proposed to call the wife of one of the defendants as a witness for the other. This cannot be done because the cases cannot be separated, and the evidence *must* have a tendency to assist the husband.¹¹ So where D., a

¹ Cowp. 334.

² 1 Phil. Ev. 37.

³ Leach, 115. *R. v. Rudd*, S. C. Cowp. 331, where the king's evidence was admitted by the magistrates as far as they could.

⁴ Russ. & Ry. 361. *R. v. Lee*.

⁵ Id. 454, *R. v. Brunton*, note (6). *R. v. Burley*, 2 Russ. C. M. 958.

⁶ *R. v. Holtham*, 2 Russ. C. M. 959.

⁷ Russ. & Ry. 454. The king's evidence in this case had prevaricated so much as to render his testimony unworthy of credit. In fact he breaks the condition, if any. *R. v. Moore*, 2 Lew. C. C. 37.

⁸ East, P. C. 356.

⁹ *R. v. Garside*, 2 Lew. C. C. 38.

¹⁰ As to the old law respecting

pecuniary interest, see 2 Hawk. c. 46, s. 114, *et seq.*; East, P. C. 993; 1 Phil. Ev. 52, 53, 54. *R. v. Fox*, Str. 652. *R. v. Machartney and others*, Holt, Ca. 300. *R. v. Paris and another*, 2 Keb. 572. *R. v. Muscott*, 10 Mod. 193. *R. v. Tilly*, Str. 316. *R. v. Dodd*, Leach, 155, 157. *R. v. Newland*, Id. 311. *R. v. The Rioters*, Id. 314, *n.* *R. v. Yates*, 5 Jur. 636; 3 Esp. 68. *R. v. Teasdale and others*, 3 Esp. 68; Ry. & M. N. P. C. 243, *n.* Statutes, 5 Wm. & M. c. 11; 1 Ann. st. 1, c. 18, s. 13; 9 Geo. 4, c. 32, s. 2; 1 & 2 Will. 4, c. 32; 5 & 6 Will. 4, c. 20, s. 21; c. 50, s. 100; 6 & 7 Will. 4, c. 65, s. 9.

¹¹ *R. v. Locker and others*, 5 Esp. 107. *R. v. Frederick and another*, Str. 1094.

prisoner, proposed to call his daughter in support of an *alibi*, but it appeared that she was the wife of another prisoner at the bar, Littledale, J., rejected the evidence, and the judges held that he had done right;¹ but she might be examined upon an *alibi* for the other prisoner, not her husband.² Nor can a married woman prove a conversation between the prisoner and her husband, so as to show that these two persons committed the felony at issue,³ nor can this kind of testimony be received, even by consent, nor after a divorce, at least as to anything which has happened during coverture.⁴ But where the wife was not indicted, although she was alleged in the indictment to be one of the parties who had conspired to obtain money by a false document, the evidence of her husband was admitted against the other conspirator, to prove that the document had been filled up without his authority.⁵ And upon a trial for murder, it seems that the wife of one prisoner was allowed to appear as a witness for the prosecution, although her testimony went to prove both prisoners (who were brothers) guilty as principals.⁶ And what a wife says in the presence and hearing of her husband, when charged with felony, is evidence on the trial.⁷ So what he is overheard to say to his wife is evidence.⁸ And in collateral matters these parties may not only be called to give evidence, which, however incapable of being used against them, might indirectly affect them, but they may likewise, upon such occasions, be suffered to contradict each other.⁹ And upon the same principle, in those cases where the wife is allowed to testify, however indirectly, against the husband, she may also be a witness, so far as such indirect evidence goes, in his favour.¹⁰ Two persons were indicted for burglary; some of the stolen property was found in the house of each prisoner. The wife of one of them was called to prove that she had taken to the house of the other the property found there, and she was deemed a competent

¹ *R. v. Smith and others*, 1 Moo. C. C. 289. *R. v. Hood*, Id. 281. *R. v. Denslow*, 2 Cox, C. C. 230, when *Smith's case* was relied on and *Bartlett's case* distinguished.

² *R. v. Moore and another*, 1 Cox, C. C. 59. *R. v. Bartlett*, Id. 105, admitted by Wightman, J., with considerable doubt.

³ 2 Russ. C. M. 983. *R. v. Glead*.

⁴ *Barker v. Dixie*, Ca. Temp. Hardw. 264.

⁵ *R. v. Halliday*, 29 L. J. M. C. 148; Bell, 257. The first count charged the prisoner with the false pretence; the second count charged him with conspiring, together with E. F. (not indicted), to cheat a savings bank. An acquittal on the

second count was deemed quite consistent with a conviction on the first. See *R. v. All Saints, Worcester*, 6 M. & S. 194. *R. v. Bathwick*, 2 B. & Adol. 639.

⁶ *R. v. Grattan*, Car. Cr. L. 66. This is seriously overruling the opinion of Bolland, B., who in a trial for sheep-stealing, would not permit the wife of one prisoner to give evidence against the rest. *R. v. Webb and others*, 2 Russ. C. M. 982. Mr. Pitt Taylor is also dissatisfied with this ruling. Of Ev. 1101.

⁷ *R. v. Bartlett*, 7 C. & P. 832.

⁸ *R. v. Simons*, 6 C. & P. 540.

⁹ See 2 Russ. C. M. 983.

¹⁰ Ry. & M. N. P. C. 354, per Abbott, C. J.

witness.¹ Although the wife of a receiver not indicted with the prisoner has been held not compellable to give evidence against the prisoner.²

There is one other principle which forms an exception to the general rule. In cases of personal injury the law would sometimes be defeated if the party who had sustained the mischief were incapacitated from attesting it; and therefore whether the charge be for beating the wife, or shooting at her,³ or forcibly abducting her, although she may consent afterwards to the cohabitation,⁴ or otherwise maltreating her,⁵ she may be sworn, in order to make good her story against her husband. And there is likewise the common case of swearing the peace. Where murder has been committed, the dying depositions of either party are also evidence, subject to the usual rule concerning those means of proof.⁶ However, it may be added here, that personal violence is the circumstance which lets in the evidence. So, in conspiracy against defendants for procuring marriages, neither husband nor wife can be called, for the facts may be proved *aliundè*, and so it has been held where the testimony of the wife in favour of a co-defendant with her husband might have enured to his acquittal.⁷ And so again it was where the husband appeared to substantiate a charge of conspiracy for marrying him to a woman of indifferent fame.⁸ Upon the principle lately mentioned, the husband has been allowed to testify, in a case of assault with intent, &c., that his wife speedily complained to him, and also to speak to her situation and appearance.⁹ The presence, however, of a wife or husband when injured is not indispensable. As when a man was charged with shooting at his wife with intent to murder her, the husband insisted that his wife should be present as a witness necessary to his interests. The counsel for the prosecution declined to call her, and the judge acquainted the prisoner that although his wife was a competent witness against him, yet that her presence was not necessary.¹⁰ The evidence of a wife against a prisoner may be received, although she may entertain a hope that, in case of conviction, her own husband may be pardoned; the objection going to her credit, not to her competency.¹¹ And where B. had been convicted of sheep-stealing, B.'s wife was held competent to testify against A., to prove that A. had stolen the sheep jointly with B.¹²

¹ *R. v. Sills*, 1 Car. & K. 494.

² *R. v. Ast*, Car. C. L. 66.

³ *R. v. Jagger*, East, P. C. 455.

⁴ *R. v. Wakefield*, 2 Lew. C. C. 279. *R. v. Brown*, 1 Ventr. 243.

⁵ *R. v. Ld. Audley*, 1 St. Trials, 393. *R. v. Azire*, Str. 633. *R. v. Perry*, Ry. & Moo. N. P. C. 354, cited. *R. v. Wakefield*, Taylor on Ev. 1107. And see *Lord Audley's case*, *R. v. Griggs*, Tho. Raym. 1, where it was denied that *Lord Audley's case* was law. It should

have been understood as between the husband and a third person, not the husband and his wife.

⁶ *R. v. Woodcock*, Leach, 500.

⁷ *R. v. Locker and others*, 5 Esp. 107.

⁸ *R. v. Sergeant and others*, Ry. & M. N. P. C. 352.

⁹ *R. v. Clarke*, 2 Stark. 241.

¹⁰ *R. v. Pearce*, 9 C. & P. 667.

¹¹ *R. v. Rudd*, Leach, 127.

¹² *R. v. Williams*, 8 C. & P. 284.

A question has sometimes presented itself, whether a woman who has cohabited with a man can be allowed to deny the marriage upon oath, so as to become a witness in his favour. Upon this point Richards, C. B., said, in *Campbell v. Twemlow*, that he remembered a prosecution before Lord Kenyon in 1782, for forgery, in which a woman to whom the prisoner had frequently alluded in his defence as his wife, was rejected as a witness for him.¹ But this ruling of Lord Kenyon, although adopted by Best, C. J., upon one occasion, was not sustained upon argument, and the C. J. admitted that he had been misled by Lord Kenyon's decision.²

Again, in pecuniary matters, although the stat. 6 & 7 Vict. c. 85, includes pecuniary interest in its provisions, yet the law remains the same as far as husband and wife are concerned. In a case of forcible entry and retainer, the wife of the party expelled was rejected by Littledale, J., for the statutes entitle the prosecutor to restitution.³ This case seems to be still an authority, notwithstanding the 16 & 17 Vict. c. 85, which enables the husband and wife of any party in an action to be competent and compellable to give evidence. For criminal cases are excepted by the 2nd section. Judges, arbitrators, and counsel are good witnesses in collateral matters, or after the subjects of their respective jurisdictions or employments are at an end, but they are otherwise not compellable to give evidence.⁴

Juryman.] A juryman may be a witness when he has any knowledge of a particular subject, as of the branch of a trade. Here he should be sworn and examined, although jurors are at liberty to make use of their general knowledge in order to arrive at a satisfactory conclusion.⁵

Time for objecting to witness.] The time for making an objection to the competency of a witness is on the *voir dire*, that is, before he is sworn in chief. He may either be questioned upon the subject, or a witness may be called to prove his incompetency. And should he deny the fact which would go to disqualify him, evidence may still be produced to contradict him. However, should the party objecting call a witness without questioning the person objected to, it is not competent for the counsel who has called that person to examine him for the purpose of repelling the charge against him.⁶

¹ 1 Price, 83; and he was executed.

² *Bathews v. Galindo*, 3 C. & P. 238; and see *Wells v. Fletcher*, 5 C. & P. 12.

³ *R. v. Beavan and others*, Ry. & M. N. P. C. 242. See 5

Ric. 2, st. 1, c. 7; 15 Ric. 2, c. 2; 21 Jac. 1, c. 15.

⁴ *R. v. Earl of Thanet*, Taylor on Ev. 774, citing 27 How. St. Tr. 845.

⁵ *R. v. Rosser*, 7 C. & P. 648.

⁶ See Anon. 1 Lew. C. C. 323.

Committal for contempt.] A witness as well as any other person may be committed for contempt.¹ A judge at *nisi prius* or of gaol delivery may commit by parol, and a chairman at quarter sessions. And it should seem that the commitment ought to be for a time certain.² Whether a magistrate can commit for all contempts is doubtful. He may, if there be a danger of a breach of the peace, and in that case by parol. It has been held that he may commit for insolent language in his presence, and whilst he is in the execution of his duty; but subsequent dicta question this decision.³ Certainly a justice cannot commit for contempt towards himself personally without a warrant in writing;⁴ whether he may, for contempt towards him *at his office*, not sitting in court, may be a question.⁵ But the decision rests with the judge.⁶

Evidence.] Having now spoken upon the subject of witnesses, we proceed to mention the mode of examining them, and the extent to which their examination, both in chief and otherwise, may be carried.

The rules in criminal cases are, for the most part, not unlike those applicable to civil issues. Thus the best evidence must, if possible, be produced. Another rule is, that hearsay cannot be admitted.⁷ A third rule is, that he who asserts the affirmative must prove it. And it is likewise a well understood regulation that the evidence must be confined to the point at issue.

Confessions.] It will, however, occur to the reader, that the prisoner may have confessed or admitted the crime charged against him: in this case, notwithstanding his plea of not guilty, his voluntary statement may be brought forward. It is generally tendered to the jury at the close of the case. The law of England,

¹ For refusing to be sworn at sessions in a case of high treason. *R. v. Lord Preston*, 1 Salk. 278.

² 7 Taunt. 66. By Onslow and Copley, Serjts. argo.

³ *R. v. Revel*, Str. 420.

⁴ *Mayhew v. Locke*, 7 Taunt. 63; 2 Marsh. 377. See other cases of committals, 7 Taunt. 66. *Sir G. Throgmorton v. Allen*, cited there from 2 Bro. Ab. 558.

⁵ *Pettit v. Addington*, Peake, Ca. 62.

⁶ *R. v. Charlesworth*, 2 Fost. & F. 326. A Mr. Fernandez refused to answer on the ground of privilege from criminating himself, and the judge fined him 500*l.* and sentenced him to imprisonment for six calendar months. A *habeas corpus* being moved for, the courts of Com-

mon Pleas and Exchequer unanimously refused the motion. 2 Fost. & F. 337, *n.* The son of the Baron De Vidil was committed for one month, in August, 1861, for refusing to give evidence against his father. It seems that this assumption of authority by the judges should undergo the revision of parliament, that the time of punishment should be limited, and that both fine and imprisonment ought not to be allowed, and that the amount of fine should be also limited.

⁷ Conversations between third persons in the prisoner's absence were admitted upon a charge of murder by Gurney, B., to show the condition of the murdered person. 1 Cox, 95. *R. v. Dalmas*.

following that of nature, presumes that a man will not criminate himself, and it accordingly requires that his confession of a crime should neither be extorted by threats, nor wrung from him by persuasion. It is rejected under such circumstances not from regard to public faith, but because it does not seem entitled to credit when tainted by the flattery of hope or the torture of fear.¹ It may be added, that the validity of confessions is for the judge's decision, and that he will require to be satisfied that the confession flows from the inducement. The onus of showing the negative of that matter lies on the prosecutor.² We give the following expressions as inadmissible:—"Unless you give me a more satisfactory account, I shall take you before a magistrate,"³ or, "send for a constable."⁴ "I am in great distress about my irons; if you will tell me where they are I will be favourable to you."⁵ "If you will give me a glass of gin, I will tell you about it." Two glasses were given.⁶ "I should be obliged to you if you would tell us what you know about it; if you will not, of course we can do nothing."⁷ "You had better not add a lie to the crime of theft."⁸ "You had better split, and not suffer for all of them."⁹ "It would have been better if you had told at first."¹⁰ "What you say will be taken down, and used for or against you, at your trial."¹¹ "What you are charged with is a very heavy offence, and you must be very careful in making any statement to me or anybody else that may tend to injure you, but anything in your defence we shall be ready to hear, or to send to assist you."¹² "You had better tell the truth, otherwise it will lie upon you, and the man will go free."¹³ "It would

¹ Leach, 263. *R. v. Dunn*, 4 C. & P. 543.

² Den. & P. 447. *R. v. Warrington*, cited. Lord Campbell, however, intimated in *R. v. Baldry* (*post*), that if the case were *res integra*, he might be disposed to allow confessions to be given in evidence, and let the jury give what weight they please to them. Id. 446.

³ *R. v. Thompson*, Leach, 291.

⁴ *R. v. Richards*, 5 C. & P. 318.

⁵ *R. v. Cass*, Leach, 293, n.

⁶ *R. v. Sexton*, 2 Russ. C. M. 827. *R. v. Jones*, Russ. & Ry. 152. Mr. Serjeant Russell cites several text books which deny *R. v. Sexton* to be law, and he is himself of that opinion. 2 Russ. C. M. 827, note (k).

⁷ *R. v. Partridge*, 7 C. & P. 551.

⁸ *R. v. Shepherd*, Id. 579. By the constable.

⁹ *R. v. Thomas*, 6 C. & P. 353.

¹⁰ *R. v. Walkley and another*, Id. 175. See also *R. v. Mills*, Id. 146.

¹¹ *R. v. Drew*, per Coleridge, J., 8 C. & P. 140, to which he adhered. *R. v. Hornbrook*, 1 Cox, C. C. 54, where the word "defence" was used by the constable:—"If you can say anything in your defence, we are willing to hear it," but these opinions of the learned judge seem to be open to discussion, and have since been overruled. *R. v. Baldry*, Den. & P. 430; 21 L. J. M. C. 130. *R. v. Farly*, 1 Cox, 76, also overruled, *ut supra*; and *R. v. Harris*, 1 Cox, 106.

¹² *R. v. Morton*, 2 Moo. & Rob. 514. *R. v. Williams*, 2 Russ. C. M. 832.

¹³ By the constable in a case of child murder. *R. v. Enoch*. By Parke and Taunton, JJ., 5 C. & P. 539. The decision of Coleridge, J., was also overruled.

be best for him if he would tell how it was transacted.”¹ *A fortiori*, abuse joined to threats will exclude a confession.² The same principle extends to a party in illegal custody. As where one detained without a warrant confessed under a promise of liberty and ten guineas’ reward; for supposing the confession voluntary, still it was made in illegal custody.³

Admissible.] The following have been held admissible confessions. Where no threat nor promise had been made, although the party had been perhaps illegally arrested, and although the conduct of the officer who had obtained the confession might have been calculated to intimidate.⁴ The law having gone far enough in rejecting confessions.⁵ Where the constable promised the prisoner that he should see his wife if he would disclose where the stolen property was, for that the prosecutor could ill afford to lose his money.⁶ Where a fellow prisoner pressed a man to tell how he murdered the boy. Having sworn his fellow prisoner to secrecy, the prisoner made a statement, and this relation of the circumstances was held admissible.⁷ Where a person upon being asked by the prisoner whether he had better confess, said he had better not, but added, that if the prisoner would say anything, it should go no further.⁸ Where the prosecutor said in the hearing of the prisoner that he considered him the tool of G., and the magistrate telling the prisoner to be sure to tell the truth, he made a statement,⁹ “A very serious oath has been made against you;” this expression did not exclude the evidence.¹⁰ Where some neighbours admonished the prisoner to tell the truth and consider his family, when the constable was present, who, however, made no comment, nor did the prisoner answer *at that time*; it was held, that a confession made to the constable an hour afterwards was admissible,¹¹ for although the person in authority was present *he* did not say anything.

A person in authority is, the magistrate, the constable,¹² the prosecutor, or a surgeon in some cases. A woman was charged with the murder of her bastard. She confessed certain things to the surgeon. But it turned out, that some time before a woman had

¹ *R. v. Warrington*, cited, Den. & P. 447. The indictment was for stealing the goods of partners in their absence: the wife of one of them induced the prisoner to confess. Held inadmissible. S. C. So is *R. v. Griffith*, 2 Russ. C. M. 832.

² *R. v. Parratt*, 4 C. & P. 570.

³ *R. v. Ackroyd and another*, 1 Lew. C. C. 49.

⁴ *R. v. Thornton*, 1 Moo. C. C. 27.

⁵ *R. v. Miles*, per Park, J., Car. Cr. L. 61.

⁶ *R. v. Lloyd*, 6 C. & P. 393.

⁷ *R. v. Shaw*, Id. 372.

⁸ *R. v. Thomas*, 7 C. & P. 345.

⁹ *R. v. Court*, Id. 486.

¹⁰ *R. v. Long*, 6 C. & P. 179.

¹¹ *R. v. Row*, Russ. & Ry. 153. *R. v. Tyler*, 1 C. & P. 129.

¹² The constable ought not, in general, to interrogate the prisoner. If he does, his questions ought not to be confined to such as are calculated to compromise the prisoner. *R. v. Stokes*, 17 Jur. 192.

told the prisoner in the surgeon's presence that it would be better to tell, to which recommendation, however, no attention was, at that time, paid, but, subsequently, the confession was made. This acknowledgment was held receivable.¹ So where the prisoner proposed to make a disclosure to a magistrate, who was also a clergyman, being told that some one would tell if he did not, and, subsequently, the prisoner, being informed that his confession would not benefit him, confessed to the coroner, who expressly informed him that his statement would be used against him, it was held receivable.² Again, a prisoner was in the custody of a constable, and was then taken charge of by another constable. He confessed to the latter, and whether his confession could be received would depend upon his being an accused party or an unwilling witness. In the former case, the first constable must have been called to show that he had not held out an inducement.³ The prisoner was charged with firing her master's premises. She was given into the charge of her master's daughter by the constable. The following words ensued, "I am sorry for you, you ought to have known better. Tell me the truth, whether you did it or no." "I am innocent." "Do not run your soul into more sin, but tell the truth." The girl then confessed. It was held—1. That here was neither threat or inducement. 2. The daughter was not a person in authority. And the conviction was affirmed.⁴ In *Rew's case*, had the confession been made immediately to the constable, and in that of *Gibbons*, had it been made to the surgeon without delay, neither statement would have been admissible, even in the absence of any threat or promise on the part of the individual in authority. The presence of such a party might seem to give a sanction to the inducement held out by the stranger. Agreeably to this, where a surgeon, in a case of administering poison, said, "You are under suspicion of this, and you had better tell all you know," the statement was rejected.⁵ So a confession made to an innkeeper in the presence of a constable, and which the constable was called to prove, was not admitted.⁶ So where the husband urged the wife to confess in the presence of a constable, upon which she made a statement: it was rejected.⁷ So a

¹ *R. v. Gibbons*, 1 Car. & P. 97.

² *R. v. Clewes*, 4 C. & P. 221. In this case also it was said to be but fair to call the magistrate before the confession was put in, because the prisoner might show an inducement. And it was also held, that the prisoner himself might call that person prior to the reading of the confession.

³ *R. v. Swatkins and others*, 4 C. & P. 548. "The distinction is very clear. You are not to sup-

press the truth, but you are not to take any measures of your own to endeavour to extort it." By Lord Denman. *R. v. Cart*, Taylor on Ev. 727.

⁴ *R. v. Sleeman*, 23 L. J. M. C. 19; Dears. 249.

⁵ *R. v. Kingston*, 4 C. & P. 387.

⁶ *R. v. Pountney*, 7 C. & P. 302.

⁷ *R. v. Laughner*, 2 Car. & K. 225; 2 Cox, C. C. 134.

confession made to a medical man in the presence of the mistress and her husband, in a case of poisoning, was held inadmissible, he having also said that it would be better for the prisoner to speak the truth.¹ "You had better tell the truth." The constable was present, but did not contradict: held inadmissible.² So the mother of the prosecutor's wife, and a neighbour, assailed a girl of fifteen charged with arson, with both promises and threats, upon which she confessed. There was little evidence besides. Littledale, J., upon its being suggested that no person in authority had interfered here, admitted the statement, and the prisoner was convicted, but the judges held that the evidence was inadmissible and the conviction wrong.³ Again, the wife of the prosecutor told the prisoner, a girl of thirteen, that perhaps it might save her neck if she would confess, this statement was deemed inadmissible, although Parke, B., had received it, and ten judges held the conviction wrong.⁴ It is the presence of a person in authority which is said to operate prejudicially to the reception of this evidence.⁵ The mistress said nothing whilst her servant confessed to a third person, who was not in authority, but held out an inducement. The mistress did not dissent, and the confession was refused, because the inducement which the third person held out was considered as the inducement of the mistress.⁶ Had not the mistress been present, the statement would have fallen under the rule, that a confession made to one not in authority is receivable.⁷ And so where one went with the prosecutor to assist him, a confession made to him in the presence of the prosecutor was rejected.⁸ Although doubts were at one time entertained even upon that point, and the judges were not unanimous.⁹ The prisoner being suspected of stealing money, her mistress told her that if she would tell the truth, she would forgive her. On a subsequent day, the superintendent of police and the mistress together visited the girl, when, after being cautioned, she made a statement. But her statement was rejected, because the original

¹ *R. v. Garner*, Den. 329. When the confession is found to have proceeded from inducement, it should be struck out of the judge's notes. But, per Erle, J., the judge is to decide in each case whether the words used conveyed the inducement or not. S. C. And by Patterson, J., it lies on the prisoner to show that the inducement was held out.

² *R. v. Millen and another*, 3 Cox, 507, where all the cases were cited.

³ *R. v. Simpson*, 1 Moo. C. C. 410.

⁴ *R. v. Upchurch*, 1 Moo. C. C. 465.

⁵ Together with the neglect of caution and warning. A policeman ought always to take care to warn a prisoner. And it is not desirable that the officer should question the prisoner. *R. v. Kerr*, 8 C. & P. 177.

⁶ *R. v. Taylor*, 8 C. & P. 733. *R. v. Luckhurst*, 23 L. J. M. C. 18; Dears. 245.

⁷ S. C.

⁸ *R. v. Stacey*, 2 Russ. C. M. 839. A threat accompanied the confession.

⁹ *R. v. Spencer*, 7 C. & P. 776.

promise of the mistress might be considered as still in the girl's mind, more especially as the mistress was present.¹ So it was where the prisoner confessed to her nurse a child murder. Lord Abinger would not admit a confession made subsequently to a surgeon.² An attorney likewise is a person in authority.³ However, upon the principle that the rule as to excluding confessions should not be extended, when the girl confessed to a surgeon in a case of child murder, in the presence of her mistress, the statement was admitted. The mistress was not the prosecutor, nor engaged in the case, neither in the apprehension, prosecution, or examination of the prisoner. Nor was the mistress in any way connected with the management of the house where the misfortune happened.⁴ So where a third person said in the presence of the prosecutor and policeman, who had said nothing, "You had better tell," the evidence was received.⁵ Should the prisoner confess by mistake, imagining that the person has authority, and it turns out that the individual to whom the confession was made, was not within the rule, it may be that the evidence will be received. Cresswell, J., was willing on one occasion to admit it.⁶

Enough has been said to show the necessity of a voluntary confession. It may appear superfluous to allege this, but there are occasions where a prisoner may be said to confess without hope or fear, and yet where the confession is not entirely free. As where the accused had desired the witness to apply to the justice that he might be admitted king's evidence, relating at the same time circumstances which went to prove him guilty. It was held, that as this disclosure was made under an idea of his being a witness for the crown, it could not be called a voluntary confession, and was accordingly not admissible.⁷ And so it was where the justice said he would do what he could for the prisoner if he would confess, upon which he confessed to a turnkey without inducement, especially as the turnkey had not given the prisoner any warning.⁸ So, in the case of a handbill by which a reward and promise of pardon were offered; a statement made under inducements created by the handbill was rejected, although the mere knowledge of the existence of a handbill concerning a murder would not have caused such rejection.⁹ But as soon as it can be made to appear that the prisoner was not actuated by any particular inducement, the case is different. As where, in a case of murder, the prisoner inquired whether there had been any proclamation or

¹ *R. v. Hewett*, Car. & M. 534. *Taylor, Spencer, and Pountney*

² *R. v. Downing*, Taylor on Evidence, 720. were cited for the prisoner.

³ *R. v. Croydon and another*, 2 Cox, C. C. 67. ⁶ Ballantine declined to press it.

⁴ *R. v. Moore*, Den. & P. 522; *R. v. Frewin*, 6 Cox, 530.

⁵ *L. J. M. C.* 199; 2 Car. & K. 153. ⁷ *R. v. Hall*, cited, Leach, 559.

⁶ *R. v. Parker*, 8 Cox, 465; *C. & P.* 535. See *R. v. Burley*, 2 Russ. C. M. 958;

Leigh & Cave, 42. The cases of ⁸ *R. v. Cooper and another*, 5

offer of pardon. Being informed that there had been, but without knowing the particulars, and after an express warning by the chaplain of the gaol that no inducement could be held out, the prisoner went before a magistrate and made a statement. This was held receivable.¹ The statement, in order to warrant its rejection, must be made with the knowledge and in the hope of receiving a reward. If the prisoner wished to screen himself and implicate others, the objection will not avail.² A printed copy of a reward was hung up in the magistrates' room, in the county gaol, and a promise of pardon was offered to any except the perpetrator of the murder. A prisoner being cautioned that any statement he might make would be used against him, made a statement. He was able to read. This paper or printed copy was held inadmissible.³ But statements made, and anonymous letters written *before* the prisoner's apprehension were admitted, and the facts of the prisoner's knowledge of the reward, and of his having been paid by the police for his support, did not affect these documents.⁴

Hence, we gain the principle that threats or promises will taint a confession where the person making them is in authority, but still, that if they are not followed by the avowal of guilt at the time, and thus an interval be allowed to elapse, a subsequent acknowledgment may be valid. A threat held out to the prisoner in the presence of another prisoner has been deemed not to invalidate a statement made by the latter at the time of the threat.⁵ Temporal favour is the benefit which excludes this evidence. Therefore, where a mistress told her servant, who was suspected of setting fire to an outhouse, that if she would confess God would forgive her, upon which she confessed, Lord Eldon admitted the confession, together with another made on the next day, out of the hearing but in the sight of the mistress, under a representation that her mistress said she had confessed.⁶ This case, however, is not to be relied upon, because the jury said they thought the first confession made under a hope of favour *here*, and the second under the influence of having made the first. The judges said that these points were not for the jury, and that although Lord Eldon agreed with the jury, the confessions were not receivable. Many of them thought the expressions not calculated to raise hopes of favour *here*, and so receivable as far as that point was concerned. Nevertheless, it seems that the mistress ought to have cautioned the woman that the words she might be induced to speak would be used against her at a future day.⁷ So, where a person, not a constable, told a boy not fourteen to kneel down, and then conjured him to tell the truth in the presence of the Almighty, upon which the boy (the prisoner) confessed to a murder, but neither threat nor promise was held out, the judges held

¹ *R. v. Dingley*, 1 Car. & K. 637.

² *R. v. Blackburn and others*, 6 Cox, 333.

³ S. C.

⁴ *R. v. Blackburn*, ut supra.

⁵ *R. v. Jacobs and another*, 4 Cox, 54.

⁶ *R. v. Sarah Nute*, 2 Russ. C. M. 832, citing 1 Burn. D'Oyley & W. 1086.

⁷ S. C.

the evidence receivable, much disapproving, however, of the mode by which the confession was obtained.¹ So, in *Gilham's case*, a confession induced by the persuasions of a clergyman, who held out no hopes of temporal benefit, was received. Although it must be noticed that the prisoner had previously been expressly cautioned against indulging any hopes of mercy here.² This caution was not given in *Radford's case* by the clergyman to whom confession was made, and, accordingly, in that case, the prisoner's statement was rejected.³

So, after several questions of a religious tendency, a policeman asked a boy between eight and nine, "Do you think God knows everything that is done?" "Yes." "Do you think He knows who set fire to the haystack?" The boy did not answer, but began to cry. The officer then asked whether he could give any information about the fire at Mr. Wright's, and said he should apprehend him for setting fire to Mr. Wright's ricks. A statement was then made. Cresswell, J., after consulting Williams, J., rejected the evidence.⁴ Drunkenness will not exclude a confession.⁵ But what a prisoner said whilst talking in his sleep was refused by Tindal, C.J.⁶ Another principle presents itself. Can any fact be ascertained, so as to be given in evidence, in consequence of the prisoner's confession, although the confession itself be not admissible? Lord Eldon, upon one occasion, intimated that in his opinion, unless the fact proved could have been sufficient to warrant a conviction, without any confession leading to it, he should direct the jury to acquit; and his lordship so directed in the case before him.⁷ But this is not now the rule. As a general principle, the fact is admitted in evidence, but not the acknowledgment of the prisoner. And the reason is this. The ground for excluding confessions is the apprehension that the accused may have been induced to say that which is false, whereas the fact discovered shows, that so much of the confession as immediately relates to it is true.⁸ The following circumstances, therefore, have been admitted. The finding of property concealed within the sackings of a bed.⁹ The observations of a prisoner connected with the finding of such property; as where he gave up to the prosecutor a guinea and a 5*l.* note as the guinea and one of the notes which had been stolen from him.¹⁰ But where the prisoner gave up some money to the prosecutor, and said that was all he had left of it, and it turned out that the prosecutor had previously said, "he only wanted his money, and if the prisoner gave him that he

¹ *R. v. Wild*, 1 Moo. C. C. 452.

⁷ *R. v. Harvey*, 2 East, P. C.

² 1 Moo. C. C. 186. *R. v. Hodg-*

658.

son, cited, Id. 202.

⁸ Leach, 265, n.

³ Id. 197, 202, cited there; and see *R. v. Sparke*, Peake, N. P. C. 78.

⁹ *R. v. Warwickshall*, Id. 263.

⁴ *R. v. Day*, 2 Cox, 209.

To the same effect are, *R. v. Mosey*, Id. 265, n.; *R. v. Butcher*, Id.; *R. v. Lockhart*, Id. 386; *R. v. Grant*, East, P. C. 658; *R. v. Hodge*, Id.

⁵ *R. v. Spilsbury and another*, 7 C. & P. 187.

⁶ *R. v. Sippet*. Taylor on Evidence, 725.

¹⁰ *R. v. Griffin*, Russ. & Ry. 151.

might go to the devil if he pleased," the conviction was holden wrong by a majority of the judges, on the ground that this evidence ought not to have been entertained.¹ Indeed, where property is found, the matter ought to be put in proof.² A servant was charged with arson. A spoon, and other things, were found in the sucker of a pump. The master threatened the prisoner concerning the things found, but was silent as to the fire. The prisoner made a statement with respect to the fire, but it was held inadmissible, because the whole was one transaction.³ Here is the distinction. Therefore where the prisoner in custody for one offence made a statement to the constable concerning another of which he was not suspected, the judge received it.⁴ The same principle prevails where the property is not found, as far as the conduct of the prisoner is concerned. Thus, the prisoner having made an inadmissible confession, carried the officer to a house, as being that where he had disposed of the stolen property. This latter evidence being admitted, the conviction was holden wrong, because the same influence which might produce a groundless confession might produce groundless conduct.⁵ However, the facts obtained by a clue furnished by the prisoner are admissible.⁶ Again, the confession, if received, must relate to the same felony which is being tried. The prisoner was on trial for stealing a marked shilling. A constable, who had found the shilling, proved asking the prisoner whether he had any more of Mr. —'s money about him. Upon this the prisoner produced some half-crowns, and made a statement. But the court would not receive it, because it was no part of the present felony, but connected with one altogether distinct. There is one more point.⁷ If a second confession follow one which is not admissible, is it right to admit such second statement? The principle here is, that the party must first be cautioned, and if, after his mind has been impressed with the idea that his prior statement cannot be used against him, he still thinks fit to confess again, the latter declaration is receivable.⁸ For the accused otherwise might imagine that, having once confessed, it would be of no use to deny what he had once said, and no distance of time will cure the defect of want of previous caution.⁹ Half-an-hour, therefore, although a caution was administered, was deemed insufficient, especially as there had been two prior inad-

¹ *R. v. Jones*, Id. 152. By five judges against three; one doubted. *R. v. Clarke*, by Vaughan, B., Car. C. L. 59.

² *R. v. Gould*, 9 C. & P. 364.

³ *R. v. Hearn*, Car. & M. 109.

⁴ *R. v. Warner*, 2 Russ. C. M. 845.

⁵ *R. v. Jenkins*, Russ. & Ry. 482.

⁶ *R. v. Leatham*, 8 Cox, 498. As if a written confession be found at a place, or a murdered body, in

consequence of what the prisoner may have said. *Crompton, J.*, Id. 501.

⁷ *R. v. Butler*, 2 Car. & K. 221.

⁸ *R. v. Richards*, 5 C. & P. 318. *R. v. Griffiths*, 2 Russ. C. M. 832. See *R. v. Sexton*, 2 Russ. C. M. 833. As to continuing influence, see Car. & M. 534.

⁹ *R. v. Edwards*, 1 Burn by Chetw. 564. *R. v. Nute*, 2 Russ. C. M. 832. See also *R. v. Howes*, 6 C. & P. 404.

missible confessions, for the fear or hope continued.¹ Even a whole day was deemed insufficient, there having been no caution.² But two days having elapsed, the influence was held to have ceased.³ The remaining topics for discussion, the general principles having been disposed of, are, first, the particular method of regulating these confessions before magistrates; and, secondly, the legal effect of them when actually received in evidence. With regard to the first point, it is observable that a marked distinction obtains between confessions before magistrates and those which are communicated to private persons. In the case of the magistrate, a positive and careful caution must be adopted.⁴ In other cases, it is not amiss to give this warning; but, before a justice, it is indispensable, because the presence of such an officer of the law might, in case of confession, naturally induce a hope of mercy. And where previous expectations had been raised in the mind of the accused, so as to produce some statement, Buller, J., although he would not reject the subsequent confession, required the most unequivocal testimony that the caution was thoroughly understood.⁵ So, notwithstanding the caution, it is necessary for the magistrates to go further in the case of a second confession, and to inform the party that his first statement cannot be used to his prejudice.⁶ Not merely to caution him not to say anything to injure himself.⁷ And it may be said that the warning must be administered before the justice, and not elsewhere.⁸ Where the prisoner was urged by a constable to confess, but, before doing so, he asked the magistrate's advice, who said he did not think it would do any good, upon which the prisoner declined to confess, but, on his way to prison, acknowledged the offence to another constable, the statement was admitted.⁹ A magistrate ought not to dissuade a prisoner from confessing.¹⁰

The wife of the constable had exhorted the prisoner to confess some days before his examination, but this circumstance was not deemed sufficient to exclude the confession before the magistrates.¹¹ And where the prosecutor desired the prisoner, when before the magistrate, to speak out and tell the truth, but was instantly checked by the magistrate or his clerk, a confession immediately obtained was held admissible.¹² Lord Denman, on one occasion, suggested the following useful observations upon this subject. "The frequent warnings given to prisoners not to say anything that may criminate themselves, renders it right for me to set right a prevalent error on this subject, and to state what I con-

¹ *R. v. Collier and another*, 3 Cox, 57.

² *R. v. Meynell*, 2 Lew. C. C. 122.

³ *R. v. Nicholls and another*, 2 Russ. C. M. 838.

⁴ *R. v. Lingate*, 1 Phil. Ev. 414.

⁵ 2 East, P. C. 658.

⁶ *R. v. Howes*, 6 C. & P. 404.

⁷ *R. v. Smith*, 2 Russ. C. M. 833. *R. v. Compson*, Id. 834. *R. v. Sherrington*, 2 Lew. C. C. 123.

⁸ *R. v. Payne and others*, Sarum, Sp. As. 1830, cor. Gaselee, J.

⁹ *R. v. Rosier*, 1 Phil. Ev. 105.

¹⁰ *R. v. Green and others*, 5 C. & P. 312.

¹¹ *R. v. Hardwick*, 1 C. & P. 98, n. 1 Phil. Ev. 410. See Den. & P. 449.

¹² *R. v. Edwards*, 1 Phil. Ev. 415.

ceive to be the proper course of proceeding. A prisoner is not to be entrapped into making a statement,¹ but when a prisoner is willing to make a statement, it is the duty of the magistrates to receive it; but magistrates, before they do so, ought entirely to get rid of any impression that may have before been in the prisoner's mind, that the statement may be used for his own benefit, and the prisoner ought also to be told, that what he thinks fit to say will be taken down and may be used against him on his trial."² The following expression of a magistrate was held not to exclude the confession. "Be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial."³ Again, "Your wife has confessed the whole, and there is case enough to send the bill before the grand jury." Park, J., considered this speech of the magistrate a caution and not a menace, and admitted the confession.⁴ This confession must not be taken upon oath. If the examination should so purport, no evidence can be received to contradict that which appears upon the face of the document itself.⁵ So particular is this rule, that when during an investigation for poisoning before a magistrate, the prisoner had been sworn, after which he himself became the accused and was committed for trial, it was held that his examination could not be used against him.⁶ So, where one gave evidence against A. in his presence, and was afterward joined as a prisoner jointly with A., the same rule prevailed.⁷ So what the prisoner said before the coroner upon a charge of murder was rejected.⁸ Although it seems, that in *R. v. Owen*, indicted for rape, Williams, J., was inclined, at the trial for rape, to admit evidence of the prisoner's deposition made upon oath before the coroner; and he did receive it, but promised, if necessary, to reserve the point.⁹

Where, however, the mistake was discovered and the deposition destroyed, a subsequent statement was received.¹⁰ And Vaughan, B., received a statement made on oath by a prisoner at a time when he was not under any suspicion.¹¹

The validity of a statement is not affected by a mistake of the magistrate in returning that the prisoner had not made any statement. As where the prisoner admitted certain facts on the 10th

¹ For instance, a magistrate must ask no question without a previous caution; *R. v. Pettit*, 4 Cox, 164; and it is better that he should abstain altogether from such questions.

² *R. v. Arnold*, 8 C. & P. 621.

³ *R. v. Holmes*, 1 Car. & K. 248. *R. v. Attwood*, 5 Cox, 322.

⁴ *R. v. Wright*, 1 Lew. C. C. 48.

⁵ *R. v. Smith and another*, 1 Stark. N. P. C. 242, per Le Blane, J., 2 Stark. Ev. 52. *R. v. Wheeley*, 8 C. & P. 250. *R. v. Pikesley*, 9

C. & P. 124. *R. v. Shellswell*, 2 Russ. C. M. 855.

⁶ *R. v. Lewis*, 6 C. & P. 161.

⁷ *R. v. Davis and another*, Id. 177.

⁸ *R. v. Wheeley*, 8 C. & P. 250. *R. v. Owen*, 9 C. & P. 238.

⁹ *R. v. Owen*, 9 C. & P. 83.

¹⁰ *R. v. Webb and another*, 4 C. & P. 564. *R. v. Davis and another*, 6 C. & P. 177.

¹¹ *R. v. Tubby*, 5 C. & P. 530.

of November, but the final settlement of the depositions did not take place till the 14th, when the magistrate returned that the prisoner declined saying anything. The statement on the 10th was received.¹ But where the prisoner's statement had been by a mistake entered into the deposition book as "The information and complaint of A. B." Gurney, B., refused to admit it, although the magistrate's clerk was present, and was prepared to explain the mistake.² So, where the examination concluded thus: "Taken and sworn before me," under which was the signature of the magistrate, Park, J., rejected it altogether, and would neither suffer the clerk to prove that it was not so sworn, nor to give parol evidence of what the prisoner had said.³ Then the questions arise, whether the confession must be in writing, and how far parol evidence of the prisoner's declaration is admissible in the absence of such a written statement. By 11 & 12 Vict. c. 42, s. 18, all that a prisoner says must be taken in writing, and signed by the magistrate, and transmitted to the court, upon which it becomes evidence without more, unless it can be shown that the magistrate did not sign the paper.⁴ And this, indeed, was the usual practice before the provision just referred to.⁵ But there is this difference. Before the late Act, unless the prisoner had signed his examination, or admitted its truth, it was not competent to tender it in evidence, but parol evidence must have been given.⁶ Now, however, the absence of the signature or the silence of the prisoner, as to the genuineness of his words, will not prevent the writing from being received if attested conformably to the statute.⁷ And it is presumed, that although a prisoner might formerly have retracted what he had said so as totally to set aside his confession,⁸ yet now the examination, duly signed, must be forwarded in the usual course in order to be presented, *quantum valeat*, to the jury. And, on the other hand, whatever might have been the practice formerly,⁹ should the magistrate now neglect to sign the document

¹ *R. v. Wilkinson*, 8 C. & P. 662.

² *R. v. Bentley*, 6 C. & P. 148.

³ *R. v. Rivers*, 7 C. & P. 177.

⁴ See, under the old law, *R. v. Jacobs*, Leach, 309. *R. v. Fearshire*, Id. 202. *R. v. Hollinshead*, 4 C. & P. 242. *R. v. Hopes*, 7 C. & P. 136. *R. v. Foster*, Id. 148. *R. v. Priestley*, 1 Lew. C. C. 74. *R. v. Rees*, 7 C. & P. 568. *R. v. Reading*, Id. 649. *R. v. Hearn*, Car. & M. 109. Case at Sarum, M. S. *ex relatione Penruddock*. Patteson, J., refused to allow the magistrate's signature to be proved by a witness, the justice and his clerk being absent. *R. v. Pikesley*, 9 C. & P. 124. All these cases are virtually superseded.

⁵ 1 & 2 Ph. & M. c. 13; 2 & 3

Ph. & M. c. 10; 7 Geo. 4, c. 64, ss.

2, 3. All repealed.

⁶ See *R. v. Foster*, 1 Lew. C. C. 46. *R. v. Dewhurst*, Id. 47. *R. v. Hirst*, Id. *R. v. Bell*, 5 C. & P. 162. *R. v. Tarrant*, 6 C. & P. 182.

⁷ See *R. v. Haines*, 2 Russ. C. M. 886.

⁸ *R. v. Bennet*, Leach, 553, n. *R. v. Telicote*, 2 Stark. N. P. C. 483.

⁹ *R. v. Lambe*, Leach, 552. *R. v. Thomas*, Id. 637. *R. v. Hobson*, 1 Lew. C. C. 66; and see *R. v. Bradbury*, Leach, 639. *R. v. Jones*, Car. Cr. L. 13.

it cannot be admitted. Although, if taken in writing and read over to the prisoner, the clerk to the magistrate may refresh his memory with the examination so taken and read, though not signed.¹ The clause of 11 & 12 Vict. c. 42, only applies when the examinations are complete and the depositions read over. A voluntary statement on remand, although not taken in writing and without caution, is admissible.² It will be taken as a fact likewise since the Act, that the statement was read over to the prisoner.³

The coroner was permitted to give parol evidence of the prisoner's statement before him upon an indictment for murder, where some irregularity interfered to hinder the confession from being received, and the prisoner was subsequently executed.⁴

So that the rule before the statute was that when negative proof appeared, parol evidence might be tendered,⁵ and the same rule applies since the statute, for the negligence of the magistrate or his clerk ought not to exclude a free declaration made after the most solemn cautions. As where the justice, being very deaf, did not take down what the prisoners said, Taunton, J., admitted parol evidence.⁶ But the clerk or some other person must prove that the examination was not taken in writing.⁷ So a parol statement duly made before a written examination will not be superseded by the latter, but may be given in evidence.⁸ And if several witnesses hear a confession, not made in the course of a regular examination, and one of them reduces it to writing as it was being delivered, the testimony of the other witnesses is not thereby excluded.⁹ Indeed, Best, C. J., has said, that upon clear and satisfactory evidence the prisoner might be shown to have said something beyond what was taken down before the magistrate.¹⁰ As where he said something in a loud tone to a witness before the justice.¹¹ Or, indeed, anything not taken down.¹² And there have been recent decisions by which the power of adding to an examination, though taken in writing, has been acknowledged.¹³ If a conversation should have passed between the prisoner and the magistrate concerning a statement, and be reduced to writing, and especially

¹ *R. v. Pressly*, 6 C. & P. 183.

² *R. v. Stripp*, 7 Cox, 97.

³ See *R. v. Chappel*, 1 Moo. & Rob. 395. *R. v. Hope*, Id. 396. *R. v. Richards*, Id.

⁴ *R. v. Reed*, Moo. & M. 403. Tindal, C. J. The form, "Prisoner admits," &c. is an improper one, though it will not invalidate the deposition. *R. v. Roche*, Car. & M. 341. But see *R. v. Mallet*, 2 Russ. C. M. 867, where Littledale, J., refused to admit any other statement than the prisoner's own words.

⁵ *R. v. Hall*, cited, Leach, 559.

⁶ *R. v. Shilleck and another*, 2 Russ. C. M. 876.

⁷ *R. v. Packer*, 2 Russ. C. M. 876. *R. v. Philips*, Id.

⁸ *R. v. M'Carthy*, 2 Stark. Ev. 52. *R. v. Fletcher and Squire*, 1 Lew. C. C. 68. See also 16 St. Tr. 35, per Eyre, J.

⁹ *R. v. Harris*, 1 Moo. C. C. 338; and see *R. v. Laver*, 12 Vin. Ab. 96, Leach, 559, cited.

¹⁰ Ry. & M.N.P.C. 232, in *Rowland v. Ashby*.

¹¹ *R. v. Johnson*, 2 Russ. C. M. 879.

¹² *R. v. Hooper*, Id.

¹³ *Venafray v. Johnson*, 1 Moo. & Rob. 316. *R. v. Harris and others*, 1 Moo. C. C. 338.

if tacked to the confession, the judge will have the memorandum read before he decides upon the admissibility of the evidence.¹ If the prisoner volunteers a statement before the case for the prosecution is concluded, or says anything, whatever might have been the contrary opinions, it is now receivable.²

Some few words may be introduced here upon the subject of statements which may happen to be gained from the prisoner by questions or otherwise, and such may thus be termed indirect avowals. On one occasion, indeed, such evidence, elicited by a magistrate who had examined the prisoner in the same manner as a witness, was rejected by Richards, C. B.³ But later consideration has not affirmed that decision. In a case where it appeared that part of the examination had been elicited by questions put by the magistrate, Littledale, J., quoted Stark. on Ev. App. pt. 4, p. 52, where it was said that Holroyd, J., had received an examination under such circumstances, and the learned judge, expressing his approbation of that ruling, admitted similar evidence upon the trial before him.⁴ So evidence taken on oath before commissioners of bankruptcy after due caution and permission to elect certain questions for answers and to reject others, has been held admissible in a case of forgery.⁵ So where the bankrupt was examined under 12 & 13 Vict. c. 106, s. 117, and answered questions beyond the compulsory power given by the Act, and *without claiming the right to refuse*: these answers were held admissible against him, upon an indictment for uttering a forged letter to obtain goods.⁶ So his answers to questions concerning his books, given under a threat of committal, were held to be admissible.⁷ So answers and depositions in chancery before any charge made were admitted.⁸ But the distinction arose when the solicitor for the prosecution put questions to the bankrupt, which he was compelled to answer, with a view to criminate him.⁹ Upon an indictment, it appeared that after the examination and subscription thereof by the bankrupt, he was asked a question. Mr. Justice Williams laid down the rule thus:—He would not receive parol evidence of any answers to questions put before the commissioners subscribed their names to the examination. He would presume that all the answers prior to that which were material were taken down and included in the examination before signature. But he would receive answers to

¹ *R. v. Dingley*, 1 Car. & K. 637.

² *R. v. Mellor*, 2 Russ. C. M. 883. *R. v. Fagg*, cont. 4 C. & P. 566.

³ *R. v. Wilson*, Holt, N. P. C. 597.

⁴ *R. v. Ellis*, Ry. & M. N. P. C. 432. *R. v. Bartlett*, 7 C. & P. 832.

See also *R. v. Mercer*, 2 Stark. N. P. C. 366; 1 Moo. C. C. 203, per Lord Tenterden.

⁵ *R. v. Wheater*, 2 Moo. C. C. 45.

⁶ *R. v. Sloggett*, 25 L. J. M. C. 93, and *R. v. Wheater* was cited.

⁷ *R. v. Scott*, 25 L. J. M. C. 128; Dears. & B. 47.

⁸ *R. v. Highfield*, 2 Russ. C. M. 859.

⁹ *R. v. Darby*, 2 Cox, 316, and *R. v. Garbett*, was distinguished.

subsequent questions.¹ So where the prisoner when in gaol gave a letter to the turnkey, who instead of sending it by post to the father of the prisoner, as directed, gave it to the visiting magistrates, whence it found its way to the prosecutor; it was held by Garrow, B., that the letter was admissible, and the judge said that Gould, J., had ruled the samething.² What a prisoner says to himself is evidence.³ And if the prisoner has said before the magistrate that the deposition of a certain witness was true, this deposition may be read at the trial as part of the prisoner's statement, although the witness be examined for the prosecution.⁴

The second point is the legal effect of these confessions as evidence. They are sufficient of themselves without proof *aliunde* of a felony having been committed, that is to say, although entirely uncorroborated.⁵ This point was, after the decision above referred to, presented distinctly to the judges, and they held the same opinion.⁶ In another case there was no proof that a robbery had been committed unless through the confession of the prisoners; one of whom was proved to have sent a message to the person robbed to prevent him from appearing. The judges held the conviction right.⁷ On the other hand, notwithstanding a voluntary confession, evidence may be received to show that the prisoner was not of the party who committed the robbery.⁸ And a party may be convicted upon *his own* confession, who after having been admitted king's evidence, refused to give his testimony, there being no other proof of the offence.⁹ Before the statute 11 & 12 Vict. c. 42, s. 18, the prisoner might have impeached his written statement.¹⁰ But now where the statement is transmitted to the court, it may be admitted without further proof than the fact of the transmission, unless it be proved negatively that the justice did not sign it.¹¹ Still a statement made before the magistrate, and *not given in evidence*, cannot be set up to contradict the prisoner's defence.¹² And the whole of the admissions must be taken together. Where there was no evidence beyond the possession of stolen goods, and the prosecutor's counsel put in the prisoner's declaration, in which he said he had bought the goods,

¹ *R. v. Radcliffe*, 2 Lew. 57.

² *R. v. Derrington*, 2 C. & P. 418.

³ *R. v. Simons*, 6 C. & P. 538.

⁴ *R. v. John*, 7 C. & P. 324.

⁵ *R. v. Wheeling*, Leach, 311, n.

⁶ *R. v. Eldridge*, Russ. & Ry. 440.

⁷ *R. v. Falkner and another*, Id. 481. *R. v. White and another*, Id. 508. *R. v. Tippet*, Id. 509.

⁸ *R. v. Barnet*, 4 Cox, 269. *R. v. Falkner and Wheeling* were cited.

⁹ Stark. on Ev. pt. 4, p. 23.

¹⁰ Stark. on Ev. p. 1045. See *R. v. Jones*, 2 C. & P. 129, where it was said that if part of the statement admits guilt, and part asserts innocence, the whole should go to the jury; and also if the whole contains nothing incompatible with innocence, it would be right, in the absence of other evidence, to direct an acquittal. And see 2 Brod. & B. 297, in the *Queen's case*, per Abbott, C. J.

¹¹ See *R. v. Harris*, 4 Cox, 157. *R. v. Hunt*, Id. 149, Erle, J.

¹² *R. v. Powell*, Car. & M. 500.

Bolland, B., directed an acquittal, for in the absence of other testimony, such an assertion must be taken as true.¹ If, however, there be other evidence, the judge, on the whole, will leave it to the jury, although the *prosecutor* has given in evidence the prisoner's exculpatory statement.² But if tendered generally the statement will not be evidence in his behalf.³

So, in a case of murder, if the prisoner should say he was present but took no part in it, although the judge will not direct an acquittal, there must be evidence to show that he did more than he had stated. The confession operates for, as well as against, him, and the jury may believe one part and reject the other.⁴ But whatever the legal effect of a confession may be with regard to the prisoner himself, it will not affect other accused persons.⁵ And the question then is, how such a statement would operate without prejudicing the jury against the supposed accomplices. It makes no difference that the confession has been made in the presence and hearing of a party implicated, who did not deny it. As where three were charged with stealing a horse, and one said before the magistrate that he and B. committed the offence, which B. did not deny. This was held no evidence against B.⁶ A prisoner pleaded guilty. It was held, that his confession could not be read, so as to charge a fellow prisoner, and, moreover, that the record of a conviction founded upon such a confession, could not be received for a similar purpose.⁷ For the prisoners before the magistrate are to answer depositions taken upon oath, and not statements made by a party accused together with them.⁸ But where it becomes necessary to read the confession of a prisoner, a question ensues whether the names of other accused parties upon trial should be read or omitted, and the better opinion is that they ought to be read, upon the principle that the whole of what a prisoner says must be stated.⁹ The jury, however, are instructed to lay out of their consideration such parts as affect the others. Park, J., has held a contrary opinion, saying that he did not concur with Mr. Justice Littledale upon the subject, and ordering the names to be omitted.¹⁰ And the author has a strong impression that the latter learned judge directed the names to be read in blank at Salisbury some years since. But Littledale, J., has ruled in favour

¹ 2 C. & P. 129, *ut supra*.

² *R. v. Steptoe*, 4 C. & P. 397. *R. v. Higgins*, 3 C. & P. 603. See *Ry. & M. N. P. C.* 258, 259, *n*.

³ *R. v. Haines*, 1 Fost. & F. 86.

⁴ *R. v. Clewes*, 4 C. & P. 221; 3 C. & P. 603, *ut supra*.

⁵ *R. v. Tong*, Kel. 17; Leach, 235. However, as to the dying declaration of an accomplice, see *R. v. Tinkler*, East, P. C. 354.

⁶ *R. v. Appleby*, 3 Stark. N. P.

C. 33. Holroyd, J., cited a case at Chester, where the judges held the same opinion.

⁷ *R. v. Turner and another*, 1 Lew. C. C. 119; and see *R. v. Lewis*, 6 C. & P. 161. *R. v. Davis*, Id. 177.

⁸ *R. v. Swinnerton*, Car. & M. 593.

⁹ *R. v. Jones*, 4 C. & P. 217. *R. v. Clewes*, Id. 221. See *R. v. Boroski*, 3 St. Tr. 474.

¹⁰ *R. v. Maudsley*, 1 Lew. C. C. 73.

of the principle above laid down, in the case of a letter, directing the names of the other persons to be read aloud, but telling the jury not to pay the slightest attention except as far as the document concerned the prisoner who wrote it.¹ So, in a conversation where a witness was deposing to what one of several prisoners had said, it was objected, that the names of the others should be suppressed, but Lord Denman, C. J., was clear to the contrary.² Nevertheless, if the magistrates' clerk leaves a blank for the names, the court will not suffer parol evidence of the names to be admitted.³ Where a man charged with forgery escaped before trial, Littledale, J., admitted evidence of what he said upon the subject of the forgery then under trial, the prisoners having been already connected together with the charge.⁴ Where a party, again, was convicted of an assault before two magistrates, and then the person assaulted died of the blow, it was held upon the trial of that party for murder, that the evidence of one of the justices might be received as to certain expressions used by the one in the presence of the other, together with the answer.⁵ It has also been held, that a confession by the principal will not be evidence against the accessory, to prove the guilt of the principal. Nor will the conviction of the principal upon a plea of guilty, or of not guilty, be evidence for the same purpose. The guilt of the principal must be proved by other means.⁶ But this rule does not hold in the case of a receiver.⁷ At least, what the thief says in the receiver's presence is evidence against the receiver,⁸ or is to be presumed, with reference to the circumstances, certainly not as to the guilty knowledge. Lastly, a confession must be full enough. Where the prisoner acknowledged having taken two heifers from the "West End, Dolver," the name of the prosecutor's farm, but the prosecutor would not swear that there was not another farm of that name, the confession was holden insufficient.⁹

Examinations.] We now come to speak of examinations before magistrates, dying declarations, letters, depositions, public docu-

¹ *R. v. Fletcher and others*, 1 Lew. C. C. 107; 4 C. & P. 250. S. P. by Littledale, J., in the Oddingley murder case. S. P. by Alderson, J., in a case of poaching. *R. v. Hall and another*, 1 Lew. C. C. 232. The attention of the learned judge having been called to the two opinions. *R. v. Walkley and another*, 6 C. & P. 175.

² *R. v. Foster and others*, 1 Lew. C. C. 110. *R. v. Barstow*, Id. *R. v. Hearn and others*, 4 C. & P. 215.

³ *R. v. Morse and others*, 8 C. & P. 605, Patteson, J.

⁴ *R. v. Stansfield and others*, 1 Lew. C. C. 118.

⁵ *R. v. Edmunds*, 6 C. & P. 164.

⁶ *R. v. Turner*, 1 Moo. C. C. 347.

⁷ *R. v. Blick*, 4 C. & P. 377.

⁸ *R. v. Cox*, 1 Fost. & F. 90.

⁹ *R. v. Tuffs*, 5 C. & P. 167. See generally on the subject of confessions, 2 Hawk. P. C. c. 46, s. 31, *et seq.*; East, P. C. 657, *et seq.*; Burn's Just. Tit. "Confession."

ments, or records, &c., and private documents, as policies of insurance, &c. We need not pause long upon examinations, for it rarely occurs that an examination which goes further than a mere denial or confession does not contain some facts which implicate the person making it. And the matter is so mixed up with the point of confessions, that the cases bearing upon both confessions and examinations, not being confessions, have been already for the most part noticed.

Dying declarations.] The admission of dying declarations as evidence lies entirely in the breast of the court. The court will judge of the circumstances of each particular case.¹ The dying declaration is an exception to the doctrine that hearsay evidence cannot be admitted, and it may also be remarked that these statements, although parol, are receivable, and even so when a subsequent story has been reduced to writing.² The statement, however, must relate to the offence which caused the death. A woman, who had been ravished, cut her throat, and under a sense of impending dissolution, implicated the prisoners in the criminal assault. This story, as a dying declaration, was held inadmissible.³ Upon these occasions the judge will have to consider the integrity of the feeling of approaching death, in other words, the hopelessness of life. Where the deceased has evidently no hope, the matter is very clear. And also where the wound or state of illness is such as to preclude hope.⁴ A woman lay mortally wounded, and in such a condition that her immediate death was almost inevitable. Eyre, C. B., held her declaration admissible, although no explanation escaped her as to her peculiar situation.⁵ The surgeon's opinion that there are hopes will not exclude the evidence, if the patient himself declare that he has no prospect of life, and that he must die.⁶ So, where the surgeon gave some slight hopes, but the man said, "I do not myself think that I shall ultimately recover." The declaration was held admissible.⁷ The patient's words were, "Oh God, I am going fast. I am too far gone to say any more." This expression was held sufficient without further evidence of the condition of the injured person.⁸ On the contrary, where the surgeon declared that recovery was just possible, and the deceased said, "I am satisfied," his state-

¹ See 6 C. & P. 386; 7 C. & P. 187.

² *R. v. Reason and another*, Str. 500.

³ *R. v. Newton and another*, 1 Fost. & F. 641.

⁴ East, P. C. 358.

⁵ *R. v. Woodcock*, Leach, 500. *R. v. Johns*, ut supra, S. P. *R. v. Tinkler*, East, P. C. 354. *R. v. Brooks*, 1 Cox, 6.

⁶ 1 Moo. C. C. 97. *R. v. Mosley*

and another. The words were, "I shall not continue long. A few days will finish me. I am sure I shall not get better." *R. v. Bonner*, 2 Russ. C. M. 759; 6 C. & P. 386.

⁷ *R. v. Reany and another*, 26 L. J. M. C. 43. *R. v. Peel*, 2 Fost. & F. 21. *R. v. Seton*, Law Times, 1846.

⁸ *R. v. Nicholas*, 6 Cox, 120. But the declaration was read by consent.

ment was deemed inadmissible, because he was in hope.¹ It is not enough to exclude, that he has some hope left in his own mind. Scarcely a human being could be found who would not entertain some hope.² Although where the deceased said she should not recover, but on the same day inquired of some one whether she would "rise again," her declaration was rejected.³ The dying declaration of a child four years old was rejected, on the ground of inability, by reason of tender age, to have an idea of a future state, which is necessary, in order to make such evidence admissible.⁴ But the declaration of a boy ten years old was deemed receivable, being made under the immediate expectation of death and with reference to a future state.⁵

The custom among Catholics, when a person is desirous of making his peace with God, is to send for a priest and to receive extreme unction.⁶ Extreme unction is not considered necessary to salvation by the Roman Catholic Church. The deceased being shot was asked whether he would have a priest fetched; he replied, "That is not of much use." Being asked whether he would see a magistrate, his answer was, "Not yet." He then made a statement, and it was received as a declaration in *articulo mortis*.⁷ The dying declaration is not quite confined to the person where death is the subject of the charge. If another person has died by the same means and mode of destruction which are laid to

¹ *R. v. Christie*, 2 Russ. C. M. 754, citing Carr. Sup. 202. *R. v. Megson*, 9 C. & P. 418.

² *R. v. Pym*, 1 Cox, 339.

³ *R. v. Fagent*, 7 C. & P. 238. *R. v. Hayward*, 6 C. & P. 157. Other instances of admissible declaration are as follow: "I am afraid I shall never get better," said some weeks before death. *R. v. Craven*, 1 Lew. C. C. 77. "You are in great danger." "I fear I am." He soon got better, so as to think himself out of danger. *R. v. Simpson*, Id. 78. But Patteson, J., did not think that hope was sufficiently excluded in Simpson's case. *R. v. Errington*, 2 Lew. C. C. 148. Believed he should die. *R. v. Wm. Smith*, Id. 81. Desire to make a will immediately. *R. v. Thomas*, 1 Cox, 52. Religious expressions. Id. Fluctuations between hope and no hope, governed by the surgeon. At length hope ceased. *R. v. Ashton*, 2 Lew. C. C. 147. *Contra*:—"I never thought I should recover; I have no great hopes of it now."

R. v. Wilson, Id. 78, Littledale, J. It was, however, received as a deposition upon oath. "I hope you will do what you can for me for the sake of my family." *R. v. Crockett*, 4 C. & P. 544; see also *R. v. Welbourn*, East, P. C. 358; Leach, 503, n. Felt herself getting worse; she had been in hopes she would have got better, but as she was getting worse, she thought it her duty to mention what had taken place. It did not appear that there were no hopes of recovery. *R. v. Megson*, 9 C. & P. 418. Merely a strong sense of danger; a great anxiety for the arrival of the surgeon. *R. v. Thomas*, 1 Cox, 52.

⁴ *R. v. Pike and ux.*, 3 C. & P. 598.

⁵ *R. v. Minton*, 2 Russ. C. & M. 760.

⁶ *R. v. Perkins*, 9 C. & P. 395; 2 Moo. C. C. 135. *R. v. Whitworth*, 1 Fost. & F. 382.

⁷ *R. v. Howell*, 1 Car. & K. 689; Den. C. C. 1.

the prisoner's charge with respect to the party he is charged with having murdered, the declaration of *that other person* is admissible.¹ Matters of opinion cannot be received as dying declarations, and it is a principle that nothing can be so received which would be rejected if the party were examined.² And thus it was that the declaration of a convict at the place of execution was refused,³ although the statute 6 & 7 Vict. c. 85, s. 1, would now make such a statement admissible. Explanations, however, of the causes of an accident are not dying declarations. A witness went up to a man who was run over. The witness did not see the injury, but saw the carriage and heard him groan. It was held that the statement made by the deceased as to the nature of the accident was receivable in evidence.⁴

These declarations need not be made in the presence of the prisoner, and herein they differ from depositions at a death-bed, at which the prisoner must, of necessity, be present. Properly taken, these latter depositions are evidence.⁵ But where the prisoner was absent during the examination, the court refused to admit them, although they had been drawn up carefully and were duly signed.⁶ And where the prisoner came in during the examination, upon which the subsequent part of the depositions was distinguished by a cross, *Chambre, J.*, refused to permit any of the previous testimony to be given, observing, that the manner and demeanour of the witness ought to be exhibited in the presence of the prisoner.⁷ Yet where the prisoner came into the room just before the three last lines of the deposition were taken down, but had the whole of the evidence carefully read over to him, and the deceased was asked whether what had been written was true, which he answered in the affirmative, after which he made the statement contained in the three last lines, which was duly taken down, ten judges held that the deposition had been well received.⁸ Parol evidence of dying declarations is not admissible unless they have been previously reduced into writing,⁹ nor will the declaration itself be receivable.¹⁰ But the document needs not, on the face of it, appear to be a dying declaration. That circumstance may be proved by parol testimony.¹¹

Again, the dying declaration must have reference to the death of the deceased. Therefore, in a case of perjury, such a document

¹ *R. v. Baker*, 2 Moo. & Rob. 53.

² *R. v. Seller*, Car. C. L. 233.

³ *R. v. Drummond*, Leach, 337.

⁴ *R. v. Foster*, 6 C. & P. 325.

⁵ *R. v. Radbourne*, Leach, 457 ; and see *R. v. Wilson*, 1 Lew. C. C. 68.

⁶ *R. v. Dingler*, Leach, 561 ; and see *R. v. Maudsley*, 1 Lew. C. C. 73.

⁷ *R. v. Forbes*, Holt, N. P. C. 599, 616.

⁸ *R. v. Smith*, Russ. & Ry. 339 ; Holt, N. P. C. 614 ; Abbott, C. J., *diss.* 2 Stark. 208. The prisoner was executed. See 19 L. J. M. C. 104 ; Alderson, B., in *R. v. Christopher and another*.

⁹ *R. v. Trowter*, East, P. C. 356.

¹⁰ *R. v. Gay*, 7 C. & P. 530.

¹¹ *R. v. Hunt*, 2 Cox, 239.

was rejected, where, during the proceedings, the defendant had shot the prosecutor.¹ So it was in a case of using instruments to procure miscarriage, the death of the woman being the consequence.² So in the case of administering poison with a similar intent.³ So in a case of robbery, where the person robbed died in consequence of the violence.⁴ So likewise upon the same principle the dying declaration of an accomplice would be inadmissible, unless it should relate to the self-destruction of the accomplice,⁵ namely, that the death of the individual is the sole ground for admitting such a paper. Nevertheless, the prisoner may show that the deceased was not of a character likely to be impressed by a religious sense of his approaching dissolution.⁶ It should be added, that dying declarations are admissible as evidence *in favour* of a prisoner charged with the death.⁷ And lastly, the declaration must point distinctly to the time of the statement, and not to anything said upon an anterior day.⁸

Depositions.] Depositions are admitted in evidence upon the proof of certain forms. The occasions are said to be, the death of the deponent, his insanity, collusion between him and the prisoner, his sickness or inability to travel.⁹ First, with regard to death. Not only may the depositions of an ordinary person be received, but likewise that of a deceased accomplice, although in common with other proofs of a similar kind, it will be watched with suspicion.¹⁰ And such a deposition may be used in a case quite different from that respecting which the prisoner is charged. As where the prisoner was at first brought before the magistrates for an assault and robbery, when the deposition was taken, and the document in question was subsequently received upon a trial of murder.¹¹ But the rule extends only to felony, and, therefore, depositions in case of information for libel were not admitted.¹² And such evidence in another case was held not admissible, because the prisoner had an opportunity of cross-examining the witnesses.¹³

Insanity is a civil death, and the impossibility of producing the witness lets in as a consequence the deposition which he

¹ *R. v. Mead*, 2 B. & C. 605; 4 Dowl. & Ry. 420. The defendant shot the prosecutor in the interval between the verdict of Guilty and the motion for a new trial, and the dying declaration was tendered upon affidavits.

² *R. v. Hind*, 29 L. J. M. C. 147; Bell, 253.

³ *R. v. Hutchinson*, cited, 2 B. & C. 608.

⁴ *R. v. Lloyd and others*, 4 C. & P. 233.

⁵ 2 Russ. C. M. 763. *R. v. Tinkler*, East, P. C. 354.

⁶ 1 Phil. Ev. 278.

⁷ *R. v. Scaife*, 1 Moo. & Rob. 551.

⁸ *R. v. Qualter*, 6 Cox, 357.

⁹ Steph. 308.

¹⁰ *R. v. Westbeer*, Leach, 12; *R. v. Smith*, Russ. & Ry. 339. *R. v. Osborne*, 8 C. & P. 113. *R. v. Hake and another*, 1 Cox, 226.

¹¹ *R. v. Smith*, Russ. & Ry. 339; 2 Stark. N. P. C. 208.

¹² *R. v. Paine*, 1 Salk. 281.

¹³ *Melen v. Andrews*, Moo. & Malk. 336. Although taken in the presence of the party charged. The

may have made.¹ And it is no objection to the reception of the evidence that the insanity is but temporary. Although, if the complaint be only delirium or depression of spirits in consequence of a blow on the head, and there be a probability of recovery, the deposition is not receivable, because this is not viewed in the light of insanity.² But where the witness at the time of his trial, and for some time previously, had been insane, his deposition before the coroner was rejected, because he might *then* have been insane.³ Again, the case of collusion furnishes a very natural ground for a deviation of this kind from the usual rule.⁴ Where it was alleged that a person who had been ravished was kept out of the way by the prisoners, her deposition was allowed to be read.⁵ But the evidence affects the delinquent only, not a prisoner tried with him and who is free from that imputation. Therefore, when such evidence was suffered to go to the jury against others than the offending party, the Court of Queen's Bench granted a new trial.⁶ Again, sickness will afford a ground for introducing the deposition. As where the prosecutor was bedridden, and there was no probability of his ever leaving his house.⁷ So, indeed, if attendance would place life in jeopardy.⁸ Mere illness, however, is insufficient, although it may operate as a reason for putting off the trial.⁹ The proposed witness was seen in bed on the 18th, and appeared ill. The trial was on the 23rd. No surgeon was present. The judge refused to receive the depositions.¹⁰ So in a case of pregnancy, Crompton, J., refused in like manner, although he said he was not positive, as a different opinion had been entertained.¹¹

As to travelling, a case has occurred where the prisoner desired to have the deposition of a witness for the prosecution, and who was at sea, read on his behalf, but the court refused, without the prosecutor's consent, to allow the request.¹² But where the witness was obliged to go home ill under medical advice, he was held to be within the words "unable to travel," and his deposition was

prisoner was tried for the murder of E. S., her child. Another child died after E. S., and the prisoner was examined on oath before the coroner touching the death of the second child. Whether this deposition was receivable in evidence upon the trial of the prisoner for murdering E. S. *qu.*? *R. v. Sandys*, Car. & M. 345.

¹ 3 T. R. 720, per Ashhurst, J.

² *R. v. Marshall*, 1 Car. & K. 147.

³ *R. v. Wall*, Worcester Sum. As. 1830; 2 Russ. C. M. 890.

⁴ See 2 Russ. C. M. 889.

⁵ *R. v. Gutteridge*, 9 C. & P. 471.

⁶ *R. v. Scaife and others*, 20 L. J. M. C. 229; Den. & P. 281. This case was tried, upon *certiorari*, in the Queen's Bench at York.

⁷ *R. v. Hogg*, 6 C. & P. 176. *R. v. Wilshaw*, Car. & M. 145.

⁸ *R. v. Day*, 6 Cox, 55.

⁹ *R. v. Savage*, 5 C. & P. 143.

¹⁰ *R. v. Riley*, 3 Car. & K. 116.

¹¹ *R. v. Omant*, 6 Cox, 466. See *R. v. Walker*, 1 Fost. & F. 534.

¹² *R. v. Hagan*, 8 C. & P. 167. By consent, almost all depositions may be read. *R. v. Hunt*, 2 Cox, 261.

read.¹ So where the deponent suffered under paralysis, so as neither to be able to hear nor to speak, and his physician did not allow him to go about, his deposition was read, although his life might not have been in danger had he come into court.² And so it was where a witness could travel, but could not give evidence, being ill and nervous.³ A material witness was about to leave the country, and the defendant desired to postpone his trial. The court acquiesced upon condition of his consent to allow the examination of the witness (*i. e.* upon interrogatories) to be read at the trial.⁴ So it would be if a party should happen to reside abroad,⁵ especially if he has been asked to come over.⁶ The court has, however, no power under 13 Geo. 3, c. 63, nor by 1 Will. 4, c. 25, to direct a commission to examine witnesses at the instance of the defendant.⁷ By 11 & 12 Vict. c. 42, s. 17, after providing that examinations shall be taken in the presence of the accused, and read over and signed by the witnesses, it is enacted that the deposition of one who is dead, or not able to travel, may be read in evidence if it be proved that it was taken in the presence of the accused, and that a full opportunity of cross-examination was afforded, and that it purported to have been signed by the justice. It may be so read either before the *grand* or *petit* jury.⁸ For the word "trial" may well be coupled with that of prosecution.⁹ But Lord Campbell said, that the judges entertained some doubt whether they could entertain the question under 11 & 12 Vict. c. 78, and whether, if the evidence had not been rightly submitted to the grand jury, the conviction would have been invalid.¹⁰ "It is probable that although the cases of death and inability to travel from illness¹¹ are expressly stated in this statute as those in which the deposition of a witness may be read against a prisoner at his trial, it may be holden, that such depositions may also be read in evidence if the

¹ *R. v. Wicker*, 18 Jur. 252. Yet the depositions must, in order to be read, be regular on the face of them, notwithstanding any certificate of illness. By Parke, B., and Channell, Serj. *R. v. Miller*, 4 Cox, 166.

² *R. v. Cockburn*, 26 L. J. M. C. 136; Dears. & B. 203.

³ *R. v. Wilson*, 8 Cox, 453, and *R. v. Cockburn* was relied upon.

⁴ *R. v. Morphey*, 2 M. & S. 602; Anon. 2 Ch. Rep. 199.

⁵ 1 Phil. Ev. 364. As to depositions in India. See 13 Geo. 3, c. 63, ss. 40, 44. *R. v. Douglas*, 13 C. B. 42. *Mandamus* from the Q. B. to the Supreme Court of Madras for the examination of witnesses. As to depositions of witnesses abroad in cases of prosecutions against public servants, see 42 Geo. 3, c. 85. *Note.*—The sta-

tute 1 Will. 4, c. 22, which gives the power of issuing commissions for the examination of witnesses, does not extend to indictments. *R. v. Briscoe*, 1 Dowl. N. P. C. 520. See also 19 & 20 Vict. c. 113, as to foreign evidence in civil and criminal suits.

⁶ *R. v. Austin*, 25 L. J. M. C. 48.

⁷ *R. v. Wood*, 7 Mees. & W. 571. *Attorney-General v. Bovet*, 15 Mees. & W. 60; 15 L. J. Ex. 755; Taylor on Evidence, 436.

⁸ *R. v. Clements*, 20 L. J. M. C. 193.

⁹ *R. v. Clements and others*, Den. & P. 251.

¹⁰ *Id.* 253.

¹¹ Pregnancy and confinement seem not to be illnesses within this statute. *R. v. Walker*, 1 Fost. & F. 534. *R. v. Huddersfield (Inhabitants)*, 9 & 10 Vict. c. 66,

witness be insane, or kept out of the way by the prisoner, or by some person on his behalf at the time of the trial."¹ Alderson, B., doubted in *Austin's case*² whether the admission of depositions was not limited to the two cases mentioned in the Act. Coleridge, J., would not hold himself bound by those limits.³ There must have been the fullest opportunity of cross-examination, question by question, and the accused must have been asked whether he had any question to put.⁴ The depositions taken before a coroner may be treated as those before a magistrate.⁵

The next matter is the usual mode of proof. The justice,⁶ the coroner, or the clerk may be sworn to the fact of having duly taken the depositions. And we have seen, that in a serious case the magistrate ought to be present, although proof of his handwriting is certainly admissible.⁷ So where neither the magistrate nor his clerk was present, the constable was allowed to prove the magistrate's handwriting.⁸ So, in the case of the coroner, where both the coroner and four deponents were dead, the testimony was rejected, because the witness called to prove it could not recollect whether he saw the coroner sign, nor could he prove the coroner's handwriting.⁹ The document, therefore, should be attested by the magistrate or other officer. But, nevertheless, it is not invalid for want of a signature.¹⁰ Where the magistrate omitted to sign his name at the end of each deposition, and signed only once at the end of a sheet on which all the depositions were written, the deposition of a deceased prosecutor was admitted.¹¹ And the deposition of a deceased witness needs not to have a separate caption. The caption at the head of the body of the depositions is sufficient.¹² Indeed, it is said, that no caption is necessary. It is sufficient to describe the deposition as the examination of the witness taken in the presence and hearing of the prisoner, and to state that the evidence referred to the charge, that the prisoner was apprised of the charge, and that he had the opportunity of cross-examination. And it was considered no valid objection upon an

1 Cox, 113. But the delivery of a dead child is such. *R. v. Wilton*, 1 Fost. & F. 391. Of course there must be medical evidence of illness, as before the grand jury. *R. v. Philips*, Id. 105.

¹ Arch. Jervis's Acts, p. 47.

² *Ante*.

³ 7 Cox, C. C. 55.

⁴ *R. v. Day*, 6 Cox, 55; Platt, B.

⁵ *R. v. Hazell*, 8 Cox, 44. "But he (Wightman, J.) doubted whether such a power ought to be exercised."

⁶ It is the duty of the justice to complete and sign the depositions as soon as they are taken. *R. v. Mayor of London*, 5 Q. B. 555; Dav. & M. 486.

⁷ *R. v. Pikesley*, ante. The

witness had given evidence in contradiction to what she had stated before the magistrate. She denied her deposition, which was verified by a mark. The officer read the deposition to the witness in order that the judge might examine her upon it. But the counsel for the prosecution could not so examine.

⁸ *R. v. Hallett*, 9 C. & P. 748. *R. v. Wilshaw*, Car. & M. 145.

⁹ *R. v. England*, Leach, 770. See also *R. v. Roche*, Car. & M. 341.

¹⁰ *R. v. Flemming and another*, Leach, 854.

¹¹ *R. v. Osborne*, 8 C. & P. 113.

¹² *R. v. Johnson*, 2 Car. & K. 355.

indictment for obtaining money under false pretences that the word "unlawfully," or any word to that effect, was left out in the caption of a deposition offered by reason of absence through sickness.¹ One caption contained the names of all the witnesses, and there was one jurat. Each witness signed his name and deposition. This was held to be correct.² A caption for murder had appended to it, by mistake, the examination of a deceased person for injuries done to himself, and of which he died. This was received as a dying declaration, being of that character.³ But where a deposition, inadmissible as a dying declaration, was put in, having no caption at all, it was rejected, and no parol explanation could be received.⁴ However, where the magistrate was absent, a deposition on oath taken by his clerk was held irregular, and no justification of any proceedings founded upon it.⁵ Yet, in this particular, the case has been shaken. For in a more recent case, *R. v. Smith*⁶ was referred to by the judges as decisive, even where the evidence was not taken on oath in the first instance; and it was received, the magistrate being present afterwards when the oath was taken.⁷ So where the deposition was taken in the presence but fair-copied in the absence of the prisoner, it was admitted.⁸ We have said that the judge is the examiner, when a deposition is repudiated by the witness. An accomplice, who could not read, gave evidence falling short of his deposition. The judge allowed him to see the deposition, but refused to let the officer of the court read it to him in order that the counsel for the prosecution might examine him upon it.⁹ In a case where there were certain interlineations, the proof tendered was the coroner's handwriting, and the evidence of one present at the inquest, but Lord Lyndhurst required the presence of the clerk who took down the examination.¹⁰ There is a qualification as to the presence of the prisoner. If the deceased subsequently assents to the deposition upon its being read over to him in the presence of the prisoner, it will then be competent to read the paper in evidence.¹¹ For the prisoner must be allowed his opportunity of cross-examining the person who makes the deposition;¹² and, more than this, the deposition taken in cross-examination

¹ *R. v. Langbridge*, Den. 448.

² *R. v. Young*, 3 Car. & K. 106.

³ *R. v. Clarke*, 2 Fost. & F. 2.

⁴ *R. v. Newton and another*, 1 Fost. & F. 641.

⁵ *Caudle v. Seymour*, 1 Q. B. 889.

⁶ Russ. & Ry. 339.

⁷ *R. v. Calvert*, 2 Cox, 491. Rolfe, B., however, condemned the practice, and on a former occasion, Mr. Robinson, the master, said, that a magistrate had been convicted in the Queen's Bench for com-

mitting a prisoner when the examination had been taken in his absence. *R. v. Courtalli*, 1 Q. B. 893. Under the Vagrant Act.

⁸ *R. v. Bates*, 2 Fost. & F. 317.

⁹ *R. v. Beardmore*, 8 C. & P. 260, Gurney, B.

¹⁰ *R. v. Brogan*, [murder,] 2 Russ. C. M. 887, citing Rosc. Cr. Ev. 60. See *R. v. Dwyers*, 2 Russ. C. M. 887, note (p). Interlineation. Attendance of clerk.

¹¹ *R. v. Smith*, Holt, N. P. C. 614.

¹² *R. v. Arnold*, 8 C. & P. 621.

must be returned carefully, else the whole will be rejected. *A fortiori*, if such depositions are taken at a subsequent period, and not duly attested, the depositions in chief will be refused. And it will be in vain for one of the committing magistrates to offer his evidence that all were accurately taken.¹ So where one deposition was shown to have been taken in writing, and the other not, the judge rejected that which was tendered, because *non constat*, but that the other deposition might have been in the prisoner's favour.²

But depositions taken before the coroner in the prisoner's absence are admissible.³

If any part of the deposition which is material to the charge should have been kept back, it seems that the document cannot be read. For the object of the legislature was to enable the prisoner to know what he has to answer.⁴ And yet immaterial statements need not be returned.⁵ It has been said by great authority, that depositions cannot be added to, nor varied by, parol evidence.⁶ And it is certain that parol testimony of such documents is inadmissible unless it be shown that they were not reduced to writing.⁷ But it was held to be competent, upon a fitting occasion, to add to the examination of a prisoner by parol.⁸ There is, indeed, much difference between adding to a deposition and contradicting it.⁹ In such a case, Lord Chief Justice Wilde cited *R. v. Moore*,¹⁰ to show the distinction between the reception of evidence independent of a judicial inquiry, and one belonging to it. "An incidental observation made by a prisoner in the course of his examination before a magistrate, but which *does not form part of the judicial inquiry*, so as to make it the duty of a magistrate to take it down in writing, and which was not so taken down, may be given in evidence against him at the trial." Therefore where the inquiry turned upon the mode in which the prisoner was dressed, and what had become of a particular coat, the evidence was rejected because it belonged to the magistrate to take it down.¹¹ Depositions made by the prisoners before magistrates containing infamous accusations, were held to be evidence against them. But the answers elicited on the cross-examination were not receivable. They were not relevant to the charge in the indictment. The judges looked into the depositions to ascertain how far the proposed evidence was mate-

¹ *R. v. France*, 2 Moo. & Rob. 207.

² *R. v. Pearson*, 1 Lew. C. C. 67.

³ See 2 Russ. C. M. 893, and the learned comments of Mr. Pitt Taylor, Of Evidence, p. 429.

⁴ See *R. v. Grady*, 7 C. & P. 650.

⁵ *R. v. Coveney*, Id. 667.

⁶ *R. v. Thornton*, 2 Russ. C. M. 895; Holroyd, J. See note (m).

⁷ *R. v. Jacobs*, Leach, 309. *R. v. Fearshire*, Id. 202. *R. v. Hinxman*, Id. 310, n. *R. v. Fisher*,

Id. *R. v. Packer*, 2 Russ. C. M. 876, note (p); Park, J. *R. v. Phillips*, Id.; Bosanquet, J. The clerk proved in the last case that nothing was taken in writing, and then the parol evidence was received.

⁸ *R. v. Harris*, 1 Moo. C. C. 338.

⁹ *R. v. Coveney*, 7 C. & P. 667.

R. v. Thomas, Id. 817.

¹⁰ Math. Cr. Dig. 159.

¹¹ *R. v. Carpenter and another*, 2 Cox, 228; and see Ry. & M. N. P. C. 231. *Rowland v. Ashby*.

rial.¹ If the statement be duly made the judge will hand it down, and no further proof is required.²

It has been held, that the statement of a deceased person may be received in evidence at a *future* trial, not, indeed as proving the facts stated as if it were a deposition under 7 & 8 Geo. 4, c. 64, but as a conversation in the presence of the prisoner.³

Before the passing of the statute 6 & 7 Will. 4, c. 114, the counsel for the prisoner could not, of right, see the depositions against his client, nor could the prisoner himself have copies of them. But we shall see presently, when we come to speak of cross-examination and of the prisoner's defence, that the statute alluded to has worked an alteration in this respect.⁴ However, whatever may be the deposition, it must be identical with the case, if there be no opportunity for the prisoner to cross-examine. Upon a charge for stealing shillings which were marked, the prisoner made a statement concerning some half-crowns. This was held inadmissible.⁵

A deposition taken for assault was refused upon a trial for feloniously wounding, notwithstanding the sameness of the transaction,⁶ but this case is not of much authority, for as soon as the power of cross-examination arises, the difference of the charge works no change in the admissibility of the deposition. As upon an indictment for murder, a deposition taken upon a previous charge for feloniously wounding was received by the judge, and his opinion was sustained by the Court of Criminal Appeal.⁷

Letters.] Letters, unless found in the prisoner's possession, can scarcely be tendered in evidence against him. And even then the jury must not arrive at an unfavourable conclusion, merely from the facts contained in the letter.⁸ Where a person was in confinement upon a charge of forgery, and a letter appearing to have come from his brother abroad, and containing passages which might seem to affect the prisoner with a guilty knowledge, was left at his lodgings, the judges were of opinion that it ought not to have been received as evidence against him, and he was pardoned.⁹ So where letters were directed to the prisoners as a firm, the court refused to admit them, because they had never been in the custody of the prisoners.¹⁰ The custody of a servant was upon

¹ *R. v. Braynell and another*, 4 Cox, 402.

² *R. v. Harris and another*, Id. 147.

³ *R. v. Edmunds*, 6 C. & P. 164. A case of murder. In fact the written deposition is evidence of what the witness said before the magistrate, although not signed, and it is not limited to the individual case, but extends to all future cases, civil and criminal. 5 Mees. & Wels. 309. *Leech v. Simpson*, 7 D. P. C. 513.

⁴ See *post*. And further as to de-

positions, *R. v. Pearson*, 7 C. P. 671; *R. v. Taylor*, 8 C. & P. 726; and as to their being evidence generally, *post*.

⁵ *R. v. Butler*, 2 Car. & K. 221.

⁶ *R. v. Ledbetter*, 3 Car. & K. 108.

⁷ *R. v. Beeston*, 24 L. J. M. C. 5; Dears. 405. Crompton, J., said he decided according to *R. v. Dilmore*, 6 Cox, 52.

⁸ *R. v. Plumer*, Russ. & Ry. 264.

⁹ *R. v. Huet*, Leach, 820.

¹⁰ *R. v. Hevey and another*, Id. 235.

one occasion considered to be so far that of the master as to warrant the leaving of that fact to the jury as evidence that the letter had reached the hands of the master.¹ A person was charged with shooting at H. G. P. Tuckett. Tuckett gave one of the witnesses his card in the presence of the prisoner, but the contents did not appear to have been communicated to the prisoner. It was held, that the card was not evidence under these circumstances to prove the name of H. G. P. Tuckett.²

But where a letter was found in a writing desk in the room where the prisoner and his brother were, which letter was directed to a person in the neighbourhood of the prisoner's late residence, this letter was admitted in evidence upon a charge of abduction, the prisoner having told a policeman that it had nothing to do with the business he had come about.³ And when found in possession, the letters derive much greater weight in evidence if answers can be traced to them.⁴ So, although there was no evidence to connect one A. with the prisoner, a letter found at his residence after his arrest, with a memorandum in his own handwriting, was admitted as relevant to the inquiry.⁵ And under 15 & 16 Vict. c. 57, where the secretary to the commissioner produced a letter from the agent, but the answer of the agent was not forthcoming, secondary evidence of it was allowed, notwithstanding the provision in the statute that no statement made before the commissioners in answer to questions put by them should be evidence except in perjury.⁶

Papers.] At one time it was held that papers, found subsequently to the apprehension of the prisoner, in the possession of persons implicated in the same crime with himself, could not be read against him, unless, indeed, they could have been shown to have existed before.⁷ But lately such papers were admitted under these two circumstances:—1st, where the lodgings in which the papers were found had not been entered by any one in the interval between the apprehension and the finding; 2ndly, where the papers were intimately connected with the conspiracy.⁸ Should there be any doubt of the connection of such papers with the case, it seems that they cannot be admitted, although found in the prisoner's possession.⁹ The handwriting need not be proved. So that should a letter be found in the prisoner's house, neither his handwriting nor any publication on his part need be shown, provided the letter relate to the case at issue.¹⁰ And it may be added here, that com-

¹ *R. v. Col. Gordon*, Id. 300, note (a). By Eyre, B., and Hotham, B.; *contra*, Gould, J. *R. v. Pearce*, *contra*, Peake, N. P. C. 76.

² *R. v. Douglas*, Car. & M. 193.

³ *R. v. Barratt*, 9 C. & P. 387.

⁴ *R. v. Horne Tooke*, 25 How. St. Tr. 120, Eyre, C. J.; Taylor on Evidence, 661. See *R. v. Watson*, post.

⁵ *R. v. Bernard*, 1 Fost. & F. 240. Not to show any partnership with A. in the order to make certain grenades.

⁶ *R. v. Leatham*, 8 Cox, 498.

⁷ *R. v. Hardy*, 24 How. St. Tr. 452.

⁸ *R. v. Watson*, 2 Stark. 140.

⁹ Id. 141.

¹⁰ Id.

parison of hands is not allowable, at least with respect to documents which are not evidence in the cause. Therefore, where the counsel for the prosecution sought to put in evidence a document undoubtedly written by the prisoner, but quite unconnected with the charge, Bolland, B., refused to admit it.¹ It became necessary to prove for the prosecution that certain sums had on a particular day been written on a paper. The owner proved that he had searched for this document at his residence, that he had not searched at his shop, and that he did not usually preserve these memoranda. Platt, B., would not receive secondary evidence of the paper.²

Notice to produce.] Here may perhaps be a convenient opportunity to introduce the question of notice to produce documents. It has long since been decided that in spite of the suggestion that a party need not produce evidence against himself, an attested copy of an instrument may be received, upon the principle that it is the best evidence which the party tendering it is able to give. There is no difference in this respect between civil cases and criminal prosecutions. Reasonable time for such production must be allowed, and upon the defendant's neglect, secondary evidence may be given.³ However, the fact of the document being in court will not supersede the necessity of notice.⁴ Yet there are occasions where no such notice is required. As where a party is charged with stealing a bill or note or with forging an instrument. Here, from the nature of the accusation the party has notice that the document in question will be required in evidence, and parol notice will be sufficient.⁵ So, where the originals of treasonable papers were proved to be in the prisoner's handwriting, copies were deemed admissible without notice.⁶ And where the prisoner read an oath from a paper, it was held that no notice to produce that paper was requisite upon an indictment for administering an unlawful oath.⁷ A charge was for stealing iron out of a canal boat. The boat was weighed at the lock, and a ticket given of the weight. Notice to produce was held necessary. Here the ticket might not have been wanted at the trial.⁸ When notice is required it must be a reasonable notice. Notice to produce should be served before the assizes when the party lives away from the assize town, in order that he may have an opportunity of bringing the paper demanded. Therefore, *a fortiori*, where the party is in prison at a distance from his home, it must be so.⁹ And thus where notice was served during

¹ *R. v. Morgan*, 1 Moo. & Rob. 134, n.

² *R. v. Rastrick*, 2 Cox, 39.

³ *R. v. Le Merchand*, Leach, 300, n.; 2 T. R. 203, cited in the note; Id. 201, n., per Buller, J., Nom. Att-Gen. v. *Le Merchant*.

⁴ 2 Russ. C. M. 745. So said at least to be the better opinion.

⁵ *R. v. Aickles*, Leach, 294. *R. v. Spragge*, cor. Buller, J., 14 East,

276, cited before Lord Ellenborough, where the prisoner had swallowed the note he was charged with forging.

⁶ *R. v. De la Motte*, East, P. C. 124.

⁷ *R. v. Moors and another*, 6 East, 419, n.

⁸ *R. v. Humphries*, 2 Russ. C. M. 745.

⁹ 1 Moo. & Rob. 260, per Little-dale, J.

the assizes to produce a policy of insurance upon a charge of arson, one day only before the trial, Littledale, J. (after consulting with Park, J.), held it insufficient.¹ In a similar case notice given in the middle of the day before the trial was deemed too late.² Upon a subsequent occasion, a notice was given to produce, and served on Tuesday evening, on the prisoner's attorney. The policies were at twenty miles' distance, and the trial was on Thursday: this was held sufficient.³ The commission day was on the 16th. On the 23rd, a notice to produce a scrip paper connected with an insurance company was served on the prisoner in custody, after the discharge of the grand jury, Maule, J., held it to be too late.⁴ But where the document can be produced without inconvenience, it is not too late to call for it the day before the trial, and after the assizes have begun.⁵ Notice to produce a cheque, served at the office of the London agents for the country attorney of the defendants, at 3 P. M. of the day before the trial in London, was held sufficient, although it appeared that the cheque had been seized by the sheriff, on account of an estreated recognizance.⁶ And so it was ruled again upon a prosecution for forging a deed, where the notice was not given till after the commencement of the assizes.⁷ However, where the prisoner was to be tried on Wednesday, a notice given on Monday to produce a note was held insufficient by Hullock, B.⁸ In case of a loss, secondary evidence may of course be given.⁹ A notice, however, which is valid for one trial stands good with reference to a second, and if other circumstances concur, service in gaol will be sufficient.¹⁰ A person may be asked to mention the address of a letter he ordered to be posted, although he has had no notice to produce the letter.¹¹ If the attorney for the prisoner has applied to bail him, a notice on such attorney to produce will suffice.¹² Otherwise the attorney must be shown to be the prisoner's attorney. The attorney must not be asked whether he had shown the notice to produce to his client.¹³

Public documents.] Public documents, as Acts of parliament, records of various kinds, books of office, &c., are admissible evidence, and no evidence can be admitted to dispute a record. Even should the indictment refer to it as being filed amongst certain records, evidence that it has not been so filed cannot be

¹ *R. v. Ellicombe*, 5 C. & P. 522; 1 Moo. & Rob. *ut supra*.
² *R. v. Kitson*, 22 L. J. M. C. 118; Dears. 187.
³ *R. v. Barker*, 1 Fost. & F. 326; and *R. v. Ellicombe* was cited.
⁴ *R. v. Allison*, 1 Cox, 24.
⁵ *R. v. Hankins*, 3 Cox, 434.
⁶ *R. v. Hamp and others*, 6 Cox, 167.
⁷ *R. v. Haworth*, 4 C. & P. 254.
⁸ *R. v. Royston*, 1 Lew. C. C. 267.
⁹ *R. v. Chadwick*, 6 C. & P. 181.
¹⁰ *R. v. Robinson*, 5 Cox, 183.
¹¹ *R. v. Clube*, 3 Jur. (N. S.), 698.
¹² *R. v. Boucher*, 1 Fost. & F. 486.
¹³ *R. v. Downham*, Id. 386.

adduced.¹ The journals of parliament are evidence, but not the printed journals.² So also is the Gazette, which may be tendered in evidence, without proof that it was bought of the King's printer, or, indeed, from whence it came.³ Upon an indictment for exercising a trade unlawfully, and against the statute 5 Eliz. c. 4, the Act was set out as an Act *containing* divers orders, &c. But that printed by the King's printer, and which the defendants produced in evidence, was an Act *touching* divers orders, &c. Lord Ellenborough held this no variance upon the production of Ruffhead, where the word "*containing*" appeared. Had the statute been recent, the decision would have been different, but the lord chief justice considered Ruffhead good authority with regard to a statute of Queen Elizabeth. Unless, indeed, an examination of the parliamentary roll should be brought forward to show the contrary.⁴ The Gazette, however, is not evidence to prove a military appointment therein notified.⁵ A proclamation, articles of war, and "any acts done by, or to, the King in his regal character," are evidence.⁶

Answers in chancery; depositions in chancery; wills.⁷ But there must be an indorsement upon the probate of a will before it can be tendered in evidence.⁸

Judgments in inferior courts.⁹ Foreign judgments.¹⁰ And if not made up, minutes of the proceedings or an examined copy will suffice.¹¹

Foreign laws and judgments.¹² Irish judgments not being records in England.¹³ Convictions before magistrates.¹⁴ So again, navy books,¹⁵ bank books,¹⁶ corporation books,¹⁷ and vestry books¹⁸ are evidence. The day books of a public prison.¹⁹ The book from the mas-

¹ *R. v. Shaw and others*, Russ. & Ry. 526.

² 2 Russ. C. M. 805.

³ *R. v. Forsyth*, Russ. & Ry. 274.

⁴ *R. v. Barnett*, 3 Camp. 344. See also *R. v. Chatburn*, 1 Moo. C. C. 403. *R. v. Rushworth*, Id. 404. *R. v. Berry*, 1 Moo. & Rob. 463.

⁵ *R. v. Gardner*, 2 Camp. 513.

⁶ 2 Russ. C. M. 805. And see *R. v. Franklin*, 9 State Trials, 259. As to the journals of the House of Lords, vol. 17 of Howell. Leach, 594, cited. *R. v. Withers*, Leach, 594, cited. As to the articles of war. 5 T. R. 446, S. C. cited. *R. v. Holt*, 5 T. R. 436, 443. As to the Gazette. *R. v. Sutton*, 4 M. & S. 546. As to the King's proclamation. As to the mode of proving records and writs,

see 2 Russ. C. M. 806, 808. Answers in chancery, depositions in chancery, wills, Id. 809.

⁷ See *supra*.

⁸ *R. v. Barnes*, 1 Stark. 243.

⁹ *R. v. Haines*, Comb. 337.

¹⁰ *R. v. Wakefield*, Moo. & Malk. 197, n.

¹¹ 12 Vin. Ab. 99.

¹² 2 Russ. C. M. 811, 812. *R. v. Haines*, *supra*.

¹³ *Harris v. Saunders*, 4 B. & C. 411.

¹⁴ 12 East, 74, 76; 16 East, 13, 15.

¹⁵ *R. v. Fitzgerald*, Leach, 20. *R. v. Rhodes*, Leach, 24.

¹⁶ 2 Esp. 665, or rather *copies from them*, Id.

¹⁷ *R. v. Mothersell*, 1 Str. 93.

¹⁸ *R. v. Martin*, 2 Camp. 100.

¹⁹ *R. v. Aickles*, Leach, 391. See the note.

ter's office in the Queen's Bench, &c.¹ Poll books,² registers, &c.³ But examined copies of the books of the Queen's Bench and Fleet Prison have been rejected.⁴ If an appointment be proved, the determination of it must be shown by the defendant, if he means to rely upon that fact.⁵ The minute book of the court of quarter sessions is not the record which should be produced in evidence upon future trials. The record should be made upon parchment, and an examined copy might then (it being a record) be admitted.⁶ But where, in order to prove an allegation in an indictment, that a certain bill had been preferred and found at quarter sessions, an examined copy of the bill of indictment, *without any caption*, together with the minute book of the sessions produced by the deputy clerk of the peace, was tendered in evidence, the court refused the proof.⁷ And they would not in a criminal case receive the town clerk's book.⁸ So again, upon an indictment for perjury upon the hearing of a parish appeal, the sessions book was rejected. There must be a regular record, and, it should seem, made up on parchment.⁹ *A fortiori*, the minute book of mere entries made at the time, is not evidence.¹⁰ But Abbott, C. J., inclined to think that an entry upon a separate leaf of the minute book, *in the form of a record*, might be admitted. It did not, however, become necessary to decide the point.¹¹ And the indictment upon which a person has been tried and acquitted may, *during the sitting of the same commission*, together with the minutes of the verdict, be admitted as evidence upon a plea of *autrefois acquit*, without drawing up a regular record. But the calendar, signed by the clerk of the assize, will not suffice, nor the evidence of a person who heard the sentence passed. The proof of lawful custody must appear by the record of the conviction, and so it was held upon a charge of wounding a person in a bridewell.¹²

A kirk-session book was rejected.¹³ So was a certificate purporting to have been given by the ministers and elders of the kirk, and if the minister's writing had been proved, it would have made no difference.¹⁴ So a document under the seal of

¹ *R. v. Crossley*, 2 Esp. 524.

² Willes, 423, 424.

³ Bell, N. P. 247.

⁴ *R. v. King*, 2 T. R. 234.

⁵ *R. v. Budd*, 5 Esp. 230. And an assumed official character is evidence of the appointment. Taylor, Ev. 653.

⁶ *R. v. Thring*, 5 C. & P. 507.

⁷ *R. v. Smith and others*, 8 B. & C. 341; Car. Cr. L. 189.

⁸ *R. v. Haines*, Skin. 584.

⁹ *R. v. Ward*, 6 C. & P. 366.

¹⁰ *R. v. Bellamy*, Ry. & M. N. P. C. 174.

¹¹ *Id.* 175.

¹² *R. v. Bourdon*, 2 Car. & K. 366.

¹³ *R. v. Barber*, 1 Car. & K. 434.

¹⁴ S. C. A certificate was found indorsed on the outside by one J. S. A servant delivered it, with other papers, to a party who appeared at the trial, but the servant was not called. Here the evidence only showed that one paper had been in the possession of J. S., and the statement in his writing was not evidence. S. C.

the holy office of Rome, no *ratio decidendi* being given. It was only evidence of the judgment, not *primâ facie* evidence of the facts.¹ The 14 & 15 Vict. c. 99, s. 7, contains the following provisions concerning public documents. All proclamations, treaties, and other acts of state of any foreign state, or British colony, and all judgments, &c. of any foreign court or British colony, and all affidavits, pleadings, &c., may be proved by certified copies without seal or signature, or judicial character of the person signing the same. The 8th section relates to the certificates of apothecaries; the 9th extends the provisions to Ireland. The 10th section makes documents which are receivable in Ireland receivable also in England. The 11th section provides the same rule for the colonies. "Colony" is defined by sect. 19. The 12th section relates to the registry of vessels. By the 13th section a conviction or acquittal, certified under the hand of the clerk of the court, shall be received. The formal parts may be omitted and the record itself needs not to be produced.² By sect. 14 every book or document of a public nature is classed within the same rule, and by sect. 15 to certify falsely is made a misdemeanor. By sect. 18 Scotland is excluded.

However, the notes of a judge are not evidence to prove what was said at a particular trial.³

Private documents.] Private documents, as bonds, bills, &c., may be produced in evidence. But where the instrument in question might, if duly stamped, be enforced between the parties, it became necessary, before the statute, in such cases to show that they had been so stamped. As where a prisoner, a clerk, gave a receipt on plain paper, Bayley, J., refused, upon an indictment for embezzlement, to admit this document, being unstamped.⁴ So upon an indictment for arson with intent to defraud the London Assurance Company, it was objected that the policy could not be received in evidence for want of a proper stamp upon an indorsement made thereon, and although Heath, J., admitted the evidence,—six judges against five held the conviction wrong, probably upon the principle that, if duly stamped, the policy might have been made use of against the prosecutors.⁵ Upon an indictment for embezzlement an entry was read in evidence. In the first column the dates appeared; in the second, the name of the person on whose behalf the money was received; in the third the signature of the person receiving; in the fourth, the amount of the parti-

¹ *R. v. Dr. Newman*, Dears. 85, 100. It was admitted as evidence of the judgment under a plea of justification in libel.

² The Act commenced November 1, 1851.

³ *R. v. Child*, 5 Cox, 197. Whether the contents of handbills written under the dictation of conspirators,

are provable by oral evidence, is made a question. Taylor, Ev. citing 33 How. St. Tr.

⁴ *R. v. Hall*, 3 Stark. N. P. C. 67.

⁵ *R. v. Gilson*, Russ. & Ry. 138; Leach, 1007; 1 Taunt. 95. See also *R. v. Wortley*, 21 L. J. M. C. 44; Den. & P. 333.

cular payment made. This entry was held, as explained by evidence, to be a receipt, and the conviction was wrong, because the entry was not stamped, and it should not have been read to the jury.¹ By 17 & 18 Vict. c. 83, s. 27, every instrument liable to stamp duty shall be admitted in evidence in any criminal proceeding, although it may not have the stamp required by law.² This, however, is not the case where the purpose for which the instrument is offered in evidence is collateral. As where the prisoner was charged with forgery. For the Stamp Acts, being revenue laws, meant to make no alteration in the crime of forgery, but only to provide that the instrument should not be available for the purpose of recovering under it in a court of justice.³ So where a prisoner was charged with stealing a letter, a cheque drawn on unstamped paper, thirty miles from London, which in itself was invalid, was admitted by the court upon the authority of *R. v. Morton* and *R. v. Reculist*.⁴ A map or plan is in general inadmissible unless verified as to facts before the court.⁵

A paper containing an inventory of goods was found in a portmanteau, but not in the handwriting of the prisoner, who was charged with larceny, but on the outside was the prisoner's name, and "private" was indorsed, and in his handwriting. Here the word "private" might have been previously written and the evidence was rejected.⁶

Sometimes, upon application, the judge, after a verdict, will order papers to be impounded, but this authority is not exercised with respect to any documents which have not been produced in evidence.⁷

¹ *R. v. Overton*, Dears. 308; 23 L. J. M. C. 29. However, the proof might have been thus: a witness might have shown that the false signature was made by the person who received the money, and then another might have showed that the signature was the handwriting of the prisoner.

² Passed in consequence of the decision in *R. v. Watts*, Dears. 326, where an unstamped agreement was held not to be the subject of larceny. Parke, B., *valdediss.*

³ *R. v. Morton*, East, P. C. 955. *R. v. Hawkeswood*, Leach, 257. *R. v. Lee*, Id. 258, n. *R. v. Reculist*, Id. 703. And see other cases, Id. 707, in the note.

⁴ *R. v. Pooley*, Leach, 900. *R. v. Cook and another*, cited, Id. 1013; 1 Taunt. 101.

⁵ *R. v. Mitchell*, 6 Cox, 82.

⁶ *R. v. Hare and another*, 3 Cox, 247.

⁷ *R. v. Clifford*, 1 C. & P. 521.

CHAPTER XV.

OF THE EXAMINATION, CROSS-EXAMINATION, &C. OF WITNESSES.

Examination, &c.] We have now presented a summary of written evidence to the reader. The usual testimony, however, is oral, and this point will involve the mode of examining and cross-examining witnesses on either side. These interrogatories, therefore, shall now be considered with reference to examination, cross-examination, and re-examination. Questions in chief must be put so as to elicit a free and unbiassed answer, and such an answer as may appear in the first instance to be quite independent of the wishes of the examining counsel. And thus it is that leading questions are exiled from our courts. This rule, however, does not apply when it becomes necessary to identify a prisoner by directing the attention of the witness towards him. And this may be done in the most direct way.¹ And there are circumstances which will justify the most leading inquiries. As where the witness appears to be reluctant or evidently hostile, and so again where he betrays a decided dislike to the cause on behalf of which he is under examination. In these emergencies the judge will permit him to be asked plainly whether such and such things have happened, for otherwise the truth could not be arrived at.

Nevertheless Bayley, J., seems to have entertained a different opinion. That learned judge thought that it would prevent collusion if such a practice were *not* suffered. A witness might be instructed to make certain answers in order to make him an adverse witness, and then the counsel might put leading questions to him.² The matter rests in a great measure with the judge.³ The mere situation, as relationship, in which one party stands to the other will afford no ground for permitting this mode of cross-questioning by the prosecutor's counsel.⁴ So that the brother of the prisoner would not be so examined unless he first showed an unfair bias, but if, as in a case of murder, the brother kept back his evidence, the court would then relax the rule and suffer him to undergo a more searching examination.⁵ The prosecutor's counsel suggested that what a witness had said upon his cross-examination was untrue, and that what he had said before the magistrate had been different, and that he had made different statements to other persons, and

¹ *R. v. Watson*, 2 Stark. N. P. C. 128. *R. v. De Berenger*, 3 M. & G. 67; 1 Stark. Ev. 170. See *R. v. Ball*, 8 C. & P. 745.

² Anon, 1 Lew. C. C. 322.

³ *R. v. Murphy*, 8 C. & P. 297.

⁴ *R. v. Ball*, Id. 745.

⁵ *R. v. Chapman*, 8 C. & P. 558.

he wished to cross-examine the witness, although his own witness in chief. It was held that he could not do so.¹ If it be wished to establish the fact that a witness swore differently before the magistrate, the deposition should be produced and shown or read to him, and then, but not before, he may be asked whether he has or not stated certain things.² The question to be put where it is sought to charge the witness with conflicting statements is, "Have you always said so except before the magistrates?" or generally not even with this exception.³ Not, "Have you always told the same story,"⁴ or, "except before the coroner?" If the witness answer "Yes," the judge will not look into the deposition in order to make it evidence.⁵ Papers are occasionally put into the hands of a witness during the examination, for the most part to refresh his memory.⁶ Whether it be in consequence of forgetfulness through age or infirmity, such as blindness, or whether the witness propose to use written entries made by himself within a short time after the transactions to which they relate, the court will always allow this kind of reference for the purpose of aiding the memory of the person examined, and in furtherance of justice.⁷ These papers, however, must be open to the inspection of the adverse counsel, unless when merely used to prove a handwriting.⁸ It should be observed that the prosecutor is not confined to the depositions; he may give material evidence independently of them.⁹

If the prosecutor's witness disproves the case for the prosecution, the prosecutor may call witnesses to prove facts in opposition to his statement, but still bearing upon the issue, and he may thus discredit his own witness. But he cannot adduce any irrelevant evidence for that purpose.¹⁰ In a case of manslaughter the deceased was at an inn for three days, and the innkeeper asked him his name, which he gave. Letters arrived in that name which the deceased had as his. It was held that the innkeeper might be asked the name which the deceased gave him.¹¹ In a case of murder, by poisoning, the deceased's conversations as to his state of health were admitted in evidence, *being recent*, and soon before the poison was supposed to have been administered.¹² Where the prisoner was a foreigner, in a case of murder, the better course was considered to be, that the whole of the evidence of each witness should be read over to the prisoner as soon as the witness had finished his testi-

¹ *R. v. Farr*, 8 C. & P. 768.

² *R. v. Taylor*, Id. 726.

³ *R. v. Price and another*, 7 Cox, 405.

⁴ *R. v. Shellard*, 9 C. & P. 277.

⁵ *R. v. Helden and others*, 8 C. & P. 606.

⁶ The inspector of police took down in writing what four persons said who reported the facts of a conspiracy. These reports were

read over to them and all signed them. The inspector was allowed to refresh his memory from them.

⁷ See Phil. on Ev. and Russ. C. M.

⁸ 2 C. & P. 604.

⁹ *R. v. Ward*, 2 Car. & K. 759.

¹⁰ *R. v. Ball*, 8 C. & P. 745.

¹¹ *R. v. Timmins*, 7 C. & P. 499.

¹² *R. v. Johnson*, 2 Car. & K. 354.

mony, and that each question and answer need not be interpreted at the exact time of giving them.¹ A witness may be asked questions to show that at a former trial the counsel for the defence had notice of the facts then adduced in evidence, as that a particular question was put to the prisoner in cross-examination. That question may be asked at the second trial, *i. e.*, for perjury.²

Questions touching the proof of particular offences will be found in the course of the sections which treat of each offence in particular.

Pardon under the great seal.] There is no privilege, and a person is bound to answer if he has a pardon under the great seal for bribery, for he is not now obliged to plead it.³ Although the ruling was once otherwise.⁴ At a much later date than *R. v. Reading*, where it appeared that the time for proceeding for a penalty was past, Lord Tenterden ordered the witness to answer, as there was no danger of punishment.⁵ And again, the court went the length of committing the individual, who, although under the protection of a pardon, refused to answer, and they discharged the jury.⁶

Informer.] But the rule is not to compel an informer to disclose his part in the prosecution. He cannot be asked whether he himself was not the informer.⁷ There shall be no unnecessary disclosure of the channel through which detection of a crime is made.⁸ Both in crown prosecutions and exchequer informations it is not permitted to disclose the name of the informer.⁹

Cross-examination.] The witness having delivered his testimony in chief, becomes now open to the scrutiny of the opposite counsel. A cross-examination cannot go to the contents of written instruments, although shown to be in the possession of the opposite party, who has even had notice to produce them.¹⁰ However, leading questions may be put without much reserve, especially if the witness should show any bias against the cross-examining counsel, whilst, on the other hand, should he seem favourable towards that counsel, the more extended privilege will be restrained.

¹ *R. v. Yscuado*, 6 Cox, 386.

² *R. v. Coyle*, 7 Cox, 74.

³ *R. v. Boyes*, 2 Fost. & F. 157; 30 L. J. Q. B. 301.

⁴ *R. v. Reading*, 7 Howell, St. Tr. 296, North, C. J.; Stark. on Ev. pt. 2, p. 137. *R. v. Earl of Shaftesbury*, 8 Howell, St. Tr. 817. See Taylor, Ev. 1178.

⁵ *Roberts v. Allatt*, Moo. & Malk. 192.

⁶ *R. v. Charlesworth*, (15 & 16 Vict. c. 57,) 2 Fost. & F. 326. *R. v. Leatham*, 8 Cox, 498. The discharge

of the jury seems to have been an unconstitutional act, however just the committal might have been.

⁷ *Att.-Gen. v. Briant*, 15 Mees. & W. 169.

⁸ 24 How. St. Tr. 808, Eyre, C. J.

⁹ *R. v. Watson*, 2 Stark. 135; and Abbott, J., cited *R. v. Hardy*. However the Chief Baron and Buller, J., were against Eyre, C. J., Hotham, B., and Grose, J., on this point. See Taylor, Ev. 1176.

¹⁰ 2 Camp. 14; 2 Stark. 22.

And "it is not allowable to go the length of putting into a witness's mouth the very words which he is to echo back."¹

A witness may be asked whether he has not stated certain facts before the grand jury, and he is bound to answer the question.²

But a witness cannot be asked as to what another witness has said, on other occasions independent of the trial, for what he has said at other times is only matter of cross-examination of the witness himself.³ And a witness may be asked by the prisoner's counsel, without putting in the depositions, a material question, although the witness's answer would, according to the evidence, appear upon such depositions.⁴ And, on the other hand, a question may be asked as to a statement made upon cross-examination before the magistrates, although no note of such cross-examination appears upon the depositions.⁵

Papers may be put into the hands of a witness by the defendant's counsel, as well as by the advocate on the other side, and in such a case, we may observe, that the latter is entitled to look at them without reading them in evidence. And he may likewise ask the witness as to the time when they were written, and still without making them evidence.⁶ The rule, however, is so far qualified, that if the examination with reference to a paper does not elicit anything, the opposite counsel has no right to see the paper.⁷ The counsel for the prisoner may cross-examine from copies of depositions if the originals cannot be found. But the existence of such depositions must be proved, and they must be verified by the magistrate's clerk.⁸ And it is not incompetent for a counsel to put depositions into the hand of a witness, and then to ask him whether he adheres to his statement.⁹ The deposition must either be read to the witness at the time of the cross-examination, and the witness must be then cross-examined upon it, or the counsel for the prisoner must put it in as part of his case at the proper time,¹⁰ or the questions may be put through the court by the prisoner's counsel;¹¹ otherwise the jury might be led to believe that the deposition contained a different statement from that given in evidence by the witness.¹² The deposition, being put in evidence, may not be contradicted.¹³ To allow such a practice would be to put

¹ *R. v. Hardy*, 24 How. St. Tr. 755.

² *R. v. Gibson*, Car. & M. 672. See *R. v. Taylor*, 8 C. & P. 726.

³ *R. v. St. George*, 9 C. & P. 483.

⁴ *R. v. Christopher and others*, 19 L. J. M. C. 103; Den. 536; and see *Id.* 542, note (a).

⁵ *R. v. Curtis*, 2 Car. & K. 763.

⁶ *R. v. Ramsden*, 2 C. & P. 603.

⁷ *R. v. Duncombe*, 8 C. & P. 369.

⁸ *R. v. Shellard*, 9 C. & P. 277.

⁹ *R. v. Matthews*, 4 Cox, 93,

Erle, J. R. v. Ford and another, 20 L. J. M. C. 171; Den. & P. 245.

¹⁰ 20 L. J. 172, per Lord Campbell, C. J., citing the *Queen's case*, 2 Br. & B. 288.

¹¹ *R. v. Peel*, 2 Fost. & F. 21.

¹² 20 L. J. 172, per Alderson, B. *R. v. Palmer*, 5 Cox, 236.

¹³ *R. v. Palmer*, ut supra, and overruling *R. v. Edwards*, 8 C. & P. 26, 31. In *R. v. Tooker*, 4 Cox, 93, Coltman, J., disapproved the practice but admitted the evidence. In these cases the witness could not read.

the officer of the court in the position of a witness, without being on oath, to contradict the sworn testimony of the witness in the box.¹ But a witness may be asked, where the statement he has made does not appear in the deposition, whether he ever made such a statement before, without putting in the deposition.²

A witness admitted before the magistrate that the prisoner's solicitor had cross-examined him. No cross-examination appeared to have been returned by the magistrate. The judge allowed the prisoner's counsel to examine the witness as to the answer he gave.³

It will not fail to strike the reader that amongst the methods which are resorted to for the purpose of weakening the testimony in chief, that of bringing discredit upon the witness is not unfrequent. This is done by demanding answers from him to certain inquiries which are calculated to disgrace him, as whether he has been tried for theft, &c., and the rule is, that he need not reply to the question, if the consequence will be to subject him to punishment.⁴ But again, having replied, he must abide the event. It is sufficient, likewise, for a refusal, that the answer would *tend* to criminate him.⁵ As, "Have you not said, that you committed the offence?"⁶ This matter was very much considered in a case which arose in the Central Criminal Court in 1847, and it was decided by nine judges,⁷ that if a witness claims the protection of the court on the ground that the answer will criminate himself, and there appears reasonable ground to believe that such might be the case, he is not compellable to answer. And if obliged to answer, what he says must, notwithstanding, be considered to have been obtained by compulsion, and cannot be given in evidence against him; and they thought it made no difference as to the right of the witness to protection, that he had chosen to answer in part, being of opinion that he was entitled to it, at whatever stage of the inquiry he might choose to claim it.⁸ And the nine judges did not consider themselves bound by the ruling of Best, C. J., in *Dixon v. Vale*, 1 C. & P. 178; and of Lord Tenterden in *East v. Chapman*, 2 C. & P. 573.⁹ And should the witness have answered such questions in his examination in chief, he must not shrink, as it seems, from similar answers on the cross-examination, although they might implicate his life.¹⁰ And a party is under no obligation to answer questions which may have a tendency to expose him to

¹ 4 Cox, 94, Erle, J.

² *R. v. Moir*, 4 Cox, 279.

³ *R. v. Edwards*, 8 C. & P. 26, and though the resolutions of the judges are binding, the judge himself may examine the witness as to any discrepancy between the deposition and the evidence. S. C.

⁴ *R. v. West*, 2 Phil. Ev. 419.

⁵ *R. v. Slaney*, 5 C. & P. 213.

⁶ *R. v. Pegler*, Id. 521.

⁷ Parke, B., Rolfe, B., Alder-

son, B., Wightman, J., Coltman, J., Cresswell, J., Maule, J., Platt, B., Williams, J.

⁸ *R. v. Garbett*, Den. 236; 2 Car. & K. 474. Six judges *contra*: Lord Denman, C. J., Wilde, C. J., Pollock, C. B., Patteson, J., Coleridge, J., Erle, J.

⁹ S. C. Den. 258.

¹⁰ Man. Ind. Tit. "Witness," per Dampier, J., and see *R. v. England*, Leach, 767.

the forfeiture of his estate, or to any penalty whatsoever, although he is not protected from the consequences of a civil suit by his refusal.¹ Even a king's evidence need not answer any questions touching other cases than those at issue, seeing that he is only entitled to a favourable consideration in respect of these cases.² So in the case of a public libel, a witness for the crown, who had belonged to the "General Convention," but subsequently became a town councillor of Birmingham, was not allowed in cross-examination to be asked as to what he said at a meeting at which the convention was agreed on, but which took place nearly a year before the publication of the alleged libel.³ Nevertheless, the principal ground of difference amongst the judges has been whether a witness need give such replies as may be calculated to degrade without subjecting him to any punishment. Upon this point it seems that there has been a great variety of opinions; some judges holding that questions tending merely to disparage might be asked; some, that only such as might *immediately* tend to that effect should be forbidden; and others, that no such questions should be put under any circumstances.⁴ "Have you not stood in the pillory for perjury?" This question was allowed to be put to a proposed bail.⁵ Whether the witness had not been turned out of his office of constable for misconduct? This question was admitted.⁶

It is clear, however, that if given, the answers of the witness must be taken as conclusive, and therefore it was held incompetent for a prisoner's counsel to adduce any evidence short of the record of conviction, in order to falsify his denial of a crime imputed to him.⁷ So where the witness was asked whether he had not been charged with robbing his master, which he denied, it was proposed to prove that he had been accused of that act, but Lawrence, J., would not permit it.⁸ He was likewise asked whether he had not said that he would be revenged of his master, and would soon fix him in Monmouth Gaol. This he denied as well, and the judge said, that the words were material as to the guilt or innocence of the prisoner, and consequently that evidence might be adduced to show that he had spoken them.⁹ Another

¹ 46 Geo. 3, c. 37.

² *R. v. Holding and another*, 2 Russ. C. M. 927, citing 1 Arch. Cr. Pl. 150; *Id.* 929, citing 1 Arch. Pract. 193, Bayley, J.

³ *R. v. Collins*, 9 C. & P. 456.

⁴ See *R. v. Friend*, 4 St. Trials, 606, vol. 13 of Howell. *R. v. Cook*, *Id.* 748, vol. 13 of Howell. *R. v. Laver*, 6 St. Trials, 259, vol. 16 of Howell. *R. v. O'Coigley and O'Connor*, 26 Howell's St. Trials, 1353. *R. v. Lewis*, 4 Esp. 225. *R. v. Hodgson*, Russ. & Ry. 211. *R. v. Pitcher*, 1 C. & P. 85. Against the necessity of answering and in favour of it, *R. v. Edwards*,

4 T. R. 440, together with some cases in the civil courts; and see Russ. C. M. 927, 930. *R. v. Barker*, 3 C. & P. 589. *R. v. Parker and another*, 1 Cox, 76. If the matter be of an infamous nature the question may be asked, but the witness need not answer; Cresswell, J.

⁵ *R. v. Edwards*, 4 T. R. 440.

⁶ *R. v. Gilroy and another*, 1 C. & P. 87 (n.)

⁷ *R. v. Watson*, 2 Stark. N. P. C. 151; *Id.* 244, per Holroyd, J.

⁸ *R. v. Yewin*, 2 Camp. 678.

⁹ S. C.

point is, that although, *prima facie*, the contrary might be surmised, the fact of a refusal to answer questions can have no effect with the jury,¹ although the opposite party may in that case produce legal evidence to prove that which the witness has declined to answer.²

A question once arose, upon the trial of three defendants for conspiracy, concerning the cross-examination of a witness called by one only of the defendants. This person's object was to present to the jury a conversation between himself and one K., another defendant. The counsel for the prosecution then proposed to cross-examine as to another conversation between the same parties, when the counsel for K. interposed and said, that as his client had called no witnesses, there would be a hardship in bringing forward a new case against him, in consequence of this latter evidence, a circumstance which might possibly happen. But Abbott, J., although he would not decide then, whether the counsel for K. might not address the jury upon it, refused to shut out this second conversation.³

Three prisoners were indicted for larceny. They were defended separately; the court discharged one of them. This man was called as a witness by one of the other two to criminate his companion at the bar. Upon this, a right of cross-examination and reply was claimed. But this was opposed, although the chairman offered to put the questions. Both prisoners were convicted, but the case was reserved as to him who was thus criminated, and whose counsel was refused liberty to cross-examine and reply, and the judges reversed the conviction. Jervis, C. J., observed that it must not be understood, that if the evidence does *not* criminate the other prisoners, there may be a cross-examination and reply.⁴

Two prisoners were charged with manslaughter; they were the drivers of rival omnibuses. They were separately defended. The counsel for one called no witnesses; the counsel for the other called witnesses, who threw the blame upon his fellow prisoner. The court held, that these witnesses might be cross-examined by the counsel for the other prisoner, and that he might address the jury for the second time. He should cross-examine first, then the counsel for the prosecution, and the re-examination should follow. Then would ensue the second address, and the general reply for the prosecution.⁵ The witness alone is concerned in this matter. Lord Tenterden, upon one occasion, declared that he had done wrong to allow the attorney-general to support an objection raised by a witness for the prosecution, who said he had been threatened in consequence of the publication (an alleged

¹ 2 Stark. N. P. C. 158, per Holroyd, J.

² 2 B. & B. 314.

³ *R. v. Kroehl and others*, 2 Stark. N. P. C. 343.

⁴ *R. v. Burdett and others*, 24 L. J. M. C. 63; Dears. 431.

⁵ *R. v. Woods and another*, 6 Cox, 224.

libel) then before the court.¹ Park, J., has permitted the counsel for the prisoner to ask the witnesses for the prosecution whether A. and B. (who were admitted king's evidence) were not persons of very bad character.²

When the prisoner brings forward a witness to character, the prosecutor's counsel may ask him if he has ever heard of the commission of a felony (mentioning it) some years previously. If the witness replies in the affirmative, the counsel may go on to ask whether the prisoner was not suspected of having been the perpetrator of it.³

Then, lastly, it may be said that there are some occasions when a person appearing in court for the purpose of giving certain evidence cannot be subjected to this test of cross-examination. As when in an action for a malicious arrest the justice was called to produce the information, it was held by Holroyd, J., that he could not be cross-examined.⁴ And the reason was because the justice was not sworn, and the reason of his not being sworn was because he merely tendered a document which another witness, namely, the clerk, would be called upon to prove. And Gaselee and Littledale, JJ., held the same in a case where the sheriff's officer had been subpoenaed to produce a warrant of the sheriff.⁵ As soon as the oath is administered, the witness becomes subject to cross-examination.⁶ Supposing that the name of a witness is on the back of the indictment, it was held discretionary, both in felony and misdemeanor, to permit the witness to be cross-examined, although the counsel for the prosecution does not call him.⁷ But it is better that the counsel for the prosecution should examine the witness, especially if he should call him.⁸

Re-examination.] To the cross-examination succeeds, if thought fit, the re-examination. And in connection with what has just been said, we may observe, in the first instance, that a counsel may examine a witness from whom certain facts have been drawn in cross-examination, in order that the witness may have an opportunity of explaining any statement that he may have made.⁹ And his reasons for giving any particular account of a transaction to a third person may be asked in such re-examination if that account has been elicited from him on the opposite side. But the ordinary course seldom goes further than an explanation of some facts connected with the cross-examination, out of which it is not com-

¹ *R. v. Adey*, Gent. one, &c.;
1 Moo. & Rob. 94.

² *R. v. Nichols and others*, 5
C. & P. 600.

³ *R. v. Wood*, 5 Jur. 295.

⁴ *Simpson v. Smith*, 2 Phil. Ev.
467.

⁵ *R. v. Murlis*, Moo. & M. 515.

⁶ *R. v. Burke*, 2 Stark. N. P. C.
472.

⁷ *R. v. Vincent*, 9 C. & P. 91.

⁸ *R. v. Bull*, Id. 22. Whether
the prosecutor's counsel, who, at
the instance of the prisoner's coun-
sel, calls a witness, may examine
that witness after his examination
by the prosecutor's counsel, qu.?
R. v. Harris, 7 C. & P. 581.

⁹ See the opinion of Abbott, C.J.,
2 Brod. & B. 297.

petent to travel. Therefore, where an accomplice confessed to several robberies committed on the same night with that charged in the indictment, the court refused to allow a re-examination having for its object the disclosure of particular circumstances so as to affect the prisoner with these robberies. The questions had only gone to the witness's discredit, and the other robberies did not arise out of the cross-examination.¹ And if counsel call a witness whose name is on the back of the indictment, but fail to examine him, any question put after the cross-examination must be considered as a re-examination, and be limited accordingly.²

In cross-examination, a witness was asked whether he did not put a certain age (as sixty-five) on a tombstone from the best information he could get. He said he put it there in consequence of what J. S. had told him. The prosecutor's counsel then desired to know what J. S. had said, but the court would not allow of the question.³

The prisoner, in another case, was tried for attempting to discharge loaded arms at B. B. was cross-examined as to whether he had not used violent language towards his father. He admitted that he had done so. Nevertheless, it was considered that B. might be asked upon re-examination how his father had acted towards *him* before he used the language elicited by his cross-examination.⁴ A witness stated that he had been bail for a previous witness for keeping a gambling house. That witness was recalled, for the purpose of saying whether he had or not kept such a house.⁵ But where, in robbery, A. stated, on cross-examination, that the prosecutor had given her seven shillings, which he had denied, the counsel for the prosecution was not allowed to ask whether she had not said to B. that the prosecutor had *not* given her any money.⁶

How many witnesses.] Thus far as to the mode of examining witnesses. It will, however, naturally be asked how many witnesses are required, and whether any person, assuming that no incompetency is attached to his legal character,⁷ can demand to be allowed to give his testimony. With respect to the first point, except in high treason, whether the offence be a personal attack upon the King, or for counterfeiting the coin, the King's seals, or sign manual,⁸ one witness is sufficient. And this rule holds both in felony and misdemeanor, and also in those treasons where the attack has been made directly upon the sovereign, or where his coin

¹ *R. v. Fletcher and others*, 1 Lew. C. C. 68.

² *R. v. Beezley*, 4 C. & P. 220.

³ *R. v. Barber*, 1 Car. & K. 434.

⁴ *R. v. St. George*, 9 C. & P. 483.

⁵ *R. v. Noel*, 6 C. & P. 336.

⁶ *R. v. Clayfield*, 2 Russ. C. M. 943.

⁷ See the statutes 6 & 7 Vict. c. 85; 14 & Vict. c. 99, ss. 1, 2.

⁸ For in these cases there is no corruption of blood. *R. v. Gahagan*, Leach, 42. *R. v. Anstruther*, Id. 43; East, P. C. 129.

or signet has been counterfeited.¹ In high treason, misprision of treason, and perjury, the oaths of two witnesses are requisite.

Then as to the second point, it will occur to the reader that the names of some persons may be found on the back of the indictment, who, however, are not called for the prosecution, and the question is, whether the prisoner can insist upon their being brought forward. Upon this point the rule is, that of right the prisoner cannot demand their appearance, for, through some unforeseen accident, their presence might not be possible, and thus an unjust acquittal might ensue; but the judge will, nevertheless, in general, order them to be called up for cross-examination.² Yet the prisoner's counsel must not call witnesses to contradict the facts gained by the cross-examination of such a person.³ The prisoner, in fact, makes them his own witnesses.⁴ However, in such a case, the judge directed the deposition of the prisoner's mother before the coroner to be read, in order to show the contradiction between her statement there, and that made afterwards at the trial. The judges deemed this proceeding right, and Lord Ellenborough, and Mansfield, C. J., considered that the prosecutor had the same right.⁵ Depositions likewise may be referred to, for the purpose of explaining each other, though not to give them a force and evidence they would not otherwise have.⁶ Another case where a witness may be objected to is, where he has been ordered to leave the court, but either through wilfulness or inadvertence has disobeyed that order.⁶ And, at one time, it seems to have been understood, that a party could not, under any circumstances, be examined, even although he were the attorney in the case.⁷ Latterly, however, this strictness has been modified, and Littledale, J., in one case declared that an attorney was not within the rule, his assistance being absolutely necessary for the conduct of the matter at issue.⁸ And, upon an indictment for burglary, where a party who had retired, upon hearing the order to that effect, being afterwards called in to produce a plan, remained in court, it was held, that it depended on the circumstances of the case, whether such a witness should be examined, and the court resolved to admit this witness.⁹ And a

¹ 39 & 40 Geo. 3, c. 93.

² *R. v. Simmonds*, 1 C. & P. 84. And see *R. v. Whitbread*; *R. v. Taylor*, Id. n.; *R. v. Woodhead*, 2 Car. & K. 520; *R. v. Barley*, 2 Cox, 191; *R. v. Cassidy*, 1 Fost. & F. 79.

³ *R. v. Bodle*, 6 C. & P. 186.

⁴ *Supra*, *R. v. Woodhead*.

⁵ *R. v. Oldroyd*, Russ. & Ry. 88, *i. e.*, where the prosecutor calls the witness. In this case the prisoner's mother was not called for the prosecution. This case was not recognized by Bolland, B., who refused

to allow the deposition to be read. *R. v. Tunnicliffe*, 2 Russ. C. M. 897.

⁶ *R. v. Hobson*, 1 Lew. C. C. 66.

⁷ *R. v. Webb*, Best, J., Man. Dig. 324; Stark. on Ev. 1733.

⁸ *Pomeroy v. Baddeley*, Ry. & M. N. P. C. 430.

⁹ *R. v. Colley and another*, cor. Littledale, J., Moo. & Malk. 329. The witness, however, was not examined, the counsel for the prosecution deeming his case sufficient without.

case was cited from the northern circuit, where Bayley, J., recognized the same exception, observing at the same time, that the testimony would be open to such remarks as might be thought fit.¹ In the Exchequer, in revenue cases, the rule has been to refuse any witness remaining in court after an order to the contrary.² It is one thing to demand the absence of witnesses on either side, as of right, although Coleridge, J., seemed to think it might be so,³ and another for the judge to order that course, at his own discretion. In the latter case, there can be no doubt; in the former it is a question whether the rule is not limited to civil cases.⁴

¹ *Ex. rel. Moody*, Id. 329. *R. v. Boyle*, cor. Bayley, J., 1 Lew. C.C. 325; S. P. and probably S. C.; and *Holroyd and Littledale, JJ.*, are said to have ruled the same.

² *Att.-Gen. v. Bulpit*, 9 Price, 4.

³ In *R. v. Murphy*, 8 C. & P. 307, where a point of law is to be argued on the evidence of the witness.

⁴ *Taylor on Ev.* 1128.

CHAPTER XVI.

OF THE NATURE OF THE EVIDENCE FOR THE CROWN AND FOR
THE PRISONER OR DEFENDANT.

Nature of the evidence.] Having now gone through the practical part of the examination of witnesses, we will proceed to relate the nature of the evidence. The chief principle is, that witnesses are to make mention of what they have actually seen, or what they positively know to be the fact, and, on some occasions, an oath to the best of the witness's belief will be received, as where he is called upon to identify property.

Hearsay.] Hearsay is not in general admissible, although there certainly are exceptions to the rule, and indeed, we have already seen that dying declarations and other statements made by persons deceased may be admitted.¹ So we have seen that certain expressions used immediately after the happening of an accident may be received as part of the *res gestæ*.² So, immediately after a robbery, the complaint is evidence, but not the name of the person complained of.³ And a cry of a mob was admitted to show the nature of the transaction in a prosecution for high treason.⁴ So, likewise, the story which a patient relates to his surgeon as to his sufferings. Again, the fact of a speedy complaint by the prosecutrix to her mother or friend that she has been indecently assaulted;⁵ and a similar appeal by a child five years old, immediately after ill-treatment, has been held admissible in evidence.⁶ Other cases of hearsay are to be met with, and it is clear that the same rule which permits their introduction in civil suits will also sanction it in criminal cases. For examples of these we may mention hearsay evidence concerning public rights, surveys, &c., statements made by parties against their own interest, &c.

However, conversations in the absence of the prisoner are inadmissible. Although, where a master had given his servant certain instructions upon leaving home, Park, J., permitted them to be given in evidence, although the prisoner was absent at the time.⁷ The prisoner made a remark to a witness. The witness mentioned it to A. The period of the communication was material. A. was

¹ See *ante*, "Dying declarations;" St. Tr. 535; Taylor on Evidence, 488.

² *Ante*.

³ *R. v. Wink*, 6 C. & P. 397. See also *R. v. Osborne*, Car. & M. 622.

⁴ *R. v. Lord George Gordon*, 2 Russ. C. M. 750, citing 21 How.

⁵ *R. v. Clarke*, 2 Stark. N. P. C. 242.

⁶ *R. v. Brazier*, East, P. C. 444.

⁷ *R. v. Jenkins and another*, 1 Lew. C. C. 114. *Doncaster Betting-room case*.

allowed to give evidence of the fact, although the prisoner was absent when the remark was made.¹ So, conversations which explain a man's conduct were admissible notwithstanding the absence of the prisoner, as directions by the husband to the wife not to tell certain facts *through fear*.²

Privileged communications.] Another branch of knowledge which the court will not permit to be disclosed is a privileged communication. As, for instance, that which a party makes to his legal adviser, official statements, &c. And we have seen in a former page that evidence given before a grand jury cannot be mentioned again by one of the jurors.

Upon one occasion, Buller, J., admitted a confession made by a Papist to a Protestant clergyman, although Lord Kenyon said, in a subsequent case, that he should have paused before he had admitted such evidence, probably considering it in the light of a confidential communication.³ What is said, however, out of or after confession, is a different kind of communication, and is receivable.⁴ But the principal questions which have arisen upon the subject are those which relate to attorney and client. This rule is so strict that the attorney cannot be suffered to detail anything which has passed in a professional way between himself and a party who is not before the court. So that it was considered incompetent for the defendants to avail themselves of a conversation which passed between an attorney and the prosecutor and one B.; even as far as B.'s statement went, it was a professional consultation, and the fact of B. having spoken in the hearing of the prisoner was held to make no difference.⁵ Upon the same principle, an attorney, who had been consulted in order to sue the prisoner upon a note which turned out to be forged, and had also got possession of the note accordingly, was not suffered to produce it, although he was not concerned for the prisoner upon the trial.⁶ But Patteson, J., has impugned the authority of *R. v. Dixon* and *R. v. Smith*, and compelled an attorney to produce a forged will, which a pretended mortgagor had intrusted to him, as evidence against such mortgagor upon his trial for forgery,⁷ and his ruling has been sustained.⁸ An indictment was tried against several for forging and uttering the will of a person unknown, and one prisoner was convicted of uttering. The will was in the possession of an attorney. One

¹ *R. v. Richardson and another*, 1 Cox, 361.

² *R. v. Gandfield and another*, 2 Cox, 43.

³ *R. v. Sparkes*, cited, Peake, N. P. C. 78. And see now *R. v. Gilham*, 1 Moo. C. C. 186.

⁴ *R. v. Hay*, 2 Fost. & F. 2.

⁵ *R. v. Withers and others*, 2 Camp. 578.

⁶ 1 Phil. Ev. 171. *R. v. Smith*,

2 Russ. C. M. 907. *R. v. Dixon*,

3 Burr. 1687; 9 East, 485. *R. v. Watkinson*, S. P. in perjury, Str. 1122.

⁷ *R. v. Avery*, 8 C. & P. 596.

⁸ *R. v. Farley and another*, Den. 197. *R. v. Jones and others*, Den. C. C. 166. S. C. nom. *R. v. Hayward*, 2 Car. & K. 234.

of the prisoners had come to him with a paper (the forged will); she said she came to consult him as to *that document*, to enforce it. The attorney said: "She did not come to consult me as to what her rights were, but that I might enforce her rights under it." Coltman, J., was of opinion that the document had been submitted not as a confidential deposit, but to be exhibited in court to enforce rights, and he admitted the evidence subject to the opinion of the judges. Though the point, however, was not decided, the judges being evenly decided upon another point. But Patteson, J., took occasion to observe, that what he was reported to have said in *R. v. Smith*¹ was too strong, and that he would have reserved *R. v. Avery*,² had not the prisoner pleaded guilty to another indictment; and Parke, B., inclined to maintain the confidential position of the attorney.³ A barrister is also within the rule. And so are interpreters and agents. And upon one occasion a barrister's clerk was not allowed to prove his master's retainer.⁴ But if the attorney be not employed, the communication of course is not privileged. As where a prisoner, charged with forgery, wrote to a friend, to ask Mr. G. whether the punishment would be the same whether the names were real or fictitious. This was held not to be privileged, Mr. G. not being then, nor at any time afterwards, the prisoner's attorney.⁵ Nor is a statement made by a woman to her surgeon privileged.⁶ Nor where the prisoner makes use of a forged instrument in order to gain certain advantages, and makes certain statements to a professional man as his adviser. Especially where that adviser acts also as attorney for the party whom the prisoner intended to defraud. In such a case it was held that the attorney was bound to produce a will, and relate the nature of the prisoner's communication respecting a mortgage, for which the forged will was to stand as a security.⁷

The second kind of communication we have to notice as being privileged is of an official character, that is to say, such as are connected with state matters or public offices. Thus the attorney-general need not give his reasons for filing an *ex-officio* information.⁸ And agents of the government or of the police, or informers, whether their employment be for the public safety,⁹ or the

¹ *Ante*.

² 8 C. & P. 596.

³ *R. v. Tylney and others*, Den. 319. "The expression 'for the purpose of enforcing the document,' seems ambiguous. Suppose it was delivered to the attorney for the express purpose of showing that the tenant in possession might give up possession to the forger of the will? Supposing, on the other hand, a man gives his title-deeds to an attorney to enable him to bring an action of ejectment, he ought not, perhaps, to

show them adversely to his client?"

Parke, B., Den. 324.

⁴ *Foote v. Hayne*, Ry. & M. N. P. C. 165.

⁵ *R. v. Brewer*, 6 C. & P. 363.

⁶ *R. v. Gibbons*, 1 C. & P. 97.

⁷ *R. v. Avery*, 8 C. & P. 596, *ante*.

⁸ *R. v. Horne*, 11 State Trials, 283, vol. 20 of Howell.

⁹ *R. v. Hardy*, cited, 2 Stark, 136. *R. v. Stone*, cited, Id. 137.

revenue, are equally protected. So, a clerk of the works in the ordnance department was not allowed to state whether a plan of the tower produced by the defendant was accurate. Proof might be given that prints of the tower might be purchased, but the officer could not be asked as to their correctness.¹ And the same rule applies to other matters connected with state policy.

Onus of proof when on defendant.] Another rule connected with evidence, which at least relieves the prosecutor from tendering certain proofs in support of the indictment, is where, from the nature of the case, it would be almost impossible to substantiate the charge, and yet where the accusation is justified upon public grounds, as under an Act of parliament, or otherwise. Thus, if the question be whether a party has obtained a certificate, it will be for the defendant to show his qualification, where the legislature has forbidden him from exercising certain employments without one.² So it is under the game laws,³ where the prosecutor need not prove a negative, and the licence for selling game must be produced by the defendant.⁴ So, under the Acts which forbid the taking of fish in the grounds of another, and stealing or damaging trees,⁵ it lies on the defendant to show that he has had the consent of the owner for so doing. So, under the old Acts concerning the coursing of deer and lopping of trees without the consent of the owner, the later opinion was that it lay on the defendant to prove consent.⁶ Indeed, the words "without the consent of the owner," were omitted in the stat. 7 & 8 Geo. 4, c. 29. It may be added here also as a principle of law, that where a duty is required at the hands of a public officer, he shall, until the contrary appear, be presumed to have performed it, and so it was adjudged in the case of Lord Halifax.⁷

Offence need not be proved in extenso.] It is sufficient to prove the offence without going to the full extent mentioned in the indictment,⁸ and immaterial averments need not be proved.⁹

Character of prisoner.] With reference to the character of the prisoner, it is not competent for the counsel in support of the case

¹ *R. v. Watson*, 2 Stark. 148.

² *Apothecaries Company v. Bentley*, Ry. & M. N. P. C. 159.

³ See 22 & 23 Car. 2, c. 23, now repealed. *R. v. Turner*, 5 M. & S. 206. *R. v. Stone*, 1 East, 639, where the judges were equally divided.

⁴ 2 Will. 4, c. 32, s. 42. See *R. v. Hanson*, from Paley on Convictions, by Deacon, 176. *R. v. Smith*, 3 Burr. 1475. The Hawkers' Act.

⁵ 7 & 8 Geo. 4, c. 29, ss. 34—38; c. 30, s. 19; now 24 & 25 Vict. c. 96, ss. 24, 33.

⁶ *R. v. Allen*. *R. v. Argent*. *R. v. Chamberlain and another*, 1 Moo. C. C. 154. *R. v. Hazy and another*, 2 C. & P. 458, overruling *R. v. Rogers*, con. Lawrence, J., 2 Camp. 654.

⁷ Bull. N. P. 298.

⁸ *R. v. Hollingberry*, 4 B. & C. 329.

⁹ *R. v. Holt*, Leach, 593.

to impeach the character in evidence, because a man of the best fame may commit an illegal act, and the worst person need not necessarily have perpetrated the particular deed which is the subject of the accusation.¹ However, should the prisoner call witnesses to his character, the prosecutor may then adduce contrary testimony, not as to particular facts, but in regard of the general reputation of the individual,² and the character of the prosecutor can only be attacked in the same general way. For the same reason the general disposition of the prisoner cannot be shown for an unfavourable purpose, and it was so held in a case where it was proposed to put in the admissions of the party that he had committed an unnatural crime at another time, and with another person, and that he always had a tendency to such practices.³

Evidence of one felony in general no proof of another.] Evidence of one felony cannot be produced in support of another, at least as a general principle. So that where on a charge of burglary it appeared that the prisoners must have entered the house after three in the afternoon, upon which the counsel, abandoning the charge of burglary, proposed to bring forward proof of a larceny committed on a prior day, the court refused to allow it, observing that this was quite a different transaction.⁴ So where there were two indictments, one for night poaching, and another for stealing the prosecutor's coat, it was not permitted to the prosecutor upon the indictment for poaching to show that the coat was found in the prisoner's house, unless the prosecutor would consent to an acquittal for the larceny.⁵ So in the case of an unlawful assembly, the defendants were not allowed to inquire concerning the conduct of those who dispersed the meeting, there being no foundation laid for such a question, by evidence on the part of the prosecution as to the conduct of the meeting.⁶ And depositions in respect of another felony are not admissible.⁷ As to show that certain persons charged in the indictment then on trial were in company with another person charged in the same indictment on a particular night, so as to identify them as the persons concerned with that other in a robbery committed on the night in question.⁸

Variances.] There is only one other subject which is connected with the failure of the prosecution by reason of defective evidence, and that is the doctrine of variances. There may be a tender of evidence wholly inadmissible, and there may be charges in an indictment, which, if unsupported, will not vitiate the proceeding, but there are cases in which certain averments must be proved,

¹ See 2 Russ. C. M. 784.

² Bull, N. P. 296.

³ *R. v. Cole*, 1 Phil. Ev. 508.

⁴ *R. v. Vandercomb and another*, Leach, 708.

⁵ *R. v. Westwood*, 4 C. & P. 547.

⁶ *R. v. Hunt*, 3 B. & Ald. 568.

⁷ *R. v. Fletcher and another*, 1 Lew. C. C. 68.

⁸ S. C.

and should the proof differ from the indictment in these last cases, the defendant will be acquitted. This is the doctrine of variance. Thus we have the case of inadmissible evidence, of evidence which need not be brought forward, and of evidence which must tally with the charge, or rather which, if it do not so agree, must be considered as irrelevant. Some instances of these inconsistencies with the record will now be given, but they must be regarded with great suspicion since the passing of the statutes of amendment.¹ The indictment was for a pretence that the defendant had paid a sum into the Bank of England. The proof was that the defendant had said that the money had been paid into the Bank of England.² There were two persons named Joshua Jennings, father and son. The indictment charged that a horse which was stolen belonged to Joshua Jennings. The evidence was that the horse belonged to the son. This was held sufficient. It did not follow that Joshua Jennings, without more, must have been the elder.³ So, in perjury when the indictment stated a suit as depending between W. P. and R. M., and the proof showed that R. M. the elder was the person concerned, it was held no variance.⁴ *Secus*, had it been the younger.⁵ An indictment stated that the defendant in perjury, had sworn she had been in a certain person's company from two to four. The proof was, that she had said she had so been from eleven to half-past four. It was deemed sufficient.⁶ We have already set out the clause of amendments.⁷ Under these clauses several amendments are permitted, so as in a great measure to lay aside the doctrine of variances. But it must not escape notice, that the making of these amendments is discretionary.⁸ And in matters of substance, or where the defendant may be prejudiced, the judge will not allow them. The prosecutor should ask for the amendment before he closes his case,⁹ for it must not be after the counsel for the defence has addressed the jury.¹⁰ The *termini* of a highway were held to be amendable, the defendant not being in any way prejudiced.¹¹

¹ *Ante*. See *R. v. Beech*, Leach, 133. *R. v. Hart*, Id. 145. *R. v. Elliott*, Id. 175. *R. v. Crooke*, Id. 706, (n.) *R. v. Halloway*, 1 C. & P. 127. *R. v. Oldfield*, 2 Russ. C. M. 376. *R. v. Tanner and others*, 1 Esp. 304. *R. v. Moor*, 1 Lew. C. C. 141. Anon, Id. 138. *R. v. Birkett and another*, Russ. & Ry. 251. *Attorney-General v. Horton*, 4 Price, 237. *R. v. Wright and others*, 1 Lew. C. C. 235. *R. v. Fitzpatrick*, Russ. & Ry. 512. "Forget" instead of "neglect" was deemed a variance. "Bad rulers"

instead of "rulers" was immaterial. *R. v. Fussell*, 3 Cox, 291.

² *R. v. Plestow*, 1 Camp. 494.

³ *R. v. Hodgson*, 1 Lew. C. C. 236. *R. v. Bland*, Id. *R. v. Peace*, 3 B. & Ald. 579.

⁴ *R. v. Bailey*, 7 C. & P. 264.

⁵ Id.

⁶ Anon. 1 Lew. C. C. 237.

⁷ *Ante*. See 9 Geo. 4, c. 15; 14 & 15 Vict. c. 100, s. 1.

⁸ *R. v. Frost*, 24 L. J. M. C. 116.

⁹ *R. v. Rymes*, 3 Car. & K. 327.

¹⁰ S. C.

¹¹ *R. v. Sturge*, 23 L. J. M. C. 172.

Best evidence.] We come now to the evidence which may be admitted. And we have said that there is a rule requiring the best possible evidence. And in another that the actual observation of a witness is the chief of its kind. And upon the same principle, when written evidence is tendered, the best proof is necessary; so that the copy of an original cannot be offered, unless the instrument first executed be lost, withheld, or destroyed. And we have seen that a policy of insurance is the best proof of its kind, and where it could not be received for want of a stamp, the prisoner was acquitted. The books of the insurance office cannot supply the defect.¹ Records of a court are the principal evidence of *their* order, and consequently no secondary proof can be allowed where their existence is admitted.² When the original instrument is produced, it is like the ocular testimony of a witness, primary evidence; but when recourse is had to a copy, the evidence is then termed secondary. And it is a rule that the original deed in writing, notwithstanding the letting in of secondary evidence, must be shown to have been duly executed.³ Where there is a limit in point of time to a prosecution, the warrant of apprehension or of committal is the best evidence.⁴

Handwriting.] Handwriting is likewise often proved by secondary evidence, as where the signature of a magistrate to a deposition is required to be proved. Here a witness acquainted with the general character of the hand is sufficient without calling the magistrate himself. For, unless the justice had kept his handwriting under his own safe custody until the trial, his knowledge is acquired in a major degree certainly, but still only by the same means as the knowledge of other persons who may have seen the magistrate write. And the principle is, that in such cases there is no objection to the competency of the writer.⁵ But comparison of hands cannot be allowed. As that the writing of the drawer, acceptor, and indorser of a bill was that of the same person. Cresswell, J., rejected the evidence of an expert, who was called to prove this.⁶ However, it seems that where the judge of a county court made a party write his name in court in order to verify it with another signature, and impounded both signatures, the jury upon a trial for perjury might look at both the signatures.⁷ And although the witness has not seen the defendant write for twenty years, his evidence is admissible.⁸ But there

¹ *R. v. Doran*, 1 Esp. 127.

² See *R. v. Hube and others*, Peake, N. P. C. 132. *R. v. Page*, 6 Esp. 83.

³ *R. v. Culpeper*, Skin. 673.

⁴ See *R. v. Phillips and another*, Russ. & Ry. 369.

⁵ See 2 Phil. Ev. 302; 2 Russ. C. M. 734.

⁶ *R. v. Coleman and others*, 6 Cox, 163.

⁷ *R. v. Taylor*, Id. 58.

⁸ *R. v. Tooke*, 25 How. St. Tr. 71.

must be proof of actual knowledge.¹ A session clerk from Scotland was not allowed to look at a kirk-session book, to compare the writing of a clergyman with a certificate found amongst some papers.² Nor can the jury look at papers which are not in the case, in order to compare handwritings. Nor will a scientific inspector be allowed to do so.³ A policeman who had only seen the prosecutor write once, and then for the purpose of the prosecution, was not permitted to give evidence of the handwriting.⁴ And the *FitzWalter peerage case* was cited, where the distinction was taken by Lord Cottenham and Lord Brougham, between a course of business like that of a solicitor or steward, and the study of a signature for the express purpose of speaking to the identity of the writer.⁵

Presumptive evidence.] It cannot, however, be always expected that the most direct and certain evidence should be produced in support of a charge, and, therefore, circumstances are often admitted in proof, for the purpose of raising presumptions that the prisoner has in all moral probability committed the crime. Thus, where a bed and blankets, which were in a house, the firing of which was charged upon the prisoners, were afterwards discovered in the house of the prisoners adjoining, Buller, J., admitted the fact in evidence, to show their connection with the design.⁶ So, in order to identify the instrument used, it was held upon an indictment for stabbing B., that C., a party who had also been stabbed, and who had preferred another indictment against the prisoner, might be called for that purpose.⁷ So, where the effect of a lotion was part of the case in an indictment for manslaughter, the operation of the same lotion upon other patients was held admissible in evidence.⁸ So where other goods than those mentioned in the indictment, and which were upon the premises of the prosecutor, were found in the prisoner's possession, this fact is evidence, as it tends to show that the prisoner was near the prosecutor's house at the time of the robbery.⁹ So where a man was charged with robbing the prosecutor of a coat by means of threats of an unnatural nature, Holroyd, J., received evidence of another ineffectual attempt to obtain a £. note by similar menaces, and the judges sanctioned his decision.¹⁰ So where a man stole a shirt at one place and left it in another, and in fact committed a third burglary in one night, the court decided upon hearing the history of all these three burglaries, by reason of their close connection

¹ Taylor on Evidence, 1479, citing *R. v. Murphy*, 8 C. & P. 306, 307.

² *R. v. Barber*, 1 Car. & K. 434.

³ *R. v. Shepherd*, 1 Cox, 237. Case of a threatening letter.

⁴ *R. v. Crouch*, 4 Cox, 163.

⁵ Taylor on Evidence, 1223; 10 Cl. & Fin. 193.

⁶ *R. v. Rickman*, East, P. C. 1035.

⁷ *R. v. Fursey*, 6 C. & P. 81.

⁸ *R. v. Long*, 4 C. & P. 398.

⁹ 1 Phil. Ev. 170.

¹⁰ *R. v. Egerton*, Russ. & Ry.

375.

with each other.¹ So in the case of a threatening letter, a subsequent correspondence between the prisoner and the prosecutor was given in evidence.² And so it is, in the case of stealings which form one transaction, as where the shopman robbed the till of marked money at several different times.³ So it was permitted to show that the prisoner had a gun near the rick on the day before it was set on fire, and that the rick in fact was on fire on that day. It was charged against him that on the following day he fired off the gun close to the rick and set it on fire.⁴ And it is no objection that this is, in effect, part of another felony.⁵ The acts done form one transaction.⁶ But the lapse of some time, half an hour, for instance, may sever the felonies. And the rule does not apply in the case of documents which are independent of the cause at issue. As in the case of a threatening letter, where letters unconnected with the indictment were tendered against the prisoner, and after consideration rejected.⁷ Nor where there is another indictment in respect of the matters tendered in evidence, unless the prosecutor will consent to an acquittal upon that indictment.⁸ But the conduct of the prisoner at a meeting two days before the transaction in question, and which conduct bore immediately upon the case, was admitted.⁹ It was admitted as part of the whole quarrel between the masters and their workmen.

The story of the person who ran out of a room with a bloody sword, immediately after the commission of a murder, is well known. It was strong presumptive evidence. And it is a presumption of law that the fact of killing being proved to have been done by the prisoner, the act must be deemed wilful, and therefore it lies upon him to show that he did not do it out of malice. Upon a charge of burglary in A.'s house, proof was given that a crowbar was found in B.'s house. B.'s house had been broken into on the night of the burglary then upon trial, and B.'s house was near that of A. The crowbar had been seen in the possession of the prisoners, and a chest of drawers in A.'s house had been forced by such an instrument. This evidence was admitted.¹⁰ The comparison of footmarks is admitted by the following examination:—"Have you looked at the soles of the shoes, and did you examine them with the footmarks before you put the shoes on the

¹ Leach, 985, by Lord Ellenborough. The cases of forgery are very analogous. See *post* in this work, "Forgery" and "Coining."

² *R. v. Robinson*, East, P. C. 1110.

³ *R. v. Ellis*, 6 B. & C. 145.

⁴ *R. v. Dossett*, 2 Car. & K. 306.

⁵ *R. v. Birdseye*, 4 C. & P. 386.

⁶ S. C.

⁷ *R. v. Morgan*, 1 Moo. & Rob. 134, n. Bolland, B.

⁸ *R. v. Westwood and others*, 4 C. & P. 547. See *R. v. Salisbury*, 5 C. & P. 155. *R. v. Davis and another*, 6 C. & P. 177.

⁹ *R. v. Atkinson*, 1 Lew. C. C. 115. Frame-breaking, cor. Park, J. And see also *R. v. Roberts*, 1 Camp. 399.

¹⁰ *R. v. Stonyer*, 2 Russ. C. M. 728.

mark." In default of this care the evidence will be rejected.¹ And if there be no other evidence, footmarks will be insufficient.²

Opinions.] There are occasions, however, where the naked facts of the case are insufficient to enable the jury to form a right conclusion. The *opinions* of intelligent men are then admitted in evidence. As where upon a trial for murder, medical men were allowed to give their opinions for the prisoner, that the death did not arise from strangulation, in opposition to the evidence for the prosecution, although they had not seen the body, and could only form their judgment from the evidence in court.³ So where the question was whether the prisoner was insane when he took away the life of a fellow creature. Here the judges allowed a person of medical skill to state whether, in his opinion, certain appearances, which were deposed to by the witnesses, were symptoms of insanity.⁴ So where a case of religious fanaticism appeared upon a trial for cutting and maiming, a physician who had heard the trial was allowed to be asked whether the facts and appearances stated, showed symptoms of insanity.⁵ So it was held to be competent for a gentleman versed in the Scotch law to give his opinion as to the legal effect of certain facts in that country, of course, assuming the statements to be accurate.⁶ In this case of *Wakefield*, witnesses were examined on both sides, as to the validity of a marriage by the Scotch law. This, however, is not a usual line of defence, it being customary to expunge evidence which ought not to be admitted, instead of *calling witnesses* to exclude it.⁷

By 7 & 8 Geo. 4, c. 28, s. 5, the jury charged to try a treason or felony shall not be charged to inquire concerning his lands, tenements, or goods, nor whether he fled for such treason or felony.

Prior conviction.] There is one other evidence for the prosecution which is sometimes received after the main testimony has been gone through, and before the case is entirely closed. This is the proof of a former conviction.

By 24 & 25 Vict. c. 96, s. 116, in any indictment for any offence punishable under this Act, and committed after a previous conviction or convictions for any felony, misdemeanor, or offence or offences punishable upon summary conviction, it shall be sufficient, after charging the subsequent offence, to state that the offender was at a certain time and place, or at certain times and places, convicted of felony, or of an indictable misdemeanor, or of an offence or offences punishable upon summary conviction (as the

¹ *R. v. Shaw*, 1 Lew. C. C. 116.
R. v. Heaton, Id.

² *R. v. Britton*, 1 Fost. & F. 354. 75.
Robbery.

³ *R. v. Shaw*, 2 Russ. C. M. 810.
925.

⁴ *R. v. Wright*, Russ. & Ry. 456.

⁵ *R. v. Searle*, 1 Moo. & Rob.

⁶ *R. v. Wakefield*, 2 Russ. C. & M.

⁷ Moo. & M. 197, n.

case may be), without otherwise describing the previous felony, misdemeanor, offence or offences; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony or misdemeanor, or a copy of any such summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or to which such summary conviction shall have been returned, or by the deputy of such clerk or officer (for which certificate or copy a fee of 5s. and no more shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of such conviction, without proof of the signature or official character of the person appearing to have signed the same; and the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows; (that is to say,) the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted, the court may proceed to sentence him accordingly; but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry: provided, that if upon the trial of any person for any such subsequent offence, such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.

In setting out the record, where it was said, "it is duly considered and adjudged by the court *there*;" *there* does not necessarily mean the place last mentioned. That was St. Luke's, Chelsea, but the words obviously referred to the Central Criminal Court before mentioned in the earlier part.¹

The jury are not to be sworn, and consequently there can be no challenge.² The statute contains the words "previous offence

¹ *R. v. Soper*, 1 Cox, 288.

² *R. v. Key*, Den. & P. 347; 21 L. J. M. C. 35. Where the counsel intimated his intention of challeng-

ing all the jury, and of having a fresh pannel. *R. v. Shuttleworth*, Den. & P. 357; 24 L. J. M. C. 36.

or offences." Therefore more than one conviction can be brought forward against the prisoner after the verdict of guilty.¹ The identity of the prisoner as connected with *felony*, if he be so charged, must be proved, *and so in misdemeanor*. The mere notice of him by the porter of the gaol was held not to be sufficient in a case of felony. He might have been confined for misdemeanor.² It should, however, be shown that the prisoner was in custody for the particular felony.³ The certificate and identity will then suffice. It may be remarked, that the judges had, at one time, come to a resolution to allow both the inquiries to go on together: *i. e.* the indictment for the offence newly charged, and the prior conviction. But this was not deemed fair towards the prisoner, and the proceeding was altered by statute.⁴ An objection was made that proof of a conviction in 1838 could not be brought to bear against a character commencing in 1844. But the court would not entertain it. The prisoner gave evidence of good character, and it was clearly competent to rebut it.⁵ And if the prisoner's counsel should obtain evidence of character upon a cross-examination, the effect will be the same as if he had called witnesses, and the conviction may be read.⁶ The identity of the prisoner may be proved by showing that he underwent the sentence, and it need not be established by producing a person who was present at the former trial.⁷ Where the certificate of conviction and the warrant of commitment agreed, and the prisoner was received under that commitment, the proof was held sufficient.⁸ The certificate must state that judgment was given. It is a certificate alleging the fact. But the indictment is valid if it states that the prisoner was convicted of felony, and received judgment, without setting forth the judgment.⁹

Two indictments against the same person.] There may be two indictments against the same person for felony. In such a case the judge will not take the evidence upon the first trial, however applicable, when the second comes to trial, not even by consent. Yet the witnesses in the second case having been resworn, the evidence on the first trial may be read over to them from the judge's notes.¹⁰ There were two indictments against a prisoner, one for stealing a

¹ *R. v. Clark*, Dears. 198, 202; 22 L. J. M. C. 135.

² *R. v. Lloyd*, 1 Cox, 51.

³ *R. v. Goodman*, 2 Russ. C. M. 130.

⁴ 12 & 13 Vict. c. 11.; 14 & 15 Vict. c. 19, s. 9, both repealed, and now 24 & 25 Vict. c. 96, s. 116.

⁵ *R. v. Shrimpton*, 21 L. J. M. C. 37; Den. & P. 319.

⁶ *R. v. Gadbury*, 8 C. & P. 676.

⁷ *R. v. Croft*, 9 C. & P. 219. *R. v. Leng*, 1 Fost. & F. 77.

⁸ *R. v. Leng*, *ut supra*, and *R. v. Croft* was cited.

⁹ *R. v. Ackroyd*, 1 Car. & K. 158. *R. v. Stonnell*, 1 Cox, 142. As to the punishment for larceny and other offences after a prior conviction, see *post*, "Larceny," 24 & 25 Vict. c. 96, ss. 7, 8, 9, superseding 7 & 8 Geo. 4, c. 28, s. 11, and 16 & 17 Vict. c. 99, s. 12.

¹⁰ *R. v. Foster*, 7 C. & P. 495.

cow, the other for stealing a calf. He having pleaded to both indictments, the jury were charged with the first, but, by mistake, the evidence applicable to the second was given. While the prisoner's counsel was addressing the jury the mistake was discovered. It was held that the evidence applicable to the first indictment should then be given.¹ The court will wait if stolen property be at a neighbouring inn, and in the meantime another prisoner may be tried, the first prisoner remaining in a corner of the dock.² The indictment may state the prior conviction before or after the substantive charge, but in that case the fresh charge should first be laid before the jury, and then in the event of a verdict of guilty, the previous conviction.³

Evidence for the defence.] The evidence for the prosecution being finished, the defence for the prisoner commences, and having begun to address the jury, the counsel for the prisoner may object to fresh evidence on the part of the prosecution, although, strictly speaking, *ex debito justitiæ*, the court may order the fresh evidence to be given. It is, however, unusual to press such a course.

Whether the prisoners should be called upon in the order of their names in the indictment, is not settled.⁴

We have seen,⁵ that there is no *rule* against the allowance of a prisoner's defence of himself, although he has been defended by counsel. In preparing the evidence for the defence, it is of importance that the counsel for the prisoner should be in possession of the depositions. A copy of these may be had under the statutes which we have already referred to.⁶ Upon a former occasion, where there were two examinations, but no regular depositions, there being only some notes taken by the clerk, Park, J., directed that the clerk should be sworn to the fact, and then handed down the book to the prisoner's counsel as a matter of right.⁷ The statute above mentioned enables the prisoner to have copies of the depositions against him. They must, however, be the depositions taken up to the time when the committal for trial takes place; those taken when there is a remand for re-examination are not within the statute. The right to them only attaches after the final hearing.⁸ It is possible that there might not be any depositions, as if a prosecution were commenced without going before any magistrate, therefore there could be no depositions, and a prisoner who requested to be tried after certain other prisoners because he had no copies of depositions, was acquainted by the court that his

¹ *R. v. Wardle*, Car. & M. 144.

² *R. v. Wenborn*, 6 Jur. 267.

³ *R. v. Hilton and another*, Bell, 20; 28 L. J. M. C. 28.

⁴ *R. v. Holman*, neg. 3 Jur. (N. S.), 722. *R. v. Meadows*, aff. 2 Jur. (N. S.), 718.

⁵ *Ante*, where the cases are collected.

⁶ 6 & 7 Will. 4, c. 114, s. 3; 11 & 12 Vict. c. 42, s. 27.

⁷ *R. v. Doncaster Betting-room*, 1 Lew. C. C. 71.

⁸ *R. v. Lord Mayor of London*, 5 Q. B. 555; Dav. & M. 484.

wish could not be complied with.¹ The reading of the prisoner's statement by the counsel for the prosecution does not make the depositions evidence. If the prisoner would have the whole or any part of the depositions read, he must read them as his evidence.² Again, the evidence of persons on the back of the indictment, but who have not been examined before the magistrate, cannot be given to the prisoner in the nature of a deposition, for here again, the rule obtains, that those depositions only which are taken before magistrates can be allowed him.³ Indeed, none other than those taken before public officers can properly be called depositions.

The depositions of a king's evidence will be shown to the prisoner. It was so held upon a charge for receiving stolen iron.⁴ And if depositions, which need not have been returned, as depositions by the coroner, should be sent to the Central Criminal Court, that court will, upon application, direct a copy to be furnished to the prisoner if they should think it material to the interests of justice.⁵ The next matter which the prisoner's counsel will take in hand is the indictment, with reference to its validity. Upon looking at the back of that document he will sometimes find the names of persons who have not been called as witnesses for the prosecution. He cannot, however, insist upon the calling of these persons as witnesses, although it is customary for the court to allow it. Nor can he have a list of the names and addresses of the witnesses who are to be called at the trial, not even although an affidavit be produced to the effect that the prisoner believes certain witnesses, whose names are on the back of the indictment, have been procured and suborned for the prosecution, and, moreover, that he is entirely unacquainted with them.⁶ So the court refused an application to give the names of witnesses in an indictment for misdemeanor. The application was made before the defendant had pleaded.⁷

The counsel now proceeds to address the jury. In so doing, he must confine himself to the evidence brought forward, and to that which he is himself about to adduce. He must not depart from the evidence in court. For example, he may not assume that a witness had not stated a certain fact in his deposition before the magistrate, on the ground of the witness having sworn to that fact before the court, whilst the deposition was silent as to it. If it were wished to prove that circumstance, the magistrate's clerk

¹ *R. v. Simpson*, Car. & M. 669. He had been committed for high treason, but the grand jury had found an independent bill against him for feloniously demolishing a house, as to which there were no depositions.

² *R. v. Pearson*, 7 C. & P. 671.

³ *R. v. Howell*, 9 C. & P. 437.

⁴ *R. v. Walford*, 8 C. & P. 767.

⁵ *R. v. Greenacre*, 8 C. & P. 32.

⁶ *R. v. Gordon*, 2 Dowl. (N. S.), 417. Whether the prisoner may call witnesses to prove subornation of witnesses against him, qu.? It does not seem to be settled. *The Queen's case*, 2 Brod. & B. 310.

⁷ *R. v. Nicholson*, 8 D. P. C. 422. *R. v. Lacey and others*, 3 Cox, 517.

might be called to show the silence of the witness on the subject.¹ And he must not, in opening a case, allude to a material conversation, which may be afterwards rejected.² The prisoner may address the court in his own person. Witnesses are then called for the defence, if there be any. It may just be noticed here, nevertheless, that if the judge should neglect to call upon the prisoner for defence, it will be matter for reversing the judgment.³ A prisoner cannot call witnesses before he addresses the jury.⁴ But it is permitted sometimes to a party who conducts his own case to take precedence of the counsel for others, both in cross-examination and in the address to the jury.⁵ If the prisoner were allowed to call witnesses first, and then to address the jury, he might comment upon the evidence on his behalf, which is not suffered.

The witnesses either disprove directly the charge against the prisoner, or show that he was in another place at the time spoken to (which is an *alibi*), or otherwise give testimony to make out his innocence. Defences of course vary according to each particular case. Next to the fact of denial of the charge we may notice the plea of excuse, not that in point of strictness there can be any excuse for a crime, but there may exist facts, which, under this head, might operate to diminish the legal reprobation of the act, such, for example, as might reduce a charge of murder to manslaughter. Thus drunkenness is not admitted as a palliation by the law of England, but two judges expressed their opinion at Lancaster that the jury might be allowed to take into consideration the inebriated state of the prisoner in cases of stabbing, in order to determine whether he acted under *bonâ fide* apprehensions that his person or property was about to be attacked.⁶ So ignorance of a statute is not, in strict law, an excuse for crime, but where the prisoner was so far out at sea that he could not have been aware of the passing of the Act 39 Geo. 3, c. 37, against maliciously shooting, the judges directed that a pardon should be applied for on his behalf.⁷ But as to drunkenness, where the question was, whether a murder had been perpetrated premeditatedly, or whether the killing arose from sudden heat and impulse, although Holroyd, J., allowed the jury to take into consideration the prisoner's drunken state,⁸ it seems that the learned judge afterwards retracted his opinion, and Park and Littledale, JJ. held the contrary upon a subsequent occasion, expressing at the same time their disapproval of *R. v. Grindley*.⁹ Jervis, C. J., has held that a person in a state of drunkenness could not be convicted of an attempt to commit

¹ *R. v. Standen*, 4 Jur. 702.

² *R. v. Creau*, [Murder: Clonmel Assizes,] 8 Cox, 509.

³ *R. v. Speke*, 3 Salk. 358.

⁴ *R. v. Perkins*, 1 Lew. C. C. 273, cor. Holroyd, J.

⁵ *R. v. Cooke and another*, 1 C. & P. 321. See also *Id.* 322, n.

⁶ *R. v. Marshall*, 1 Lew. C. C.

76. *R. v. Goodier*, *Id.*

⁷ *R. v. Bailey*, Russ. & Ry. 1.

⁸ *R. v. Grindley*, 1 Russ. C. M. 8.

⁹ *R. v. Carroll*, 7 C. & P. 145.

See *R. v. Meakin*, *Id.* 297.

suicide.¹ Upon the above principle, the conduct of a prisoner is certainly not of itself sufficient to prove his innocence, but, upon an indictment for murder, expressions of goodwill and acts of kindness by the prisoner towards the deceased are most important testimony to show from his general disposition towards that person that he could not be guilty of the charge.² Herein lies the distinction. The jury may consider drunkenness with reference to the motive or intent of the crime.³

Again, in libel, one paragraph may be read to explain another, so as to create a favourable impression on the prisoner's behalf, however disjoined it may be from the passage charged as libellous, provided it be connected with the matter complained of.⁴ And as the conduct of a prisoner may occasionally be brought forward against him, so, on the other hand, his general demeanour at a meeting or otherwise may be produced on his behalf.⁵ So, questions may be asked for the prisoner, whether he had ever been heard to express disloyal opinions, or whether he had taken part in any particular movement, as the establishment of a convention.⁶ But it seems that such declarations should not be general, but connected with the facts alleged against the prisoner.⁷ Although such evidence was allowed in *R. v. Horne Tooke*, but Lord Ellenborough subsequently expressed his disapprobation of it. So the letters of one defendant to another have been admitted upon a charge of conspiracy, to show that the former was a dupe of the latter, and not a partner in the transaction.⁸ And it is well known that the character of the prisoner is evidence not with reference to particular acts, but generally, yet so as to be applicable to the particular charge.⁹ But the Court of Exchequer refused to hear witnesses to character in informations, as for keeping false weights.¹⁰ Therefore whilst it is incompetent to inquire into the conduct of the prisoner upon isolated occasions, it is equally so to offer his character in evidence where the nature of the accusation differs from the good disposition which is attributed to him. Consequently, upon a charge of stealing, his loyalty would be of no

¹ *R. v. Moore*, 16 Jur. 750. In this case the person was so drunk as not to know what he was about. But when the principle is considered, it makes no difference. It could be no excuse upon a charge of murder.

² Taylor on Ev. 323.

³ *R. v. Gamlen*, 1 Fost. & F. 90, Crowder, J.

⁴ *R. v. Lambert and another*, 2 Camp. 400.

⁵ 1 Phil. Ev. 516.

⁶ *R. v. Walker*, Id. citing 23 How. St. Tr. 1131. *R. v. Hardy*, Id. 518. But the exact words must not be put into the mouth

of the witness. Taylor on Ev. citing 24 How. St. Tr. 659, 755.

⁷ 2 Camp. 400.

⁸ *R. v. Whitehead*, 1 C. & P. 67.

⁹ See 1 Phil. Ev. 515; Taylor, 323. The witnesses to character must be examined at the trial, and not after the verdict. Although, if the attorney-general does not object, they may be heard after verdict. *R. v. Mullins*, 3 Cox, 526.

¹⁰ *Att.-Gen. v. Bowman*, 2 Bos. & Pul. 532, n. If this evidence were admitted, "it would be necessary to try character in every charge of fraud upon the excise and custom-house laws." Eyre, C. B.

avail; upon a trial for treason, his honesty would be no answer; upon a charge of forgery, his humanity would in no way save him.¹ On the other hand, a statement made as to the possession of property *before suspicion* is very competent evidence for the prisoner upon a charge of burglary or stealing.²

It is, again, no excuse that the prisoner is a foreigner, although that circumstance may operate in mitigation.³ The circumstances which we have just related are such as raise presumptions in favour of the prisoner, so that there are not merely presumptions against, but also in favour of the accused.

Another mode of defence is by impeaching the credit of the witnesses for the prosecution, by proof that they have said or written something concerning the case which is at variance with the testimony given at the trial, or by evidence of other declarations made by them, or by showing that the character of a hostile witness is open to animadversion. As to the first and second points, it is usual to cross-examine the witness in the first instance as to matters which are relevant to the issue. And then should he deny any facts attributed to him, evidence is called to show that he has actually said upon a former occasion the words which he denies at the trial. And the same rule is applied where the witness declines to answer.

The mode of proceeding where it is proposed to contradict a written statement of the witness is in some measure the reverse of the above. In the latter case it is not competent to cross-examine him as to the contents of a paper, but the paper should be placed in his hand, and the question put to him whether it is not his handwriting. Upon his admission of its authenticity the paper becomes evidence for the party who has interrogated him, and should he deny the validity of the writing, evidence may then be called to substantiate it. But still it is observable that no cross-examination can take place upon that point. It does not seem to have been decided whether a witness may be asked whether he has not written a different account. A witness being asked to repeat what she had said, omitted part. The shorthand-writer's notes were admitted to verify her former statement.⁴ The defendant's counsel must not put the precise words to his witness as those used for the prosecution, in order to contradict the latter. He must ask his witness to make his statement, and then he may be examined as to particular expressions.⁵

*Insanity.*⁶ The defence of insanity is one likewise which is attempted on the behalf of prisoners, and the accused or his

¹ See 1 Phil. Ev. 515; Taylor, 324.

² *R. v. Abraham*, 2 Car. & K. 550. Burglary. Verdict, Guilty.

³ *R. v. Esop*, 7 C. & P. 456.

⁴ *R. v. Slater*, 6 C. & P. 334.

⁵ *R. v. Fussell*, 3 Cox, 291.

⁶ By 1 Vict. c. 14, repealing 39 & 40 Geo. 3, c. 94, if any person be discovered and apprehended under circumstances denoting a derangement of mind and a purpose

counsel must prove it. If the accused appears to be labouring under the effects of a diseased mind, so as to be unconscious that the act he committed was a crime, it is likely that his defence will be successful, as the judge will direct an acquittal upon that ground.¹ But it must be manifest that the prisoner did not know the effect of his actions.² The jury are the judges.³ And the fact must be made out to the satisfaction of the jury, for the question is, not whether he is insane, but whether they think him so.⁴ So it must be if he be proved to be in such a state as not to know right from wrong.⁵ The jury, however, should be instructed that every man is presumed to be sane, and responsible for his actions, till the contrary be shown.⁶ A sense of some wrong done to him, although it be a partial delusion, will not avail a prisoner, if he knew when he did the act that he was doing wrong.⁷ He must be regarded by the jury as if the facts were real instead of mistaken on his part, as if the wrong was actually committed. Here the questions would be whether he has transgressed the law, in redressing that wrong, whatever it may be, and, secondly, whether he knew right from wrong at the time.⁸ And his insanity should be shown affirmatively. If the matter be left in doubt, it is the duty of the jury to convict him upon proof of the offence.⁹ Hereditary insanity is an admissible proof if it be shown by proper medical testimony.¹⁰ However the jury may and must, if they so think, find that the prisoner is insane, and upon being acquitted on the ground of insanity, he will be detained during the Queen's pleasure.¹¹

of committing some crime punishable by indictment, two justices may call to their assistance a physician, surgeon, or apothecary, and upon view and examination of the person in custody, if they deem him insane, or a dangerous idiot, may send him to the county or other asylum or hospital. But the relations, upon entering into recognizances, may take the insane person into their own care. By 3 & 4 Vict. c. 54, s. 1, if such a person should be in prison, he may be examined before two justices by two physicians or surgeons, and upon a certificate of insanity he may be removed to a lunatic asylum by a warrant from the secretary of state. In case of a return to sanity, the proceedings may be taken afresh, or upon a certificate by two physicians or surgeons, the secretary may by warrant remit the person to his original confinement, in order to trial, or may discharge him if his term of imprisonment shall have expired.

¹ *R. v. Hadfield*, 1 Russ. C. M. 13. See *R. v. Oxford*, 9 C. & P. 525.

² *R. v. Offord*, 5 C. & P. 168.

³ *R. v. Arnold*, 1 Russ. C. M. 9. *R. v. Richards*, 1 Fost. & F. 87.

⁴ *R. v. Layton*, 4 Cox, 149. To ask the question whether the prisoner is capable of judging upon right and wrong is improper. S. C.

⁵ *R. v. Arnold*, 1 Russ. C. M. 9. *R. v. Parker*, Id. 10. *R. v. Bowler*, Id. 11. *R. v. Bellingham*, Id. *R. v. Higginson*, 1 Car. & K. 129. *R. v. Haynes*, 1 Fost. & F. 666.

⁶ *R. v. M'Naghten*, 10 Cl. & F. 200.

⁷ Id.

⁸ Id.

⁹ *R. v. Stokes*, 3 Car. & K. 185.

¹⁰ *R. v. Tucket*, 1 Cox, 103.

¹¹ Whether for treason, felony, or misdemeanor. 39 & 40 Geo. 3, c. 94, s. 1; 4 Vict. c. 54, s. 3.

Nevertheless, the prisoner may himself make suggestions, and call witnesses in answer to the defence of insanity set up in his behalf by his own counsel, and thus repudiate the case introduced for the defence.¹ Counsel will not be allowed to quote from books in favour of insanity, however high their authority.²

Infancy.] Infancy may also be suggested as a defence, but between the ages of seven and fourteen the judge will leave the case to the jury.³ The presumption of law, in the absence of evidence to the contrary, is that such a child has not a guilty knowledge.⁴

Alibi.] An *alibi* is likewise a well-known feature of defence, and to this the prosecutor may rejoin by showing circumstances connecting the prisoner with the spot in question, even although such circumstances may involve the commission of another felony by the prisoner.⁵

Character.] Lastly, the prisoner sometimes relies upon the bad character of the witnesses against him as a matter of defence. And here, again, he must confine himself, as in the case of the prisoner's own character, to general evidence, and therefore cannot exhibit particular facts to impeach the credit of the parties.⁶ The character of the testimony against the accused may accordingly be attacked in any way which may tend to throw discredit upon it.

Should a witness declare that he would not believe A. upon his oath, it is not necessary, in order to give effect to this testimony, that the witness should ever have heard A. give evidence upon oath.⁷

Evidence in defence. Principal and accessory.] There is one other matter of defence, and it is an exception to the general rules of evidence. It is that an accessory may controvert the guilt of his principal, notwithstanding the record of his principal's conviction. And, therefore, *vivâ voce* testimony was allowed to dispute the propriety of a conviction in a case where it subsequently turned out that the prosecutor had intrusted his servants in such a way with his property as to part with the possession of it. The servants were the principals, and the prisoner, who was charged as accessory after the fact and receiver, was accordingly acquitted.⁸

The following objections to the record of a conviction of a prin-

¹ *R. v. Pearce*, 9 C. & P. 667.
In which case, however, the prisoner's own witnesses made the case of insanity more perfect than before. See also *R. v. Harris*, 2 Russ. C. M. 932, n.

² *R. v. Crouch*, 1 Cox, 94.

³ *R. v. Owen*, 4 C. & P. 236.

⁴ *R. v. Owen*, 4 C. & P. 236.

⁵ *R. v. Briggs*, 2 M. & Rob. 199.

⁶ *R. v. Watson*, 2 Stark. N. P. C. 149.

⁷ *R. v. Bisham*, 4 C. & P. 392.

⁸ *R. v. Smith*, Leach, 288. *R. v. Prosser*, Id. 290.

principal produced in evidence against a receiver were held unavailing. That the principal had been asked whether he *was* instead of *is* guilty. That the record did not state how issue was joined, nor how the jurors were returned, and that the only award against the principal was, that he be in mercy, &c.¹ So the record of a conviction is not evidence to disprove the fact of a witness having always given the same account of a transaction. The evidence upon oath of persons present at the examination must be produced. It was so held in a case where A. was examined before magistrates, and afterwards upon the trial of a matter touching a similar transaction; and it was held incompetent to show by the record the contrariety of the testimony.² Upon the trial of an information for penalties, the defendant (who had been held to bail) subpoenaed the officer from the Queen's Remembrancer's Office, to produce the affidavit, on which he had been held to bail, so as to give it in evidence to cross-examine the person who had made the affidavit, if called as a witness at the trial. He was so called, and the affidavit was offered by the counsel for the defendant. The court held, that the affidavit should be produced, and that the defendant might make use of it in this way, but that if the affidavit had been made by another person, a deponent, besides the witness, and related to other persons besides the defendant, the defendant could only use so much of the affidavit, as sworn by the witness, as related to the defendant himself.³

Evidence in answer to evidence for the defence.] The prosecutor may answer the witnesses who are called for the defence. It is not very common for a case to take this turn, but it occasionally happens that it becomes necessary to support the credit of a witness by proving his general good character in answer to the imputations cast upon it. But he cannot discredit his own witness by throwing blame upon the character of that person because the evidence does not turn out exactly in accordance with his wishes. Upon such an occasion his course is to establish his case by other witnesses. And should they speak differently from the first, the contradiction is unobjectionable.⁴ Perhaps, however, under particular circumstances, evidence might be admissible to show that a friendly witness had been mistaken as to a particular fact.⁵ But no evidence can be received which might have been brought forward in support of the original case.⁶ And it may be added,

¹ *R. v. Baldwin*, Russ. & Ry. 241; 3 Camp. 265.

² *R. v. Howe*, 1 Camp. 461.

³ *Att.-Gen. v. Bond*, 9 C. & P. 189.

⁴ See *R. v. Ball*, 8 C. & P. 745. *R. v. Chapman*, [a case of murder,] Id. 538. *R. v. Farr*, Id. 768. It is competent, but most undesirable, to call witnesses to disprove

the prisoner's witnesses as to good character. *R. v. Hughes*, 1 Cox, 44. And certainly evidence of general bad character must not be given. *R. v. Burt and others*, 5 Cox, 284.

⁵ See 2 Russ. C. M. 919.

⁶ *R. v. Hilditch and another*, 5 C. & P. 299. *R. v. Findon*, 6 C. & P. 132.

that should a witness be called to disprove the defence of the prisoner, he cannot be asked as to anything which does not arise out of the testimony which he has given. Therefore where the prisoner's case was, that he had bought certain goods, it was held incompetent for the prosecutor's counsel to ask the witness whether he did not see the prisoner commit the theft itself.¹ Nor can a witness be contradicted whose name is on the back of the indictment, but who is not called by the prosecutor.² Whether the counsel for the prosecution, who, at the prisoner's instance, calls a witness, but does not ask him a question, can examine him after the prisoner's counsel has put questions to him, has been made the subject of discussion. Gaselee, J., seemed to be in favour of such an examination.³

So, if the character of a prosecutrix in an assault with intent to commit a rape be assailed, she may show that her character has been good for many years after the impeachment of it, which she would not deny.⁴ Evidence to show that the witness had repeated the same story before in another place is not admitted unless there be a charge of misrepresentation.⁵

The evidence being now closed on both sides, it may occur to the reader that something unforeseen might possibly happen to make the introduction of fresh evidence a measure of justice. This is certainly not a case of frequent occurrence, but, upon one occasion, after the jury had retired to consider their verdict, Bayley, J., called them back into court, in order to hear the examination of the prisoner's father, who had not come into court before.⁶

¹ *R. v. Stimpson*, 2 C. & P. 415.

² *R. v. Bodle*, 6 C. & P. 186.

³ *R. v. Harris and another*, 7 C. & P. 581.

⁴ *R. v. Clarke*, 2 Stark. 241.

⁵ See *R. v. Parker*, 3 Dougl. 244; Taylor on Ev. 1101.

⁶ *R. v. Hughes*, 1 Lew. C. C. 321.

CHAPTER XVII.

OF THE ATTENDANCE OF WITNESSES, AND OTHER INCIDENTS
BEFORE VERDICT.

It is desirable to inquire how far witnesses may be compelled to attend and give testimony. Now it is imperative upon a witness, who is present, to give evidence, and where a demur has been made on the part of the witness until his expenses should be paid, the judges have found themselves under the necessity of disallowing the objection.¹ Mr. Serjeant Russell mentions *R. v. Cousens* also, where Wightman, J., ordered an officer of the ecclesiastical court to go before the grand jury, although he had been brought upon a *subpœna*, and his expenses had not been paid.² Probably, however, should the court discover that the witness had not the means of performing his journey, the process by attachment, should the witness not appear, would not be enforced, unless proof were given that the expenses had been tendered.³ This is quite different from the obligation under which the witness lies, to answer when he actually appears.

The mode of requiring the attendance of witnesses for the prosecution is either by recognizance or by *subpœna*. The recognizance is directed to be entered into before the magistrate, or, in cases of death, before the coroner. The *subpœna* may be issued out of the Crown Office, whether there be a proceeding in the King's Bench or not.⁴ It may also be had from the clerks of the peace, or of assize; and with respect to the general service of a *subpœna* throughout the kingdom, the statute, 45 Geo. 3, c. 92, s. 3, provides that the service of every writ of *subpœna* or other process in any one of the parts of the United Kingdom, requiring the appearance of such person to answer or give evidence in any criminal prosecution in any other part, shall be as good and effectual in law as if the same had been served where the person is required to appear; and in case such person so served shall not appear accordingly, the court out of which the same issued, upon proof of service to their satisfaction, may transmit a certificate of such default under the seal of the same court, or under the hand of one of the judges or justices of the same, to the Queen's Bench in England, or to the Court of Justiciary in Scotland, or to the Court of Queen's Bench in Ireland, as the case may be; and the said last-mentioned courts respectively shall and may thereupon proceed against and punish the person so having made default, in like manner as they might have done if such person had neglected or refused to appear

¹ *R. v. Cooke*, 1 C. & P. 321;
S. P. at York Sum. As. 1820,
2 Russ. C. M. 948.

² 2 Russ. C. M. 948.

³ See 2 Russ. C. M. 947.

⁴ *R. v. Ring*, 8 T. R. 585.

in obedience to a writ of *subpœna* or other process issued out of such last-mentioned courts respectively. Provided, by sect. 4, that, before punishment, it shall be made to appear to such court that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of *subpœna* or other process was served upon such person.

But the Act has no reference to persons who are within the same realm as that wherein the trial is to be had, and therefore, unless the *subpœna* issues from the Crown Office, the proceedings against the defaulter may, indeed, be by fine at sessions, or by indictment for disobedience, but not by attachment.¹

By 11 & 12 Vict. c. 42, s. 20, justices may bind by recognizance in felonies and misdemeanors. A minor cannot enter into a recognizance, nor can a married woman, but the magistrate may commit her upon her refusal to give evidence or find sureties for her appearance. And it may not be amiss to cite a case here, where upon proof that a woman's husband had been gone for four years and a half to Buenos Ayres, and had not been since heard of, the wife's recognizance was taken for the prisoner's coming up for judgment.²

The process by *subpœna*, to which we have already adverted, and which is the other mode of compelling attendance, may not only be had on the behalf of the prosecutor, but of the prisoner likewise,³ and in the former case it is obvious that it applies to persons who have either been out of the way when the examination took place before the justice, or whose testimony has subsequently been deemed necessary at the trial. There is also the *subpœna duces tecum*,⁴ in the case of deeds or writings, and the *hab. corp. ad testificandum* where the party is in custody, or under the command of an officer who refuses to permit his attendance. The rule for the *hab. corp. ad tes.* is *nisi* only in the first instance.⁵ For if the court suspect contrivance, they will refuse the writ, as when it was sought to send A., a convict for perjury, to swear against B. as a material witness, in respect of the oath for the breach of which he was himself convicted.⁶ In the case of a prisoner of war, an order from the secretary of state becomes necessary.⁷ It is said that the usual affidavit by the witness of readiness to attend applies only when the party is on board of a ship, and then not always.⁸ This affidavit, which states that the individual is a material witness, and which, when he is at a distance, should show

¹ *R. v. Brownell*, 1 Ad. & El. 598; and *R. v. Ring* was referred to.

² *R. v. Simpson*, 1 Lew. C. C. 295.

³ Since the statute, 1 Ann. st. 2, c. 9, s. 3, which enabled the prisoner to have his witnesses sworn.

⁴ *R. v. Dixon*, 3 Burr. 1687. It

has been held that an attorney is not bound to obey this writ, so as to prove a forgery against his client.

⁵ *R. v. Pilgrim*, 4 D. P. C. 89.

⁶ *R. v. Burbage*, 3 Burr. 1440.

⁷ *Furly v. Newnham*, 2 Dougl. 419.

⁸ 1 Ch. Cr. L. 614.

how he is material, should be left with the sheriff or other person in whose custody or under whose dominion the witness remains.¹

Upon these two procedures, by recognizance and *subpœna*, alone, it is that the expenses of a prosecution can be awarded.² And it is quite clear that a prisoner's costs are not within the Act. The only kindness shown to a prisoner, where the prosecutor absents himself, is to permit him to go at large till the next assizes without sureties.³ On the other hand, where the prosecutor did not arrive at York till the grand jury were discharged, Hullock, B., ordered the expenses of the witnesses for him under the Act.⁴ So it was, in a case of manslaughter, where the accused did not appear.⁵ Where a witness became insane whilst attending under a recognizance, Patteson, J., allowed the costs of medical treatment and of removing him to another place.⁶ In this last case it had been explained to the learned judge that Park, J., had allowed charges of a similar nature, where a woman witness had been brought to bed.⁷ The expenses attending a prosecution of cheating at cards are within the Act.⁸

But there are cases in which these expenses will not be allowed, as where the grand jury requested their disallowance, there being no foundation for the charge.⁹ So where persons went for the purpose of identifying a horse, Hullock, B., refused to allow those expenses.¹⁰ So, in frivolous cases or otherwise, the court will exercise a discretion as to the allowance of expenses.¹¹ And where the indictment has been removed by *certiorari*, the statute does not apply.¹² So where an indictment for a riot was removed in like manner and tried at *nisi prius*, neither the prosecutors nor the witnesses were allowed any costs.¹³ So where a party was bound over to prosecute at the sessions in a case which was tried at the assizes, although the witnesses who received their *subpœnas* from the clerk of assize were held entitled to costs under the 7 Geo. 4, c. 64, s. 23, it was considered doubtful whether the prosecutor was so entitled, and the court refused a *mandamus* to the treasurer of

¹ 2 Russ. C. M. 945, &c.

² *R. v. Ley*, 1 Lew. C. C. 133. In burglary. *R. v. Paine*, 7 C. & P. 135. In larceny. The bill being found under the term "prosecuted." *Secus* if no bill had been preferred. *R. v. Robey*, 5 C. & P. 552. In murder, where the township was small and poor, except the attendance of witness upon the coroner. *R. v. Lewen*, 2 Lew. C. C. 161. See *R. v. Taylor*, 5 C. & P. 301. *R. v. Rees*, Id. 302.

³ *R. v. Cow*, 1 Lew. C. C. 131.

⁴ Id. 129, Anon.

⁵ *R. v. Flannery*, Id. 133, S. P. by Gurney, B., on the authority

of the last case at Newcastle, Sp. As. 1833.

⁶ In *R. v. Mallison*, 1 Lew. C. C. 132.

⁷ Id.

⁸ *R. v. Gardner*, 5 Cox, 140.

⁹ *R. v. Laycock*, 1 Lew. C. C. 132.

¹⁰ *R. v. Millington*, 1 C. & P. 83.

¹¹ *R. v. Powell*, Id. 96.

¹² *R. v. Richards*, 8 B. & C. 420.

¹³ *R. v. Johnson*, 1 Moo. C. C. 173. *R. v. Oates*, Id. 175. See *R. v. Cooke and others*, 1 C. & P. 322.

the town to pay costs under the clause, in obedience to the order of the judge of assize.¹ We have already stated, as far as the statute is concerned,² how the proceedings of recognizance and *subpœna* are to be enforced. As to the recognizance, the justice may commit the party refusing to be bound, and should he enter into the obligation, but neglect to fulfil it, the court will upon application, if they see fit, estreat the recognizance. A judge, however, has power to respite the recognizance, and he has power to do this in cases before the coroner as well as others.³ Secondly, as to the *subpœna*, the neglect to appear upon this latter requisition is punishable by an attachment,⁴ or, it may be, by an indictment where the default happens at sessions. The original *subpœna* must be shown to the witness in order to found an attachment, and at the time of serving it.⁵ And it must be moved for in the term succeeding the trial.⁶ It is the same whether it be a prosecutor's or a prisoner's *subpœna*.

A *subpœna* from the Crown Office commanding the defendant to attend the assizes in the country as a witness must be obeyed upon pain of attachment.⁷ But if not issued from the Crown Office it is of no avail, and so it was held in the case of a witness who was summoned to the quarter sessions.⁸ A witness is protected from arrest, *eundo, morando, et redeundo*.⁹

Calling back witnesses.] The next point we have is, that the judge has the right to call back any witness he may think proper for the purpose of re-examination. Thus upon an indictment for larceny, the judge was desirous of inquiring more particularly as to certain funds, out of which the notes which were the subjects of the prosecution had been received, but upon an objection made by the prisoner's counsel, the question was not pressed, and the prisoner was convicted upon the former evidence. A point of law arising, the judges took the case into consideration, and having decided it, they observed that it would have been both competent and proper for the judge to make any further inquiry concerning the notes which he might have thought fit.¹⁰ So in burglary, where there was no counsel for the crown, Taunton, J., recalled a witness, but allowed the prisoner's counsel to cross-examine;¹¹ but Gaselee, J., recalled a witness where there was a counsel for the crown.¹² Moreover a person present in court must give evidence if required, although not subpoenaed.¹³ However, the judge will not allow counsel to prove facts after the case has been closed. As at

¹ *R. v. Jeyes*, 3 Ad. & El. 416.

² *Ante*, 7 Geo. 4, c. 62, s. 31; 16 & 17 Vict. c. 32, s. 8.

³ *R. v. Mead*, 1 Lew. C. C. 294.

⁴ Archb. Cr. Pl. 156.

⁵ *R. v. Wood*, 1 D. P. C. 509. *R. v. Sloman*, Id. 618.

⁶ *R. v. Stretch*, 3 Ad. & El. 503.

⁷ *R. v. Ring*, 8 T. R. 585.

⁸ *R. v. Brownell*, 1 Ad. & El. 598.

⁹ 2 Russ. C. M. 956. With respect to *mandamus* to examine witnesses, see 4 T. R. 662. *R. v. Holland*.

¹⁰ *R. v. Remnant*, Russ. & Ry. 136.

¹¹ *R. v. Watson*, 6 C. & P. 653.

¹² At Salisbury, M. S.

¹³ *R. v. Sadler and others*, 4 C. & P. 218. The case of a way.

Stafford, where, in a case of burglary, it had been forgotten to prove that the house had been shut up on the night previous, here Park, J., refused the fresh evidence, and the prisoner was acquitted.¹ It is otherwise in civil cases, and Park, J., in the above case, admitted the distinction.² If a prisoner makes two different statements as to his possession of property, and he mentions persons who, as he says, can prove his innocence, it is better for the prosecutor to have those persons at the trial, if he can, but it is not incumbent on him to call them. The prisoner's counsel cannot then say that such persons could prove his innocence, but that he had not the means of procuring their attendance.³ Where it becomes necessary, for the purposes of justice, to indict the prisoners jointly, and the evidence is complicated, the judge, in summing up, will separate the evidence applicable to each prisoner.⁴

Bill of exceptions.] Whether a bill of exceptions will lie in criminal cases is a matter upon which there has been a difference of opinion.⁵ However, as the judge will almost invariably save a point, so as to respite, if not the sentence, at all events the execution of it, it does not appear to be felt as a grievance that no decision has been come to on that subject. Lord Hardwicke, however, said that he had known it allowed upon informations in the Court of Exchequer.⁶

Adjournment of trial.] The court, of their own authority, may adjourn when a case of necessity exists, as where the trial has continued so long as to exhaust those connected with the case,⁷ and although, on one occasion, the prisoner's consent was invited to such an adjournment,⁸ it was almost immediately afterwards held that the consent was not necessary.⁹ Upon any long trial the judge will adjourn till the next day (unless Sunday). The form of such adjournment, together with the oath administered to the bailiff who is to keep the jury, may be found in 6 T. R. 531.

View.] Sometimes it is permitted to the jury to have a view, but it will not be allowed if there be a prospect of their being misled.¹⁰ And where the question upon an information for the duties against the proprietors of a glass manufactory could be tried by the inspection of a model, the Court of Exchequer refused a view.¹¹ Gaselee, Serjt., allowed a view in a case of rape, although the prosecutor did not consent.¹²

¹ 1 C. & P. 120, cited. *R. v. Haynes*, 1 Fost. & F. 666.

² *Brown v. Giles, Esq.*, 1 C. & P. 118.

³ *R. v. Dibley*, 2 Car. & K. 818.

⁴ Case of Mr. Powell's murderers, Leach, 508, Yates, J.

⁵ Kel. 15; 3 Jones & Lat. 568. *R. v. Hayes*, contra.

⁶ *R. v. Preston (Inhabitants)*, Ca. Temp. Hardw. 249.

⁷ *R. v. Stone*, 6 T. R. 530.

⁸ *R. v. Tooke*, Id. n.

⁹ *R. v. Thelwall*, Id. n.

¹⁰ 2 Ch. Rep. 422, Anon.

¹¹ *Att.-Gen. v. Green*, 1 Price, 130.

¹² *R. v. Whalley*, 2 Car. & K. 376.

CHAPTER XVIII.

THE VERDICT.

Verdict.] The judge having summed up the case to the jury, they either deliver their verdict in court, or retire for the purpose of considering it. Should they be unable to agree, it is competent for the judge to discharge them, and to have another jury summoned to try the issue.¹ It should, however, be of necessity. A sufficient necessity appeared where the jury had been locked up from 2 P. M. to 8 A. M. without any prospect of agreeing.² And the propriety of the discharge cannot be questioned upon a *habeas corpus*, at all events not until two assizes have elapsed.³ If the prisoner wishes to object at the next assizes to the propriety of the discharge, he should plead *puis darrien continuance*.⁴ Desperate illness will induce a discharge, and medicine may be given but not sustenance.⁵ The verdict may be either general or special, and in all cases the jury may find specially. This latter verdict sets forth the circumstances of the case, and concludes with praying the judgment of the court.⁶ And the court will exercise the province of a jury when they come to give judgment. They will even find the defendant guilty as to part, and acquit him of the rest.⁷ Nevertheless, the jury may find a general instead of a special verdict, and may thus raise a question of law.⁸ Some questions, however, have arisen with respect to the manner of delivering the verdict. Where the jury are together in the box, no difficulty can arise with respect to the verdict of one being that of all, for they must be unanimous, but upon one occasion when the verdict was given in court by the foreman (the jury box being occupied by another jury), three others only being present, the rest answering to their names from an inner room, so that it was doubtful whether all could have heard the verdict, the court granted a new trial, observing, however, that no affidavit could be received on the part of any of the jury, because consent must be inferred should the verdict be given within the hearing of all. Here it was uncertain whether all the jury did hear, and therefore, upon the motion of the attorney-general *ex gratia*, and with

¹ *R. v. Cobbett*, 3 Ch. Burn, 528.
R. v. Newton, [Murder,] 18 L. J.
 M. C. 201; 3 Car. & K. 85; 13 Q. B.
 716.

² *R. v. Newton*, ut supra.

³ S. C.

⁴ S. C.

⁵ S. C.

⁶ Steph. 313.

⁷ *R. v. Hayes*, 2 Str. 843.

⁸ *R. v. Allday*, 8 C. & P. 136.
 To the same effect, *R. v. Harvey*,
 St. Tr. 414. *Conway and Lynch*
v. The Queen, 1 Cox, 210. *R. v.*
Dawson, 8 Cox, 360.

the consent of the defendant, the new trial was granted.¹ So where one jurymen appeared to have answered for the rest upon a point which involved the legal consequence of an acquittal, upon which the verdict was recorded, it was held competent for the judge to direct them to retire again upon an understanding that several differed from the jurymen's answer, and the prisoner being then convicted, the judges held that the mistake in the verdict might be corrected.² So where one jurymen said "Not guilty," which was entered by the clerk of the peace on his minutes, but the rest of the jury interposed as the prisoner was being discharged from the dock, and said "Guilty." The judges held, that the mistake might be corrected, although they would not fix any time when it might not be so amended.³ But they must not express their disapprobation of a verdict, after they have duly discovered it. Therefore the judges censured the conduct of eight jurymen who had signed such a paper of disapprobation.⁴ And the affidavit of a jurymen with respect to a matter of law, cannot of course be received.⁵ The dispersion of a jury in a case of misdemeanor is not fatal to their verdict.⁶ Although privy verdicts⁷ are not to be countenanced. If a witness be found to have been unsworn after a verdict of guilty, the jury will reconsider their verdict, and lay that witness's evidence out of the question.⁸

Verdict, nature of it.] The next question is, as to the nature of the verdict.⁹ And here we may observe that where offences laid in the indictment are of the same species, the party may be found guilty of one only, and this is commonly the charge of the least magnitude, as, where the prisoner was charged with murder, and convicted of manslaughter, in which case, as the st. 9 Geo. 4, c. 31, s. 9,¹⁰ did not create nor alter the nature of the offence of manslaughter, but merely increased the punishment, the judges held that transportation for life might be awarded, although the indictment did not conclude *contra formam statuti*.¹¹ So, where the charge was for murder, and the conviction was for concealing the

¹ *R. v. Wooller*, 2 Stark. 111.

² *R. v. Parkins*, 1 Moo. C. C. 45.

³ *R. v. Vodden*, 23 L. J. M. C. 7; Dears. 229. And Parke, B., said, "I infer from the case that the ancient form of calling on the jury to hearken to their verdict was abandoned, which is a great error." 23 L. J. M. C. 8.

⁴ *R. v. Thirkell*, 3 Burr. 1696.

⁵ *R. v. Almon*, 5 Burr. 2686. *R. v. Wooller*, ut supra. Lord Ellenborough denoted it as most dangerous.

⁶ *R. v. Wooll*, 1 Chit. Rep. 601.

⁷ See as to privy verdicts, Tho. Raym. 193. *R. v. Ladsingham*.

⁸ *R. v. James*, 6 Cox, 5.

⁹ A recommendation to mercy on the ground that the defendant did not know he was acting contrary to law will not affect the conviction. *R. v. Crawshaw*, 9 W. R. 38.

¹⁰ Now 24 & 25 Vict. c. 100, s. 5.

¹¹ *R. v. Chatburn*, 1 Moo. C. C. 403. *R. v. Rushworth*, Id. 404. *R. v. Berry*, 1 M. & Rob. 463.

birth of a child.¹ So in burglary, the prisoner may be found guilty of stealing in the dwelling house, or of simple larceny.² And the form would be "not guilty" of the breaking and entering in the night, but "guilty" of the "stealing."³ So upon an indictment for breaking a dwelling house and putting persons in fear, although the fear, the gist of the offence, be negatived, a conviction for larceny will be good.⁴ So where an indictment for horse-stealing was defective, the prisoner was held to be rightly convicted of a common larceny.⁵ So in libel, a party charged with composing, printing, and publishing, may be convicted upon the two latter charges only.⁶ So of the composing and publishing without the printing.⁷ So in riot, a person may be found guilty of assault.⁸ Unless, indeed, both be laid in one count, for then an acquittal upon one charge is a verdict of not guilty of both.⁹ Where two were charged with stealing in a dwelling house, and one was capitally convicted of stealing to the amount of 6*l.*, and the other was convicted of stealing to the amount of 10*s.*, the judges held that judgment could not be given against both the prisoners, but that a pardon being granted to the latter, or a *nol. pros.* entered as to him, judgment might go against the other.¹⁰ In the last case the judgments were quite distinct, but where three persons were indicted for burglary, one of whom pleaded guilty, and the two others were convicted of stealing in a dwelling house, seven judges¹¹ held that judgment might be entered against all, *i. e.* against the man who had pleaded guilty, for the burglary, and against the two, for the capital larceny. Hullock, B., however, agreed that if a *nol. pros.* were entered as to the person convicted of burglary, judgment might then go against all three for stealing in a dwelling house.¹² However, where the evidence against two was that they had broken and entered, and, against the third, that he had stolen a sack of flour, Park, J., said that the two first could not be convicted of burglary, and the other of larceny, and it was recommended that all three should be convicted of stealing the flour, especially as the latter was an afterthought on the part

¹ *R. v. Cole*, 3 Camp. 371, which is the only instance where a person may be convicted of misdemeanor upon a charge of felony. *R. v. Burrow*, 1 Lew. C. C. 134. York Summer Assizes, 1823, per Holroyd, J. See also *R. v. Maynard*, Russ. & Ry. 240.

² *R. v. Withal and another*, 1 Leach, 88.

³ *R. v. Hungerford*, 1 East, P. C. 518. And see *R. v. Comer*, Leach, 36; East, P. C. 516.

⁴ *R. v. Etherington*, 1 Leach, 671.

⁵ *R. v. Beany*, Russ. & Ry. 416.

⁶ *R. v. Hunt*, 2 Camp. 583.

⁷ *R. v. Williams*, Id. 646.

⁸ *R. v. Hemings*, 2 Show. 93.

⁹ *R. v. Heaps*, 2 Salk. 593.

¹⁰ *R. v. Hempstead and another*, Russ. & Ry. 344.

¹¹ Hullock, B., and Burrough, J., *contra*.

¹² *R. v. Butterworth and others*, Russ. & Ry. 520, overruling *R. v. Turner*, 1 Sid. 171; East, P. C. 519.

of the two.¹ If two be indicted jointly for making a corrupt contract, one alone may be convicted.² And where two were charged with an obstruction, and, upon the trial, no joint obstruction appeared, the judge directed the prosecutor to elect against whom he would proceed, and ordered the other to be acquitted.³ The word "misdemeanor" has been held to be *nomen collectionem*, and, therefore, where the jury found the defendant guilty of the misdemeanor and offence charged upon him in an indictment for assaulting with intent to commit a rape, and for a common assault, the judgment was affirmed by the Court of Queen's Bench upon a writ of error from the sessions.⁴ If the chairman at sessions upon a special finding, direct a verdict of guilty to be entered, when, in point of law, the finding amounted to an acquittal, the course for the prisoner is to apply for a pardon. The Court of King's Bench will not grant a *mandamus* to the justices to amend the verdict according to the finding.⁵ Nor will they grant that writ to alter the minutes of a verdict. As in a case of poisoning horses, "guilty of mischance" was the first verdict, and the second, "guilty" generally, with a recommendation to mercy on the ground of there being no malicious motive. The *mandamus* was refused.⁶ But they will grant a *mandamus* to make up a record in order to enable a party to plead *auterfois convict*.⁷

Certain defendants being charged with a conspiracy, three of them were found guilty generally, four were convicted of conspiring to effect some of the objects charged in the indictment, and were acquitted as to the rest. This was a finding that the three were guilty of conspiring generally with the others to effect all the objects of the conspiracy. And it appeared by the same finding that four of them were only partially guilty. The verdict was therefore wrong, bad in law, and repugnant.⁸ So, again, a count charged several defendants with conspiring to do several illegal acts. The jury found one of them guilty of conspiring with some of the defendants to do one illegal act, and with other defendants to do another illegal act. This finding was held bad, because here was a verdict averring two conspiracies, whereas only one was charged in the count. Therefore the jury cannot⁹ find a defendant guilty of more than one charge where there is but a single charge in the indictment.¹⁰ A good finding on a bad count and a bad finding on a good count, are equally nullities.¹¹ If a husband and wife be found guilty of receiving, and the wife's conviction be wrong, the judges will sever the verdict.¹² A verdict

¹ 1 Lew. C. C. 36, Anon.

² *R. v. Taggart*, 1 C. & P. 201.

³ *R. v. Lyon and another*, Id. 528.

⁴ *R. v. Powell*, 2 B. & Adol. 75.

⁵ *R. v. Suffolk*, JJ. 5 Nev. & M. 139.

⁶ *R. v. Hewes*, 3 Adol. & El. 725.

⁷ *In re Bowman*, 5 B. & Adol. 1113.

⁸ *O'Connell v. Reg.* (in error),

11 Cl. & Fin. 155.

⁹ S. C.

¹⁰ S. C.

¹¹ S. C., and see under the head of "Judgment," *post*.

¹² *R. v. Mathews and ux.*, Den. 596.

of guilty in larceny, with a recommendation to mercy on the ground that the prisoner did not intend ultimately to defraud, is not inconsistent.¹

By 14 & 15 Vict. c. 100, s. 9, if upon the trial of any person charged with any felony or misdemeanor it shall appear to the jury that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not therefore be acquitted, but the verdict may be that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of the attempt; and such person shall be liable to be punished as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried.

By sect. 12, if upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which trial may be had shall think fit to discharge the jury from giving any verdict, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor. This clause will not apply in the case of a charge of misdemeanor for carnally knowing a girl between ten and twelve, whereas it turned out that the girl was under ten. The prisoner was acquitted, the case not being within the Act.²

The 1st count was for inflicting grievous bodily harm, the 2nd for assaulting and unlawfully wounding. Verdict, guilty of a common assault. The conviction on the 2nd count was good.³ Again, the 1st count was for inflicting grievous bodily harm, the 2nd for a common assault. Verdict, guilty of an aggravated assault without premeditation, and done under the influence of passion. The judge was held right in directing a verdict on the 1st count.⁴

¹ *R. v. Trebilcock*, 27 L. J. M. C. 103; Dears. & B. 453.

³ *R. v. Oliver*, 30 L. J. M. C. 12; Bell, 287.

² *R. v. Shott*, 3 Car. & K. 206. But the prisoner might, of course, be indicted for felony.

⁴ *R. v. Sparrow*, 30 L. J. M. C. 43; Bell, 298.

CHAPTER XIX.

OF REWARDS AND OTHER MATTERS.

Rewards.] The trial being ended, and the verdict given, it is usual to make application for the different rewards allowed by parliament where such are payable, as the sum of 20*l.* formerly given for apprehending persons who have returned from transportation.¹

By 7 Geo. 4, c. 64, s. 28, where any person shall appear to any court of oyer and terminer, gaol delivery, or superior court of county palatine, to have been active in or towards the apprehension of any persons charged with murder, or with feloniously and maliciously shooting at or attempting to discharge any kind of loaded fire-arms at any other person, or with stabbing, cutting, wounding, or poisoning, or with administering anything to procure the miscarriage of any woman, or with rape, or with burglary, or felonious housebreaking, or with robbery, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessory before the fact to any of such offences, or with receiving any stolen property, knowing the same to have been stolen, every such court is hereby authorized and empowered to order the sheriff of the county in which the offence shall have been committed to pay to the person who shall appear to the court to have been active in or towards the apprehension of any person so charged such sum as to the court shall seem sufficient to compensate such person for his expenses, exertions, and loss of time in or towards such apprehension; and the like power is given to the sessions in the case of receivers. Provided that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation as courts are by this Act empowered to allow to prosecutors and witnesses respectively. Detaining the burglar till help came was held to be within this clause.²

By sect. 29, every order for payment in respect of such apprehension shall be forthwith made out and delivered by the proper officer of the court unto such person, upon being paid for the same the sum of 5*s.* and no more; and the sheriff of the county for the time being is hereby authorized and required, upon sight of the order, forthwith to pay to such person, or to any one duly authorized on his behalf, the money in such order men-

¹ 16 Geo. 2, c. 15; 8 Geo. 3, P. 166. *R. v. Blake*, Id. So in c. 15, both repealed by Geo. 4, c. 84, robbery, where great courage had s. 29. been displayed. *R. v. Womersly*, 2 Lew. C. C. 162.

² *R. v. Dunning and another*, 5 Cox, 142. *R. v. Barnes*, 7 C. &

tioned; and the sheriff may apply for repayment of the same to the treasury, who, upon inspecting such order, together with the acquittance of the person entitled to receive the money thereon, shall forthwith order repayment to the sheriff of the money so by him paid, without fee.

By 14 & 15 Vict. c. 55, s. 8, when any person appears to any court of sessions of the peace to have been active in or towards the apprehension of any party charged with any offence which they have power to try, they shall have power to order compensation to be paid to such person in the same manner as other courts, but the compensation shall not exceed 5*l.*, and every order for payment shall be made out gratis, and delivered by the proper officer of the court unto such person.

And by 7 Geo. 4, c. 64, s. 30, if any man shall happen to be killed in endeavouring to apprehend any person who shall be charged with any offence mentioned in that Act, the court before whom such person shall be tried may order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married, or to his child or children in case his wife shall be dead, or to his father or mother in case he shall have left neither wife nor child, such sum of money as to the court shall seem meet; and the order for payment of such money shall be made out and delivered by the proper officer of the court unto the party entitled to receive the same, or unto some one on his behalf to be named in such order by the direction of the court; and every such order shall be paid by and repaid to the sheriff in the manner directed by this Act.

In construing the old Act burglary has been held not to include sacrilege.¹ Stealing from the person was not included.² Lord Campbell upon one occasion required an affidavit as to the amount actually expended, and awarded it, but not as a recompense.³ Again, the expenses of apprehending a person in Scotland,⁴ or America,⁵ are not within the statute. Under 5 Geo. 4, c. 84, the court has power to order the reward to the prosecutor in a case of returning from transportation.⁶ And under the word "bullock," in an indictment, a reward was ordered, although the

¹ *R. v. Robinson*, 1 Lew. C. C. 129. Bolland, B., ruled the same upon the authority of the above case. *Id.* See *R. v. Austen*, 1 Dowl. & Ry. N. P. C. 24, under the old statute, 58 Geo. 3, c. 70, s. 4, where the court refused compensation to a party who had apprehended horse-stealers, and had expended 17*l.* in so doing, but horse-stealing is now included.

² *R. v. Thompson and others*, 1 Cox, 43. *R. v. Durkin* was cited, (2 Lew. C. C. 163,) where

Patteson, J., allowed these expenses upon an indictment for an attempt at child murder, but Maule, J., doubted of that case.

³ *R. v. Haines* [Horse-stealing,] 5 Cox, 114.

⁴ *R. v. Seaton*, 6 Cox, 78, (n.)

⁵ *R. v. Barrett*, *Id.* 78. The course is to apply to the secretary of state. Nor can the magistrate certify for such expenses.

⁶ *R. v. Emmons*, 2 Moo. & Rob. 279. See *R. v. Ambury*, 6 Cox, 79.

only words applicable in 7 & 8 Geo. 4, c. 29, s. 25, were "cow and heifer."¹

Restitution of property.] Another application, which is occasionally made, seeks for the restitution of property. As to this the statute 24 & 25 Vict. c. 96, s. 100,² provides a remedy, which will be found under the head of Larceny.

Certificate—special jury.] The practice of asking for a certificate that the case was fit to be tried by a special jury does not apply to criminal cases.

We are now to consider how the verdict may be impeached.

¹ *R. v. Gillbrass*, 7 C. & P. 444. 431. The cases will be found in

² See *R. v. Stanton*, 7 C. & P. Part iii. "Of Larceny."

CHAPTER XX.

OF PROCEEDINGS TO STAY JUDGMENT.

Arrest of judgment.] The verdict may be impeached by a motion to arrest the judgment for defects upon the face of the record. This is matter of law, and is determined by the judge or judges, according to the particular case. Where the conviction takes place in the King's Bench, four days are allowed for this purpose, and the rule for a new trial is the same,¹ supposing that so many days of the term should remain, if not, then the longest time that can be had in the term.² Although, if the court should perceive that injustice has been done by the verdict, they will grant a new trial at any time before judgment.³ The judge is bound, *ex officio*, to take notice of any of these errors, and any one as *amicus curiæ* may point them out, provided the defendant be present.⁴ So that if a defendant should waive his objection to the judgment, the court will still give him the benefit of any errors on the record.⁵ And the right extends to any part of the record, not merely to errors upon the face of the indictment.⁶ Indeed, the court will allow a motion to arrest the judgment after a rule for entering a verdict for the crown has been argued and made absolute.⁷ When the defendant is convicted of felony he usually *moves instanter to arrest the judgment*, or delays till the next day with the sanction of the court. When the defendant is found guilty at the assizes in misdemeanor, he should give notice to the judge of his intention to object to the indictment or to the judge's direction, and then the judge will respite the judgment.⁸ It was so decided on 1 Will. 4, c. 70, s. 9, and if the indictment be defective, the court can amend the judgment by setting it aside, even after sentence has been pronounced at the assizes.⁹ But since the establishment of the court of criminal appeal, motions in arrest of judgment are much out of use.

A pardon may be pleaded in arrest of judgment.

¹ *R. v. Dr. Newman*, 22 L. J. Q. B. 156; 1 El. & Bl. 268; Dears. 85, 98. But as no general rule had been laid down, the court would not shut out Dr. Newman.

² 2 Curw. Hawk. 624.

³ *R. v. Holt*, 5 T. R. 436. *R. v. Morris*, 2 Burr. 1189.

⁴ *R. v. Buckeridge*, 2 Show. 297.

⁵ 1 East, 146.

⁶ 1 Ch. Cr. L. 662.

⁷ *R. v. Barton (Inhabitants)*, 4 Jur. 431.

⁸ *R. v. Nott*, 7 Jur. 621; Dav. & M. 1.

⁹ *R. v. Nott*, 4 Q. B. 768.

By 7 Geo. 4, c. 64, s. 21, no judgment after verdict shall be stayed or reversed for want of a *similiter*, nor by reason that the jury process has been awarded to the wrong officer upon an insufficient suggestion, nor for any misnomer or misdescription regarding such process, or of any of the jurors, nor because any person has served on the jury who has not been returned as a juror.

New trial.] Secondly, there may be a motion for a new trial, but this is not grantable in treason or felony, unless where a case is moved into the Court of Queen's Bench by *certiorari*.¹ In misdemeanor it is not of unusual occurrence. As, for surprise.² But not if the trial merely comes on sooner than was expected, after notice.³ When the defendant is so surprised that he cannot defend himself, the court will grant a new trial.⁴ The defendant must either be in custody, or be present in court.⁵ Various causes will of course operate to produce a new trial. Thus, if the prosecutor be fixed with having circulated papers relative to the case amongst the jury, the verdict will probably be set aside.⁶ So where the jury committed a contempt by taking papers with them without leave of the court, and found a verdict for the party who gave them the papers, the court deemed it a high contempt.⁷ So in any case where the jury have been tampered with.⁸ So where the judge reported that he was dissatisfied with the verdict, and the jury offered affidavits that the verdict was contrary to their meaning, a new trial was allowed.⁹ No affidavits can be admitted upon a motion of this nature to contradict the report of the judge.¹⁰ It is no ground for a new trial that two out of twelve special jurymen had not been summoned on the defendant's part. Although the defendant did not know the fact until after the trial.¹¹ Nor that one of the jury was a grand juror in the case, if when he proposed to leave the box, the defendant objected.¹² There will be a new trial if the defendant has failed to give notice of trial under 5 & 6 Wm. & M. c. 11.¹³

¹ *R. v. Scaife and others*, Den. & P. 281; 20 L. J. M. C. 229; 17 Q. B. 238.

² *R. v. Whitehouse*, Dears. 1. The costs were ordered to abide the event of the new trial. The case had been removed by *certiorari*.

³ *R. v. Richardson*, 4 Jur. 104. A cause expected to last the whole day was put off, and this, which was an indictment for libel, was next in order to be tried.

⁴ *R. v. Pursell*, 8 Mod. 289, in perjury. *R. v. Leper*, Andr. 209, cited. See, however, *R. v. Mayors*, Andr. 209.

⁵ *R. v. Caudwell*, Den. & P. 372; 21 L. J. M. C. 48.

⁶ *R. v. Burdett*, 1 Ld. Raym.

⁷ S. C.

⁸ *R. v. Davis*, 12 Mod. 9. A case of fraud. *R. v. Melling*, Id. 128.

⁹ *R. v. Simmons*, 1 Wils. 329; Say. Rep. 34.

¹⁰ *R. v. Grant*, 5 B. & Adol. 1082, 1086.

¹¹ *R. v. Hunt*, 4 B. & Ald. 430.

¹² *R. v. Sullivan and others*, 8 Ad. & El. 831.

¹³ *R. v. Furser*, Say. Rep. 90.

If the jury eat and drink at their own cost, the verdict is not avoided although they may be fined.¹ If evidence be rejected which was inadmissible for a particular purpose according to the view taken at the trial, but which would have been admitted had the case been presented in another point of view for another purpose, the court will not look upon the matter as if evidence had been improperly refused, and will not, therefore, upon that ground grant a new trial.² It is said, that after a trial at bar, the verdict will not be set aside because the jury have merely gone against evidence.³ Affidavits of new facts are not in general admissible upon a motion for a new trial. But affidavits of the death of a person may be received to account for his not having been examined as a witness at the trial.⁴ These cases apply to convictions. But new trials have been applied for in cases of acquittal, although the applications have been coldly received, and, as a general principle, have been rejected. Even although the acquittal has proceeded from the misdirection of the judge, the case is the same.⁵ Or where the verdict in a case of obstructing the highway was against the weight of evidence.⁶ Nevertheless, there have been circumstances where a judgment for the defendants in consequence of a verdict in their favour has been suspended. But the exception will be found to refer to *public* rights. As where the defendants were acquitted upon an indictment for not repairing a road, yet it was understood that a new indictment would be forthwith preferred. Here the court said that if judgment were entered, the prosecutors would go to the second trial with a millstone about their necks, the weight of which it would be impossible to resist, and although in fact the court admitted they were doing that indirectly which if done directly would be contrary to the established practice, they, notwithstanding, allowed a suspension of the judgment under the peculiar circumstances.⁷

However, the court refused the rule in a subsequent case where *R. v. Wandsworth* was referred to.⁸ And in one still more re-

¹ *R. v. Burdett*, 12 Mod. 111. *R. v. Hardey*, 19 L. J. Q. B. 196; 1 Stark. 517, n. Secus if the refreshment be at the cost of either of the parties.

² *R. v. Grant*, 5 B. & Adol. 1082.

³ *R. v. Melling*, 12 Mod. 128.

⁴ *R. v. Bowdich*, 2 Ch. Rep. 278. See also Lofft. 391, 425, 451. *R. v. Davis*, 1 Str. 104, cited, and other cases there.

⁵ *R. v. Cohen and another*, 1 Stark. 516. *R. v. Silvertown Parish*, 2 Wils. 298. *R. v. Praed or Edwards*, 4 Burr. 2259. *R. v. Mann*, 4 M. & S. 336. *R. v. Russell*, 23 L. J. M. C. 173; 3 El. & Bl. 942. See also *R. v. Reason*, 6 T. R. 375.

⁶ *R. v. Johnson*, 29 L. J. M. C. 133. "There was a case tried at Warwick (*The Queen v. Pegg*) not reported, in which it was said there might be a new trial in such a case." By Field arg^o. Id. 134.

⁷ *R. v. Wandsworth (Inhabitants)*, 1 B. & Ald. 63. *R. v. Middlesex (Inhabitants)*, S. P. Id. 64. And see *R. v. Oxfordshire (Inhabitants)*, 16 East, 223. *R. v. Reynell, Clerk*, 6 East, 315. *R. v. Sutton*, 2 Nev. & M. 57. *R. v. Challicombe*, 6 Jur. 481.

⁸ *R. v. Chigwell*, 1 B. & Ald. 67.

cent, it would appear, that unless, perhaps in the event of a verdict against the weight of evidence, the court will not accede to a new trial. An indictment was preferred for obstructing the Menai Straits. The defendant was acquitted. It was urged that the judge had misdirected the jury, but the court would not allow the case to be tried again. But Coleridge, J., thought that as this proceeding was in the nature of a civil right, a misdirection of the judge ought to warrant a new trial.¹ Therefore *R. v. Wandsworth* must be looked upon as of doubtful authority.

A new trial may be had in favour of some defendants who may appear to have been improperly convicted, although refused with reference to others who may have been acquitted.² But if one defendant obtains a new trial upon a verdict of guilty of conspiracy, the other defendants, although rightly convicted, are entitled to a new trial also.³

A new trial is sometimes granted upon payment of costs, and the principle is the same in criminal as in civil cases.⁴ In penal actions it is not usual, under any circumstances, to grant a new trial.⁵ And it may be added, that inferior jurisdictions cannot grant a new trial except for irregularity.⁶

The next point is, that all the defendants must be present when the rule for a new trial is moved for. The reason given for this is, that the most criminal person might keep out of the way and take the opinion of the court, by putting forward one of the other convicted defendants.⁷ The rule is the same where a conviction is removed by *certiorari*, and the defendants are in custody.⁸ In *R. v. Askew*, Le Blanc, J., observed, after the above reason had been again given by Lord Ellenborough, that upon reading the report, if the court saw any reason to think that justice had not been obtained, it was open to them to grant a new trial, or to interfere in any other way for the furtherance of justice.⁹

The consent of counsel cannot dispense with this rule.¹⁰ The exceptions to the rule are not many. Circumstances of extreme poverty may induce the court to mitigate it.¹¹ And errors are not within the rule. They may be assigned by attorney with leave of the court.¹² And in order to preserve the rule, there must be a conviction. When a case was merely set down for argument,

¹ *R. v. Russell*, 23 L. J. M. C. 173.

² *R. v. Mawbey and others*, 6 T. R. 619.

³ *R. v. Gompertz*, 9 Q. B. 824; 16 L. J. Q. B. 121.

⁴ *R. v. Ford*, 1 Nev. & M. 776.

⁵ *Jervois, q. t. v. Hall*, 1 Wils. 17. *Fonereau v. —*, 3 Wils. 59.

⁶ *R. v. Buckeridge*, 2 Show. 297; *Skin*, 159.

⁷ *R. v. Teal and others*, 11 East,

307. *R. v. Askew and others*, 3 M. & S. 9. *R. v. Lord Cochrane and others*, *Id.* 10 (n.) *R. v. Hol- lingberry and others*, 4 B. & C. 329. See also *R. v. Gibson*, 7 Mod. 205; 2 Str. 968.

⁸ *R. v. Spragg and another*, 2 Burr. 930.

⁹ 3 M. & S. 10.

¹⁰ *R. v. Fielder*, 2 Dowl. & Ry. 46.

¹¹ *R. v. Boltz*, 6 Dowl. & Ry. 65.

¹² *R. v. Stapleton*, 1 Str. 443.

the indictment being removed into the King's Bench, the court held that the defendant need not appear, the proceeding being in the nature of a special verdict.¹

With reference to the time for moving for a new trial, there being no such motion in cases of felony, it has been settled that the application must be made within the four first days of the term, though the argument may be postponed till the defendant is brought up for judgment.²

Case reserved.] The third course which is pursued in order to correct the errors of a verdict, and the most common in cases of felony, is for the judge at the assizes or Central Criminal Court, or at the sessions of the peace, to reserve such points as he may see fit to be considered. And in the meantime to respite, either the judgment, where he is himself doubtful, or the sentence, either when he is pressed by the counsel for the prisoner, or generally, in favour of life or liberty, when a reasonable ground for consideration presents itself to his mind. Before the 11 & 12 Vict. c. 78, these questions could not be reserved at the sessions,³ and, before that statute, the result of the deliberations upon the case reserved were rarely delivered in public, but it was most common for the sentence to be carried into execution without comment, or for a pardon, conditional or absolute, to be recommended. When a majority of the judges decided in favour of the prisoner, a pardon was always recommended. On the other hand, when the conviction was affirmed, the dissenting judges were always bound by the opinion of the majority,⁴ and so it is still under this Act. The judges act upon a rule concerning evidence which should be mentioned here. Should the question turn upon the admissibility of certain testimony given at the trial, the judges will decide whether there was sufficient evidence to convict the prisoner without the objectionable proof, supposing they should be in favour of the objection. And if the evidence should be deemed ample without such proof, the conviction will be sustained. This point has been adjudged and adhered to in many

¹ *R. v. Nicolls*, 2 Str. 1227.

² *R. v. Hetherington*, 5 Jur. 529. *Note.*—Where the prosecutor, instead of taking down the old record again after a new trial obtained by the defendant in a case of perjury, prepared a new indictment, the court refused to stay proceedings till the costs of the former indictment were satisfied. *R. v. Tremearne*, 5 B. & C. 761. And, in misdemeanors, if the defendant should plead guilty upon the understanding that he is not to be brought up for judgment, no costs can be

taxed for the prosecution in the absence of an arrangement made at the time of pleading. *R. v. Rawson and others*, 2 B. & C. 598. The court cannot compel a defendant to go before the master, nor award costs. *R. v. Richardson*, 6 Dowl. & Ry. 141.

³ *R. v. Salop, JJ.*, 13 East, 95. Where such an attempt was made, but repelled firmly by Lord Ellenborough, *Id.* 97, 98.

⁴ See 2 Moo. C. C. 171, *n.*, by Tindal, C. J., Parke, B., Williams, J.

cases.¹ It is, however, to be understood that the judges sit upon these occasions for the purpose of affording mutual assistance to each other, and certainly not as a court of appeal. They cannot, therefore, direct a *venire de novo*. Two indictments were preferred against certain persons for rapes. They were acquitted on the first indictment, and they pleaded *aut. acq.* to the second. A jury being impannelled, Bolland, B., held that it lay upon them to begin, and they put in the commitment and acquittal, which composed their evidence. The jury found in their favour, although the learned judge said he did not conceive the identity of the rape to have been proved. And the opinion of the judges was requested, a distinction being suggested between a collateral issue and an acquittal upon the merits. But the judges were unanimous that nothing could be done except to discharge the prisoners.² If after argument upon the case reserved it should appear that the prisoner has been guilty of another crime (a less offence, for instance) the court will remand him.³

Objections apparent on the face of the indictment are not usually allowed to be argued. The prisoner must have recourse to his writ of error in respect of these.⁴ In misdemeanor, if the objection be on the face of the indictment, the judges will leave the prisoner to his writ of error. The judges pursued this course in a case of conspiracy, charging the defendants with procuring the personation of voters upon the election of councillor for a borough.⁵

An important alteration upon this subject was made by 11 & 12 Vict. c. 78.

By sect. 1, when any person shall have been convicted of any treason, felony, or misdemeanor before any court of oyer and terminer or gaol delivery, or court of quarter sessions, the judge or commissioner or justices of the peace before whom the case shall have been tried may reserve any question of law which shall have arisen on the trial for the consideration of the justices of either bench and barons of the Exchequer, and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been decided; and in either case the court, in its discretion, shall commit the person convicted to prison, or shall take a recognizance of bail, with one or two sufficient sureties, and in such sum as the court shall think fit, conditioned to appear at such time or times as the court shall direct, and receive judgment, and to render himself in execution, as the case may be.⁶

¹ *R. v. Tinkler*, Russ. & Ry. 133, n.; East, P. C. 354. *R. v. Treble*, Russ. & Ry. 164. *R. v. Oldroyd*, Id. 88. *R. v. Ball*, Id. 132; 1 Camp. 324.

² *R. v. Lea and others*, 2 Moo. C. C. 9. See *Ld. Raym.* 1584.

³ *R. v. Francis and others*, Ca. Temp. Hardw. 113.

⁴ *R. v. Overton*, Car. & M. 655.

⁵ *R. v. Haslam and others*, Den. C. C. 73.

⁶ This statute extends to special commissions. *R. v. Bernard*, 1 Fost. & F. 240.

By sect. 2, the judge or commissioner or court of quarter sessions shall thereupon state, in a case signed in the manner now usual, any question of law which shall have been so reserved, with the special circumstances, and such case shall be transmitted to the said justices and barons, who may reverse, affirm, or amend the judgment, or avoid such judgment, and order an entry to be made on the record, that the party convicted ought not to have been convicted, or arrest the judgment, or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given, or make such other order as justice may require; and such judgment and order, if any, shall be certified under the hand of the presiding chief justice or chief baron to the clerk of assize or his deputy, or to the clerk of the peace or his deputy, who shall enter the same on the original record; and a certificate of such entry, under the hand of the clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, in the form, as near as may be, or to the effect mentioned in the schedule to the Act,¹ with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted shall be; and the said certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons, for the execution of the judgment, as the same shall be so certified to have been affirmed or amended, and execution shall be thereupon

¹ The certificate mentioned in the last preceding section shall be in the following form, or to the same effect:—

Whereas at the session of the peace for the county of —, held on —, before — and others their fellows, [or at the session of oyer and terminer and gaol delivery held for the county of —, on —, before, among others, Sir A. B. Knight, one of the justices of the court of —, and —, *here name the quorum commissioners*, justices of oyer and terminer and gaol delivery,] A. B., late of —, labourer, having been found guilty of felony, and judgment thereupon given, that [*state the substance*], the court before whom he was tried reserved a certain question of law for the consideration of the justices of either bench and the barons of the Exchequer, and execution was thereupon respited in the meantime:

This is to certify, that the said justices and barons having met in the Exchequer Chamber at Westminster or Dublin, (as the case may be,) on the — day of —, it was considered by the said justices and barons there that the judgment aforesaid should be annulled, and an entry made on the record that the said A. B. ought not, in the judgment of the said justices and barons, to have been convicted of the felony aforesaid; and you are therefore hereby required forthwith to discharge the said A. B. from your custody.

(Signed) E. F.

Clerk of the peace for the county of —,
[or clerk of assize for —,
as the case may be].

To the gaoler of — and the sheriff of —, and others whom it may concern.

executed on such judgment, and for the discharge of the person convicted from further imprisonment, if the judgment shall be reversed, avoided, or arrested, and in that case such sheriff or gaoler shall forthwith discharge him, and also the next court of oyer and terminer or gaol delivery, or sessions of the peace, shall vacate the recognizance of bail, if any; and if the court of oyer and terminer or gaol delivery, or court of quarter sessions, shall be directed to give judgment, the said court shall proceed to give judgment at the next session.

By sect. 3, the jurisdiction and authorities by this Act given to the said justices of either bench and barons of the Exchequer shall and may be exercised by the said justices and barons, or five of them at the least, of whom the lord chief justice of the Court of Queen's Bench, the lord chief justice of the Court of Common Pleas, and the lord chief baron of the Court of Exchequer, or one of such chiefs at least, shall be part, being met in the Exchequer Chamber or other convenient place; and the judgment or judgments of the said justices and barons shall be delivered in open court, after hearing counsel or the parties, in case the prosecutor or the person convicted shall think it fit that the case shall be argued, in like manner as the judgments of the superior courts of common law at Westminster are now delivered.

But by sect. 4, the said justices and barons, when a case has been reserved for their opinion, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended.

The judges expect that the case shall be rightly stated in the first instance, and they have refused to send a case of larceny back to be restated, in order that another ground for supporting the conviction might be presented.¹ And the case is not to be a lengthy narrative of the facts.² In the event of an omission occurring to counsel, the course is to communicate with the judge who reserved the case, and to suggest any amendment to him. For the court will not attend to a point not reserved, although fairly deducible from the case itself, nor will they go into the consideration of it, as evidence given at the trial, unless it be stated in the case.³ Although they will look at a copy of the indictment, notwithstanding that it does not appear in the case.⁴ And the court will not send back for amendment upon the mere application of counsel;⁵ nor upon an objection not incident to the merits.⁶ Under this statute it is clear that a recorder may reserve questions of law. The court required no argument

¹ *R. v. Holloway*, Den. 370; 18 L. J. M. C. 60.

² *R. v. Stear*, 13 Jur. 41.

³ *R. v. Smith*, 1 Temp. & M. 214.

⁴ *R. v. Williams*, Den. & P. 63; 20 L. J. M. C. 106.

⁵ *R. v. Hilton and another*, Bell, C. C. 20; 28 L. J. M. C. 28.

⁶ *R. v. Brummitt*, Leigh & Cave, 9.

on the point.¹ The jurisdiction is as plain as possible. A recorder is a justice of peace *virtute officii*.²

If a judge should die after he has reserved a case, the other judge of assize may sign and state the case, for the prisoner is in law tried before both judges.³

The judges have held that they are not competent under the Act to interfere with a judgment given for the crown upon demurrer. The remedy is by writ of error. Nor will they entertain a discussion of this nature at the instance of the prisoner, for, were that to be so, they might be called on by the attorney-general at a future day to decide such a question against the wish of the prisoner. The demurrer was then argued before three judges and overruled, and the prisoner was sentenced to transportation.⁴ At first, indeed, Parke, B., doubted whether the court could even take cognizance of defects upon the face of the record, but this doubt was speedily resolved in the affirmative.⁵ But a motion in arrest of judgment is a question arising at the trial within the Act, and therefore it is no objection that such matters appear on the record, and are moved in arrest of judgment.⁶ The court has jurisdiction after conviction over such matters only as take place at the trial.⁷ Conviction means conviction on verdict and trial; trial by a jury.⁸ The judgment of the court, moreover, under 11 & 12 Vict. c. 78, deprives the party of his writ of error.⁹ Upon an argument in this court the counsel for the defendant begins.¹⁰ The court has power under 7 & 8 Geo. 4, c. 64, s. 22, to allow the costs of the prosecution upon argument.¹¹ Although Lord Campbell refused *to interfere upon a subsequent occasion*.¹²

¹ *R. v. Masters*, Den. 332;
² Car. & K. 130.

² Den. 334.

³ *R. v. Featherstone*, 23 L. J. M. C. 17; Dears. 369.

⁴ *R. v. Faderman and others*, Den. 565, 569; 19 L. J. M. C. 147.
R. v. Duffy, 4 Cox, 24, (Ireland,) was said to be overruled; Den. 570, n.

⁵ *R. v. Webb*, Den. 338, 341;
18 L. J. M. C. 39.

⁶ *R. v. Martin*, 18 L. J. M. C. 137; 2 Car. & K. 950.

⁷ *R. v. Faderman*, ut supra.

⁸ Id. ut sembl.

⁹ Id. ut sembl.

¹⁰ *R. v. Gate*, (*Fulford, Inhabitants*), Dears. & B. 74, 94.

¹¹ *R. v. Cluderay*, 3 Car. & K. 205.

¹² *R. v. Dolan*, Dears. 436; 24 L. J. M. C. 61, n.

CHAPTER XXI.

OF ACQUITTAL.

Acquittal.] The consequence of an acquittal is, that the prisoner stands absolved, in law, from the charge imputed to him, in the words of the particular indictment under which he has been tried. And with reference to the plea of *aut. acq.* which is nearly connected with this subject, we may refer the reader to a former page¹ where that subject has been discussed. As to the time of an acquittal where there is no case against a defendant, it does not follow that he must be immediately acquitted. Very frequently the judge will require that the evidence for the other defendants should be first gone through. But Lord Tenterden was of opinion that this matter lay very much in the discretion of the judges, who would select the most convenient season, and his lordship said that he had himself ordered an acquittal immediately after the opening speech for the defendant.² So, on the other hand, the direction of an acquittal in the progress of a case so as to enable the counsel for the prosecution to call the person acquitted in support of the charge, lies entirely in the discretion of the judge.³ The next question is, whether the prisoner, upon his acquittal, is entitled to his immediate discharge in the absence of a detainer against him; but upon one occasion Hullock, B., in a case of horse-stealing, doubted whether he had the power to do this, and declined to grant the discharge until the grand jury had ceased from their labours.⁴ Several learned judges, however, (and indeed it is the usual practice) direct the liberation of the party immediately after a favourable verdict. Mr. Baron Hullock, in another case, refused to discharge the recognizances of the prosecutor until the grand jury were discharged. The prisoner had openly and with force seized three sheep, which he claimed as his own, and the prosecutor, who had become convinced of the innocence of the prisoner, moved that his own recognizance might be discharged, but without success.⁵ And if there be another charge against the prisoner, he will be of course detained after his acquittal upon the first charge. However, where a person charged with maliciously shooting was acquitted, the judge refused to allow the prisoner to be detained whilst articles of the peace were being preferred against him.⁶ Where a prisoner was undergoing punishment for stealing a pig, Cresswell, J., advised, that no evidence should be

¹ *Ante.*² Moo. & Malk. 198, (n.)³ *R. v. Hutchinson*, 1 Lew. C. 295.
C. 74; Anon, Id. 20, by Holroyd, J.⁴ *R. v. Owen*, 9 C. & P. 83.⁵ *R. v. Garbutt*, 1 Lew. C. C.⁶ *R. v. Holt*, 7 C. & P. 518.

given against him for stealing another pig at the same time, and he was acquitted.¹ The bail are discharged upon an acquittal. In a case of perjury the clerks of the Crown Office opposed the discharge of the recognizances of bail until the acquittal should be entered of record, and at first the judges were disposed to respite the recognizance until the next term, but Foster, J., being urgent to the contrary, the recognizances were discharged.² And by Wright and Dennison, JJ.,³ if any one is aggrieved, let him apply to the court next term if he think fit.⁴ Where the jury pronounce a verdict of acquittal in a case where there are grounds for believing that the prisoner is insane, it is the duty of the judge to ask them whether they acquit for that reason.⁵ If two be charged with felony, and one appear to be guilty and the other innocent, both must be acquitted if the prosecutor is unable to identify the guilty person.⁶ So upon a special verdict, where it appeared that a murder had been committed by one of five persons, but the party could not be identified, the court said that all must be discharged.⁷ So where one parted company with his brethren, who committed a robbery, all having been in the original design, for, it may be, he might have repented.⁸

Copy of indictment.] Should there be no reasonable ground for the prosecution, the person acquitted will be entitled, by order of the court, to a copy of the indictment, without which he cannot recover damages.⁹ At one time a very learned judge held the reverse of this doctrine. In a case where it was evident that the prosecution was malicious, Willes, C. J., refused an application for a copy, saying that there was an undoubted right to such a document, and that the officer would be punishable for refusing to make it out,¹⁰ and this opinion was expressed, notwithstanding the existence of some orders to the contrary.¹¹ The rule, however, only applies to cases of felony, for, as to misdemeanors, the copy may be demanded of right,¹² and if there should be a pro-

¹ *R. v. Brettell*, 2 Russ. C. M. 127. Wood, B., allowed an indictment to be preferred against a person who had been acquitted of uttering a forged note, for uttering another at the same time, *Id.*

² *R. v. Spenser*, 1 Wils. 315.

³ Lee, C. J., absent.

⁴ S. C.

⁵ *R. v. Burrow*, 1 Lew. C. C. 238.

⁶ *R. v. Richardson and another*, Leach, 387.

⁷ Ipswich murder case, *Id.* 388. *R. v. Rees and ux.* 6 C. & P. 606. Note, that although the grand jury throw out a bill against a person, yet he may, if in custody,

be placed at the bar in order to be identified as having been in the company of the prisoners. *R. v. Deering and another*, 5 C. & P. 165.

⁸ *R. v. Hyde and others*, 1 Hale, P. C. 537.

⁹ 2 Russ. C. M. 812; and see note (d) there.

¹⁰ *R. v. Brangan*, 1 Leach, 27.

¹¹ 16 Car. 2; Kel. 3; May Sess. 1739; Leach, 28, (n.)

¹² *Evans v. Phillips*, Sel. N. P. 1063. *Morison v. Kelly*, 1 Sir Wm. Bl. 385. As to convictions, *R. v. Midlam*, 3 Burr. 1720. See *Cuddy v. Barlow*, 1 Man. & Ry. 275.

bable cause for the prosecution, no damages can, of course, be recovered.¹

It is also observable that, notwithstanding some former opinions to the contrary, the original record, or a copy of it, however obtained from the officer, is evidence *per se*, and cannot be impugned, although there be neither an order of the court, nor a fiat of the attorney-general.² Even where the prisoner and another having been acquitted of a forgery, and the copy being granted to the other only, Lee, C. J., refused to reject the copy which the plaintiff offered in evidence, although unaccompanied, as far as he was concerned, by any order of the court.³ It has been said, however, that the defendant might have had an action against the officer who gave the copy without authority, and such an act, moreover, seems to be a contempt on the part of the officer, who would not have been compelled to produce the document without authority.⁴ So where the attorney-general had granted his fiat for a copy in a case of concealment of bankrupt's effects, the court refused to interfere, although it was stated that the fiat had been obtained under a misrepresentation.⁵ But where two prisoners, after an acquittal for burglary, prayed a copy of their indictment in order to assist them in their plea of *aut. acq.*, the court would not accede to the application, but directed that the indictment should be slowly and distinctly read over to them as a matter of right.⁶ And where the acquittal arose from the incompetency of a witness, the claim was rejected.⁷ Where a party had been tried at a court of quarter sessions which had lapsed for want of adjournment, he was held entitled to a record of the proceedings, although his object was to plead *aut. conv.* by means of that record.⁸

Discharge by proclamation.] In the event of there being no charge made at the end of the assizes or sessions, a prisoner, unless specially ordered to be detained, will be discharged by proclamation.⁹ So under special commissions,¹⁰ and without any fee to the gaoler.¹¹

It often happens that prisoners are continued over to the sessions which succeed the assizes, and that the witnesses are, in that case, bound over accordingly. Upon one occasion, Wood, B., considering that he was bound under the commission of general gaol delivery to order the discharge of prisoners so circumstanced, did so in pursuance of his opinion. But the majority of the judges

¹ 1 *Ld. R.* 253; *Tidd*, 617.

² *Leggatt v. Tollervey*, 14 *East*, 302.

³ *Jordan v. Lewis*, *Str.* 1122; 14 *East*, 305, (n.)

⁴ 14 *East*, *ut supra*.

⁵ *Browne v. Cumming*, 10 *B. & C.* 70.

⁶ *R. v. Vandercomb and another*, 2 *Leach*, 711.

⁷ *R. v. Quick*, cited, *Leach*, 28, n.

⁸ *R. v. Middlesex, JJ.*, 3 *Nev. & M.* 110.

⁹ *Leach*, 170.

¹⁰ *Id.* The reporter makes a query, but at the special commission in 1830 it was so done.

¹¹ See 55 *Geo. 3*, c. 50.

thought that it was not imperative upon a commissioner of gaol delivery to discharge all the prisoners not indicted, it being in his discretion to continue their commitments.¹ So where indictments found at quarter sessions were sent to the assizes, but not removed by *certiorari*, Wood, B., ordered the prisoner against whom they were found to be discharged, conceiving that there ought to have been a new indictment, and also thinking that the justices ought not to impose an additional burden upon the judges, and, moreover, never having tried such an indictment unless previously removed by *certiorari*. But the judges were of opinion that the prisoner should have been tried at the assizes upon the indictment found at sessions, and that the discharge by proclamation was consequently wrong.² However, the judge refused to try an indictment for *perjury at common law* found at the sessions, because the sessions have no jurisdiction over that offence.³ An indictment was found at the assizes in 1840 against the defendant for keeping a gambling booth. In 1844 he was taken on a judge's warrant, and gave bail to appear and try at the next assizes. He appeared, but the prosecutor could not be found, according to affidavit, so as to have served him with notice of trial. It was held in this case that as no notice of trial had been proved, the defendant could not be acquitted; but the defendant surrendered himself to the governor of the gaol immediately before the end of the assizes, and, upon this, the judge directed that the prosecutor and witnesses should be called three times. They did not answer, and the defendant was then discharged by proclamation, and the court would not call upon him to enter into any fresh recognizance.⁴

Again, where a prisoner was committed to the sessions, the assizes intervening, and no indictment was preferred at such assizes, the judge discharged the prisoner upon his own recognizance.⁵ But the rule affects the county gaol alone. The judge has no authority over the House of Correction.⁶ However, if the attorney-general interferes, the court of gaol delivery cannot discharge the prisoner,⁷ nor can that court discharge a prisoner who has received sentence elsewhere, although the conviction is evidently wrong, and though the convict is in a gaol within their jurisdiction. The application must be made to the secretary of state.⁸ But, although there may not be a discharge by proclamation, the Court of King's Bench will, in cases of great delay on the part of the crown, permit the defendant, even in treason and felony, to bring on the trial, or in a case like that of Mr. Platt, they will bail the defendant.⁹

¹ Case, Russ. & Ry. 173.

² *R. v. Wetherall*, Russ. & Ry. 381.

³ *R. v. Haynes*, Ry. & M. N. P. C. 298.

⁴ *R. v. Hibburd*, 1 Car. & K. 461; cor. Atcherley, Serjt.

⁵ *R. v. Arlett*, 2 Car. & K. 596.

⁶ S. C.

⁷ *R. v. Platt*, Leach, 157.

⁸ *Ex parte Palmer*, 6 C. & P. 122.

⁹ See 2 Salk. 652.

Conviction.] The consequences of a conviction are, that in felony the prisoner stands committed as of course. In misdemeanor a *capias* is awarded against the defendant, if absent, in order to insure his appearance to receive judgment (which, in case of default, may be prosecuted to outlawry); or, he may, if present, be committed instanter, unless the prosecutor will consent to his liberation upon his recognizance to appear at a future day for the purpose of receiving judgment.¹ Likewise, in treason and felony, the personal property of the convict becomes forthwith forfeited to the crown, although, before conviction, he may lawfully sell his goods for the support of himself and his family.² A pardon before conviction will stay the forfeiture.

¹ *R. v. Waddington*, 1 East, 159. ² See Steph. 317, 320.

CHAPTER XXII.

OF JUDGMENT.

Judgment.] The consequence of an unfavourable verdict not set aside,¹ nor vitiated by any adverse determination upon a case reserved, is, that judgment must be passed upon the prisoner. Formerly,² in the case of a peer or peeress, if the offence were not capital, the party was entitled to be discharged upon pleading privilege of peerage.³ But by 4 Vict. c. 22, every peer of the realm shall plead to an indictment for felony, and, upon conviction, shall be punished in the same manner as any other subject of the crown. The prisoner must be present, and judgment cannot pass in his absence, not even upon outlawry,⁴ unless indeed by consent,⁵ age, or infirmity;⁶ or absence in Ireland.⁷ But the dispensation will not extend to cases of aggravation,⁸ as aggravated assaults,⁹ nor to any case where corporal punishment is to be inflicted,¹⁰ nor to a conviction for a nuisance on a navigable river.¹¹ But where the rule is relaxed the court will set a fine in the absence of the defendant,¹² And sometimes, as we have said, the conviction is followed by the sentence upon a case reserved, so that, in the latter event, execution alone remains.

We shall state the judgment applicable to each offence as we proceed with the other portions of this work, but there are some statutable provisions relating to the present subject which may not be improperly placed here. The 7 & 8 Geo. 4, c. 28, s. 7, ordains that there shall be no judgment of death in cases of felony, unless for some felony which was excluded from clergy before, or on, the first day of the session of parliament then being,¹³ or which shall be so made punishable afterwards. By sect. 8, crimes under the penalty of death shall be punished according to the particular statutes affecting each, and in the absence of any specific direction for felony, the punishment shall be transportation for seven years,¹⁴

¹ It needs scarcely be mentioned, that a criminal judgment cannot be set aside upon payment of costs, pleading the general issue, and giving short notice of trial, as in civil suits. *R. v. Hunter*, 1 Wils. 163.

² 1 Ed. 6, c. 12, s. 13, for the first offence.

³ *R. v. Duchess of Kingston*, Leach, 146.

⁴ *R. v. Harrison and another*, 12 Mod. 156. See also *R. v. Harwood*, 2 Str. 1088; 2 Hawk. c. 48, s. 17. *R. v. Hann and another*, 3 Burr. 1786; Lofft. 28, 400.

⁵ Lofft. 252.

⁶ *R. v. Constable*, 7 D. & Ry. 663.

⁷ Lofft. *ut supra*.

⁸ Lofft. *ut supra*.

⁹ Id. 42.

¹⁰ *R. v. Templeman*, 1 Salk. 55. *R. v. Harrison and another*, 1 Ld. Raym. 267.

¹¹ For you may proceed to outlawry. *R. v. Chichester*, 17 Q. B. 504, n.; Den. & P. 458.

¹² 2 Curw. Hawk. 634. But see *post*, *R. v. Buckeridge*, 2 Show. 297; Skin. 159.

¹³ *Id est*, 14 Nov. 1826.

¹⁴ Now penal servitude not exceeding 3 years: 20 & 21 Vict. c. 3, s. 2.

imprisonment not exceeding two years, and one, two, or three public or private whippings in addition to the imprisonment. By sect. 9, hard labour and solitary confinement likewise, at the will of the court, are added to the list of punishments, the latter to be for any portion of the time of imprisonment, or for the whole, as may be thought fit: Provided by 1 Vict. c. 90, s. 5,¹ that such solitary imprisonment do not exceed one month at a time, or three months in one year. By 56 Geo. 3, c. 138, which abolished the pillory, except in certain cases, fine and imprisonment, or either, at the discretion of the court, are substituted. And by 1 Vict. c. 23, which entirely annulled the punishment of the pillory, it is expressly provided that no other punishment, except the pillory, shall be in any way changed, altered, or affected by the Act.

With regard to the judgment, by 1 Ed. 6, c. 7, s. 5, in all cases of treason or felony for which judgment of death may ensue, where the prisoner shall be reprieved without judgment at that time given against him, those persons who at any time thereafter shall by the Queen's letters patent be assigned justices to deliver the gaol where such person found guilty shall remain, shall have full power and authority to give judgment of death against such person so found guilty, and reprieved, as such justices before whom such person was found guilty might have done if their commission of gaol delivery had remained and continued in full force. And by 11 Hen. 6, c. 6, justices of the peace under a new commission are to have the same powers as those under the old.

By 4 Geo. 4, c. 48, s. 1, whenever any person shall be convicted of any felony punishable by death, except murder, and the court before which such offender shall be convicted shall be of opinion that under the particular circumstances of the case such offender is a fit and proper subject to be recommended for the royal mercy, the court, if it shall think fit so to do, may direct the proper officer then being present in court to require and ask, whereupon such officer shall require and ask, if such offender has or knows anything to say why judgment of death should not be recorded; and in case such offender shall not allege any matter to arrest or bar such judgment, the court may abstain from pronouncing judgment of death upon such offender, and may order the same to be entered of record, and thereupon judgment of death shall be recorded.

By sect. 2, the record shall have the same effect as if the judgment had been pronounced.

By 7 & 8 Geo. 4, c. 28, s. 10, wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, the court may award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence, either of imprisonment or of transportation, the court, if empowered to pass sentence of transportation, may award such sentence for the subse-

¹ The only section of the Act unrepealed. 24 & 25 Vict. c. 95, schedule.

quent offence, to commence at the expiration of the imprisonment or transportation to which such person shall have been previously sentenced, although the aggregate term of imprisonment or transportation, respectively, may in the whole exceed the term for which either of those punishments could be otherwise awarded.¹

By 3 Geo. 4, c. 114, whenever any person shall be convicted of any one of the offences following; that is to say, any attempt to commit a felony; any riot; keeping a common gaming-house, a common bawdy-house, or a common ill-governed and disorderly house; and by 14 & 15 Vict. c. 100, s. 29, any cheat or fraud punishable at common law; any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice; any escape or rescue from lawful custody on a criminal charge; any public and indecent exposure of the person; any public selling, or exposing for public sale or to public view, of any obscene book, print, picture, or other indecent exhibition; the court may sentence the offender to imprisonment in the common gaol or house of correction for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment.

Lastly:—By 11 Geo. 4 and 1 Will. 4, c. 70, s. 9, upon all trials for treason, felony, or misdemeanor, upon any record of the Court of Queen's Bench, judgment may be pronounced during the sittings or assizes by the judge before whom the verdict shall be taken, as well upon the person who shall have suffered judgment by default or confession, upon the same record, as upon those who shall be tried and convicted, whether such persons be present or not in court, excepting only where the prosecution shall be by information filed by leave of the Court of Queen's Bench, or such cases of informations filed by Her Majesty's attorney-general, wherein the attorney-general shall pray that the judgment may be postponed; and the judgment so pronounced shall be indorsed upon the record of *nisi prius*, and afterwards entered upon the record in court, and shall be of the same force and effect as a judgment of the court, unless the court shall, within six days after the commencement of the ensuing term, grant a rule to show cause why a new trial should not be had or the judgment amended; and it shall be lawful for the judge before whom the trial shall be had either to issue an immediate order or warrant for committing the defendant in execution, or to respite the execution of the judgment, upon such terms as he shall think fit, until the sixth day of the ensuing term, and in case imprisonment shall be part of the sentence, to order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison.²

Every judgment pronounced should be entered of record. A judgment of death is not bad because it does not say "you and each of you."³ When a man lies under sentence of death he

¹ The words "penal servitude" must now be substituted for transportation.

² See 14 Hen. 4, c. 1. *R. v. Lloyd*, 4 B. & Adol. 135.

³ *R. v. Tucker*, 4 Mod. 162.

cannot be brought up to receive sentence for an offence which is subject to that penalty, although he was tried upon the other charge subsequently, and did not plead his prior attainder.¹

A woman sometimes pleads pregnancy in stay of execution, upon which a jury of matrons is sworn. Should a jury of matrons desire to have the evidence of a surgeon before they deliver their verdict, the surgeon should be examined in open court.²

The following entry upon the record was held sufficient to show that the prisoners were asked why the court should not proceed to pass judgment against them: "And thereupon this, it is forthwith demanded if they the said C. & H. have or know anything to say wherefore, &c., who nothing further say unless as they before said."³ Where a statute makes an offence larceny, and says that an offender shall be liable to be transported for any term not exceeding fourteen years, in the discretion of the court, &c., it is not imperative on the judge to transport. The milder sentence of imprisonment may be awarded as in ordinary cases of larceny; and the same rule will apply to penal servitude. For two distinct offences the judge will order the party to be transported, or sent to penal servitude, for two periods of seven years, the second to commence at the expiration of the first.⁴ And so it is in misdeameanor. A sentence may be pronounced to commence from the end of the term from which the defendant has received judgment in respect of another offence.⁵ And if a count be held bad in error, a judgment of imprisonment under a second count is not vacated. If the first count be rejected, the whole term of imprisonment is not thereby gone. Where the *third* count therefore was held bad, the term of two months' imprisonment awarded under the fourth count was adjudged to commence at the expiration of the term of imprisonment under the second count.⁶

The prosecutor upon one occasion was allowed to apply to the court for leave to amend, and he was allowed several amendments of the record.⁷

By 1 Geo. 4, c. 57, females shall not be whipped. In lieu thereof, imprisonment with hard labour for a term not exceeding

¹ Russ. & Ry. 268. Case from the recorder in 1814.

² *R. v. Wycherley*, 8 C. & P. 262.

³ *Campbell v. Reg.* 2 New. S. C. 297. 11 Q. B. 799.

⁴ *R. v. Hudson*, Russ. & Ry. 285, under 39 Geo. 3, c. 85 (repealed).

⁵ *R. v. Bath*, Leach, 441. See 30 Geo. 3, c. 47; 2 & 3 Will. 4, c. 62, s. 2. As to transportation, 1 Will. 4, c. 39.

⁶ *Wilkes v. Reg.* (in error), 4 Bro. P. C. 367. *R. v. Carter*, 9 Jur. 178; four counts for extortion; four counts for uttering forged licences;

sentence of the same term of imprisonment was passed in respect of each count.

⁷ *Gregory v. The Queen*, 15 Q. B. 957. It was ordered, that the defendant be placed in the first division of the fourth class. This was a misprision, not a judgment, the court having no power to make such an order. The order was amended. *Id.* The amendments were by entering a separate imprisonment on each count, and striking out the above-mentioned order. *Id.*

six months nor less than one is substituted, together with solitary confinement, provided it do not exceed seven days at any one time. Judgment in a case of high misdemeanor cannot be given as for trespass and misdemeanor.¹

Fines.] Excessive fines are not to be imposed, nor are cruel and unusual punishments to be inflicted.² But it is common to aggravate or mitigate the fine³ according to the willingness of the defendant to make compensation for the costs of the prosecution, and the Court of King's Bench, with the king's privy seal for that purpose, may give the prosecutor one-third of the fine assessed on a criminal charge for any offence whatsoever. And it seems that the acceptance of taxed costs will not hinder the prosecutor from moving to aggravate the fine.⁴

The king's coroner may receive fines imposed upon persons convicted by indictment or information by the Court of King's Bench.⁵ But it cannot be done without the king's privy seal.⁶ Again, by the privy seal, the Court of Exchequer may discharge a fine imposed by statute, as well as one set by the judgment of the court.⁷ However, although the Court of King's Bench at Westminster should pronounce judgment for a fine, the city of London is entitled to such fine in respect of any offence committed within that city.⁸

When the defendant has received judgment to pay a fine, a writ of *levari facias* may immediately issue.⁹ He becomes the king's prisoner, and cannot surrender in discharge of his bail in a civil action without leave of the court.¹⁰ A fine may be amended if awarded contrary to a statute, but the court will not set aside the verdict and judgment.¹¹ A joint fine against several defendants is bad.¹²

Where the offence has been laid to have been done "feloniously," the court will reject the word "feloniously," and give judgment for the misdemeanor, should the matter so turn out.¹³ But if there are statements in an indictment for felony which cannot be rejected, the court then cannot give their judgment for the misdemeanor.¹⁴

Affidavits.] Affidavits in aggravation, entitled "In the King's

¹ *R. v. Westbeer*, Leach, 12; Str. 1133. *R. v. Leaser*, Cro. Jac. 497, and other cases.

² 1 Wm. & M. sess. 2, c. 2, No. 11.

³ In such a case the defendant must be present. *R. v. Buckeridge*, 2 Show. 297; Skin. 159.

⁴ 2 Hawk. c. 27, s. 53. See *R. v. Summers*, 1 Salk. 55.

⁵ *R. v. Shackell*, M'Cl. & Y. 514.

⁶ *R. v. ———*, 2 Anstr. 523.

⁷ *R. v. Dibbens*, Parker, 165.

⁸ *R. v. Mayor of London*, 1 Cr. M. & R. 1.

⁹ *R. v. Woolf*, 2 B. & Ald. 609; 1 Ch. Rep. 583.

¹⁰ *R. v. Bethel*, 5 Mod. 19.

¹¹ *R. v. Stevens*, 3 Smith, 366.

¹² 2 Curw. Hawk. 635.

¹³ *R. v. Scofield*, East, P. C. 1028.

¹⁴ *R. v. Turner*, 1 Moo. C. C. 47. *R. v. Burrow*, 1 Lew. C. C. 134.

Bench," have been read after judgment by default.¹ Such are admissible although made by a witness who was examined at the trial.² And perhaps witnesses may be under the defendant's influence, so that the court, as in a case of assault where the witnesses refused to appear, could not know the circumstances without affidavits of aggravation. But the court will allow the defendant time to answer any new matter.³

Counsel.] After verdict, the rule is to hear the defendant's affidavits in the first instance, then those for the prosecution. The counsel for the defendant is then called upon, and lastly, the counsel for the crown. Still, after judgment by *default*, the rule is reversed with respect to the turn for hearing affidavits read and for the addresses of counsel. If there be no affidavits, the counsel for the defendant is first heard, and then counsel for the prosecution.⁴ Upon a more recent occasion it was determined that the counsel for the crown should be heard first, where the defendant had pleaded guilty, and the affidavits in aggravation should be read before those in mitigation. The counsel for the defendants was heard first. But it was said, that if a verdict of guilty were taken by consent, and without evidence, the case would be reversed as to the affidavits, and that the defendant's counsel should then be first heard, and his affidavits read in the first instance. If some defendants should be convicted by verdict and others suffer judgment by default, the rule is the same as though the last-mentioned defendants had pleaded guilty.⁵ So again where some defendants had been convicted by verdict, and some had suffered judgment by default, the counsel would be heard in mitigation for all in the first instance, and then the counsel for the crown.⁶ Affidavits in aggravation will not be permitted in felony.⁷ Under *very special circumstances* affidavits in mitigation might be received upon the trial of traverses, but it was neither usual nor desirable to entertain them on either side upon such occasions.⁸ So at the Central Criminal Court where a defendant had pleaded guilty to an indictment for libel, and there were affidavits both in mitigation and aggravation, the court would not hear counsel on either side,⁹ nor the defendant himself after that plea.¹⁰ Scandalous and irrelevant affidavits will be removed from the files of the court. It is a contempt to file them. If not filed, the opposite party may yet

¹ *R. v. Morgan*, 11 East, 457.

R. v. Sutton, 7 Ad. & El. 593,

² *R. v. Sharpness*, 1 T. R. 228.

594, n.

³ *R. v. Archer*, 2 T. R. 203, n.;

⁶ *R. v. Despard*, 2 M. & Ry.

R. v. Wilson and others, 4 T. R. 487.

⁷ In *R. v. Ellis*, 6 B. & C. 148.

⁴ *R. v. Bunts and others*, 2 T. R. 683. Reg. Gen.

⁸ *R. v. Cox and others*, 4 C. & P.

⁵ *R. v. Dignam. R. v. Caistor.*

538, by Patteson, J.

⁹ *R. v. Gregory*, 1 Car. & K. 228.

¹⁰ 1 Cox, 31.

be allowed to put in counter-affidavits to answer defamatory matter.¹

Unless there be some proof of an intention to abscond, the court will not require bail from a person convicted of a misdemeanor, as a security for his presence to receive judgment, nor even his own recognizance.² If a prosecutor intend to secure costs for himself upon the condition of not bringing up the defendant for judgment, he should take care to have a right understanding, and express himself clearly. Nothing having been said about costs under such circumstances, the court discharged a rule for taxing them.³

The conduct of a defendant subsequent to the time when he is found guilty may be taken into consideration, either by way of aggravation, or of mitigating the punishment. In general it is done for his benefit in order to extenuate the offence, but it is also done, if required, to aggravate.⁴ Care should be taken to pronounce judgment upon the right statute, though the particular statute need not be referred to in giving judgment.⁵

The statute 1 Geo. 4, c. 117, abolished the capital penalty for stealing privately in a shop, and substituted another punishment. The prisoner committed an offence against the old before the new statute passed, but was not tried till afterwards, and it was held that she could not be punished under either Act, but that she should only receive punishment as for a common larceny.⁶ The judgment for felony should allege by whom the indictment was presented, and on oath, &c. It is not enough to say that at the sessions of gaol delivery, &c., it was presented, &c.⁷

With respect to the time and place for pronouncing judgment, it is usual for the judge to pass sentence soon after the trial. But as this rule did not extend to records from the King's Bench, and as it was found, especially upon convictions for misdemeanor, very oppressive to require the presence of the defendant in London for the purpose of receiving judgment, the stat. 1 Will. 4, c. 70, s. 9, was passed to relieve such persons.⁸ For the purpose of amending the judgment by diminishing the punishment, some particular defect in the sentence should be pointed out, or some matter which could not have been brought forward at the assizes.⁹ However, cases of information filed by leave of the Court of King's Bench, or by the attorney-general where he

¹ *R. v. Gregory*, 1 Car. & K. 228.

⁶ *R. v. Mackenzie*, Russ. & Ry.

² *R. v. Whitcomb*, 1 C. & P. 429.
124.

⁷ *R. v. Butterfield*, 2 M. & Rob.

³ *R. v. Rawson and others*, 2 B. & C. 598.
522.

⁸ *Ante*.

⁴ *R. v. Withers*, by Lord Kenyon, 3 T. R. 432. S. P. *R. v. Walter*; *R. v. Smollet*, cited there.

⁵ *Murray v. Reg.* (in error), 9 Jur. 596.

⁹ *King v. Reg.* (in error), 9 Jur. 833; 7 Q. B. 782. The words "it is considered," should not be omitted from the *postea* on such an occasion. S. C. *Sembl.*

prays a postponement of the judgment, are excepted out of this statute. And the Court of King's Bench could always give judgment either upon indictments originating with them, or removed by *certiorari* from an inferior tribunal. And so it was held where an indictment for lighting fires on the coast was found at sessions, and tried at the Cornwall assizes, although it was objected that the judge at *nisi prius* ought to have passed the sentence.¹ The judge of *nisi prius* may, therefore, give judgment at the time, or return the *postea* with the offender into the court above.² But an inferior court may be compelled to give judgment by a writ of *mandamus*, and although even an erroneous judgment should be disclosed in the return, it will be allowed, for the remedy in that case is by writ of error.³ And an inferior court cannot set aside a verdict except for irregularity.⁴ In nuisance, a verdict for the crown was taken by consent subject to a reference. Upon this the defendant was deemed to be entitled to notice of a motion for judgment, and also to copies of the affidavits upon which the motion was founded. The verdict being undisturbed by the award, it lay upon the prosecutor to move for judgment pursuant to the verdict, or for an attachment against the defendant if he did not perform the award.⁵ It is dangerous in giving judgment to use the words "offences aforesaid," where there are good and bad counts, and bad findings on some of the good counts. For each count charges a separate offence, and the expression "offences aforesaid," extends to all the offences of which each defendant stands convicted. So, that when some counts were good and some bad, such a judgment was held invalid.⁶ Therefore a general judgment for the crown on an indictment containing several counts, one of which is bad, and where the punishment is not fixed by law, cannot be supported.⁷ But where the indictment contained nine counts, and a general judgment of transportation for fourteen years was passed, they were taken to be the same fourteen years upon each count, and the judgment was held valid.⁸ This, however, supposes each count to be good. A judgment that the defendant be imprisoned for six months for the offences charged in each and every count of the indictment would hardly stand if there were one bad count, for it is a general judgment of one imprisonment for six months.⁹ And it is no ground for reversal that the record contains no entry of acquittal on that part of the indictment upon which the defendants were found not guilty.¹⁰

¹ *R. v. Cook*, 4 M. & S. 17.

² 14 Hen. 6, c. 1; Steph. 319.

³ *R. v. West Riding, JJ.*, 7 T. R. 467.

⁴ *R. v. Peters*, 1 Burr. 568.

⁵ *R. v. Gore or Gower*, 8 D. P. C. 102.

⁶ *O'Connell v. Reg.* (in error), 11 Cl. & Fin. 155.

⁷ See S. C. *R. v. Middleditch*, Den. 92, 98.

⁸ *Holloway v. The Queen*, Den. & P. 287; 17 Q. B. 317.

⁹ *Gregory v. Reg.* (in error), 15 Q. B. 957.

¹⁰ *O'Connell v. Reg.* ut supra. See another point there as to the

There appears to be no exclusively particular form for the commencement of a judgment in cases of misdemeanor.¹ However, if the attorney-general should enter a *nol. pros.* judgment will not pass. The *nol. pros.* can only issue at the instance of the attorney-general.²

Alteration of judgment.] It is not unusual for the court, both at the assizes and sessions, to make an alteration in the judgment, but this must be done during the continuance of the commission, or, at sessions, during the sitting of the magistrates.³ Unless, indeed, there be an adjournment. In law the time is considered but as one day. The same thing was done at the Old Bailey,⁴ and so again in the Court of King's Bench, provided the alteration take place in the same term.⁵ So at the assizes where that part of the sentence in murder which directed the dissection and anatomization of the body⁶ was omitted, the judges agreed, although differing as to the principal point, that the mistake might have been set right by having the prisoner brought up again.⁷ It seems that corporal punishment, as the pillory, (now abolished,) does not at any time form part of the original sentence. It is left to the discretion of the officer, or appointed by a particular rule of court.⁸ The rule above mentioned applies to fines which cannot be altered after the term, or expiration of the sitting of the court.⁹ Moreover, the judgment of a preceding term cannot be altered, even by consent, and although the record upon which the former judgment was given has been altered in the meantime by an order of justices of oyer and terminer.¹⁰

reversing or varying of the judgment with reference to the recognizances required, a query in S. C.

¹ *In re King*, 15 L. J. (N. S.) Q. B. 2.

² *R. v. Dunn*, 1 Car. & K. 730.

³ 2 Salk. 606.

⁴ *Id.* 607.

⁵ *R. v. Fitzgerald and another*, 1 Salk. 401, where the punishment was increased. *R. v. Price*, 6 East, 328.

⁶ These marks of infamy exist no

longer. 2 & 3 Will. 4, c. 75, s. 16. 6 & 7 Will. 4, c. 30, ss. 1, 2.

⁷ *R. v. Fletcher*, Russ. & Ry. 58. *R. v. Wyatt*, S. P. Id. 230. The omission in this last case was leaving out the day of execution, but the mistake was rectified on the next morning.

⁸ *Atkinson v. Rex* (in error), 3 Bro. P. C. 517.

⁹ 2 Hawk. c. 48, s. 20.

¹⁰ *R. v. Carlile*, 2 B. & Adol. 971.

CHAPTER XXIII.

OF ERROR.

Error.] A judgment may be reversed with or without writ of error. But the record cannot be removed after judgment without that writ.¹ When the error occurs *dehors* the record (as if the commission under which the prisoner has been tried were invalid), there needs not to be any writ.² The writ of error applies to mistakes upon the face of the record. As where a party was ordered to be transported for fourteen instead of seven years.³ So, where there was a judgment of transportation at sessions, in a capital case, the prisoners were ordered to be discharged.⁴ So, where there was a judgment against a servant for embezzlement without a specific charge.⁵ So, where a manifest omission appears upon the record.⁶ As in misdemeanor, where, instead of a *capiatur*, there was a *misericordia*.⁷ But it is not error that the verdict was not entered of record when it was given, because that is impossible.⁸ Nor that the copy of the caption on the record does not contain the names of the persons on whose oath the indictment was found.⁹ Nor is it competent to contradict the record. Nor can errors both of law and fact be assigned.¹⁰ Nor can there be error unless judgment has been

¹ *R. v. Seton (Inhabitants)*, 7 T. R. 373.

² Steph. 331. A recorder may try prisoners although the judges of assize, oyer and terminer, and gaol delivery are also sitting. The Court of Queen's Bench, indeed, being the court of criminal appeal, would work a suspension. The same rule applies to justices of the peace, but it certainly would be highly inconvenient for them to hold these sessions during the assizes. *Smith v. Reg.* (in error), 18 L. J. M. C. 207; 13 Q. B. 738.

A court of quarter sessions may respite from one session to another, and, although the record stated, at the first session, "it was considered and adjudged that the defendant should enter into recognizances

to appear," &c., the court held, that those words did not operate as a judgment so as to oust the sessions of their power to pronounce sentence at a subsequent sessions. *Keen v. Reg.* (in error), 10 Q. B. 928; 16 L. J. M. C. 180.

³ *R. v. Ellis*, 5 B. & C. 395.

⁴ *R. v. Bourne and others*, 7 Ad. & El. 58. See also *R. v. Howes and another*, Id. 60, n.

⁵ *R. v. Flower*, 5 B. & C. 736.

⁶ See *R. v. Fletcher*, Russ. & Ry. 58.

⁷ *R. v. Holroy*, 5 Mod. 341.

⁸ *R. v. Carlile*, 2 B. & Adol. 971.

⁹ *R. v. Aylett*, 6 Ad. & El. 247, n.

¹⁰ *R. v. Carlile*, 2 B. & Adol. 362.

pronounced. Where, after a verdict, the entry upon the record ran thus: "It is therefore ordered that the said L. K. be transported," &c., the Court of King's Bench, upon error, awarded a *procedendo*, for no judgment had been given. The prisoner was admitted to bail, and the court below were directed to pronounce sentence.¹ Two verdicts were set out upon a record, one of which had been considered invalid by the justices at sessions. There being no objection to the second, the judgment was affirmed. For *Per cur.* For if the first verdict were good, the second trial would have been *coram non iudice*; but then the second trial would apply here, as the first verdict was bad.² An indictment at the quarter sessions for the city and county of Chester contained two counts, one for stealing in a dwelling house, and the other for a common larceny. The jury process was to inquire of the felony in the indictment. The verdict was, guilty of the felony aforesaid. The judgment was fourteen years' transportation. The Court of Queen's Bench reversed the judgment, and awarded a *venire de novo*. Error was brought. The court of error said that the *venire de novo* had been well awarded for this misawarding of the jury process, that it was no objection that judgment had been given by the court of quarter sessions,³ and that the quarter sessions was not an inferior court in that sense of the term, but a continuing court of oyer and terminer. But the court of error intimated that they thought the word "felony" might have been construed to be *nomen collectivum*, and so no error; however, they affirmed the judgment of the Queen's Bench.⁴ Again, it is ground of error that a peremptory challenge has been refused. The prisoner was sentenced to transportation for life under 1 Vict. c. 85, for shooting maliciously, but it being shown that his challenge had been disallowed because it was on a capital charge, a *venire de novo* was awarded.⁵ Before the statute 11 & 12 Vict. c. 78, should an erroneous judgment have been awarded by the court below, as where the quarter sessions sentenced a person by mistake to imprisonment and hard labour, the court upon reversing the judgment in error could not have rectified the blunder. In that case they declared they had no alternative but to discharge the prisoner.⁶ The court could neither send back the record to have the error corrected nor award the proper punishment.⁷ But this defect is cured by 11 & 12 Vict. c. 78, s. 5. Thus

¹ *R. v. Kenworthy*, 1 B. & C. 711. But it seems, that upon the affirming of a summary conviction upon *certiorari*, the court may re-commit the defendant for the residue of his term of imprisonment, although he had been admitted to bail upon the issuing the writ. *Ex parte Lord*, 4 Dowl. & L. 405.

² *R. v. Fowler and another*, 4 B. & Ald. 273.

³ *Gray v. Reg.* was cited as in point upon this objection.

⁴ *Campbell v. Reg.* 17 L. J. M. C. 89; 11 Q. B. 799. Whether a *venire de novo* may issue in a case of felony for a defective verdict, qu.?

⁵ *Gray v. Reg.* 11 Cl. & Fin. 427.

⁶ *Silversides v. Reg.* 2 Gale & D. 617.

⁷ *R. v. Bourne*, 7 Ad. & El. 58.

upon the reversal of a judgment in any criminal case, the court of error may either pronounce the proper judgment or remit the record to the court below for that purpose. The Act, however, was not retrospective. The court makes an order or rule for the prisoner's discharge.¹ If there be no order in error after the service of a four-day rule upon the attorney-general and the prosecutor, the prisoner must be discharged.²

This writ is not grantable in felony as of course, but it is seldom denied, and in misdemeanor, the attorney-general must, it is said, grant his fiat, *ex deb. justitiæ*, where there is probable ground.³ Although the attorney-general is not compellable to do this, and the court has no power to interfere.⁴ So in a colony, as St. Helena, the same sanction must be obtained.⁵ It lies from inferior jurisdictions to the Court of King's Bench, and thence to the House of Lords.⁶

A judgment may also be reversed by Act of parliament.⁷ And outlawry may also be reversed by a court of error. As where the defendant dies abroad,⁸ or where it appears upon the writ of proclamation and return that he had a day in court after his outlawry.⁹ An affidavit that the defendant saw the person outlawed in his coffin will be sufficient.¹⁰ Where the defendant comes in a *procedendo* will be at once awarded.¹¹ It is to be observed, that whether the offence be treason or felony, the heir or executor may have the writ.¹² A judgment upon an indictment is within the statute 1 Will. 4, c. 70, s. 1.¹³ If a defendant bring error from the Queen's Bench to the Exchequer Chamber, he must pray oyer of the record and assign errors in writing, and the crown may orally join in error.¹⁴ The defendant should in general be present to move for oyer of the record of the indictment upon which he has been convicted, but the court dispensed with his attendance, upon affidavits showing him to be an aged and infirm person, living in New South Wales,¹⁵ where he had been for thirty years past; that he was subject to paralysis and could not come over without injury to

¹ *Holt v. Reg.* (in error), 2 Dowl. & L. 774. Query of *King v. Reg.* (in error), 14 L. J. Q. B. 86, whether the court has power to discharge?

² *R. v. Howse*, 3 Nev. & M. 462; 7 Ad. & El. 60, n.

³ Steph. 332.

⁴ *R. v. Newton and another*, 24 L. J. Q. B. 246; 4 El. & Bl. 869; 16 C. B. 97, where the attorney-general refused in a case of malicious wounding.

⁵ *R. v. Lees*, 27 L. J. Q. B. 403.

⁶ Steph. 331. See the form of the *precipe* and petition, with the secretary of state's fiat, Den. & P. 512, n.

⁷ 1 Ch. Cr. C. 750.

⁸ *R. v. Buchanan*, 1 Cr. & M. 195.

⁹ *Barrington v. The King* (in error), 3 T. R. 499.

¹⁰ 1 Cr. & M., *ut supra*.

¹¹ *R. v. Perry*, 5 T. R. 478; 6 T. R. 573; see also *R. v. Yandell and others*, 4 T. R. 521. *R. v. Russell*, cited, Id. 534.

¹² *R. v. Marshe*, 5 Rep. 111. *R. v. Ayliffe and another*, 1 Show. 15.

¹³ *R. v. King*, 7 Q. B. 782. Respecting judgments in Queen's Bench, Common Pleas, and the Exchequer, see *R. v. Wright* (in error), 1 Ad. & El. 434.

¹⁴ *Mansell v. Reg.* (in error), Dears. & B. 375.

¹⁵ *Murray v. Reg.* 9 Jur. 410.

his health, and great pecuniary loss.¹ Should the plaintiff in error neglect to assign his errors in proper time the defendant in error will sign judgment of *non. pros.*, and the defendant in error may then enter the proceedings and judgment of *non. pros.* upon the rolls of the court below.² The court will not notice a statement of the sentence in the manuscript of the record upon errors assigned, but will require the *postea* to be brought up with the sentence indorsed, and grant a *certiorari* for that purpose. It was so held, where the defendants had been convicted of a conspiracy, and error had been assigned on the sentence itself.³ Two were charged with misdemeanor, and one only brought error. He could not object that there was any discontinuance as to his co-defendant.⁴ There were several continuances on the record of *ven. fac. jur.* One was returnable on April 12th, on which day another was awarded. The record then set out the withdrawal of the pleas of not guilty, the conviction and day for judgment, the non-appearance of the defendant who had brought error, the outlawry and judgment. The outlawry was reversed. It was held in error that the 12th of April was part of Easter Term for the purpose of awarding process in continuation of former process, and, therefore, that there was no discontinuance of the jury process. But *if so*, the objection would not hold, because the defendant had confessed the indictment, and the validity of the judgment did not depend upon the regularity of the proceedings before trial.⁵ Again, whilst the outlawry lasted, the suit was suspended, and, consequently, it was idle to give either to him or to the coroner and attorney a day, so that entries of a *dies datus* were unnecessary.⁶ Again, the date of the term was a sufficient heading to the narrative of the proceedings which took place on the coming in of the defendant to traverse the outlawry. It was unnecessary to state that he was brought into court on the *capias ut lagatum* to reverse the outlawry. The outlawry having been reversed, it was held no ground of error that one of the writs of outlawry was made returnable and a subsequent writ awarded on a *non dies juridicus*.⁷

One defendant may assign error without the others.⁸

By 8 & 9 Vict. c. 68, s. 1, in every case of judgment for a misdemeanor where the defendant shall have obtained a writ of error to reverse such judgment, execution shall be stayed until such writ of error shall be determined; and if the defendant shall be

¹ S. C. 3 Dowl. & L. 100; 7 Q. B. 700. The prosecutor and his attorney being both dead, the court directed service of the rule to join in error to be made by sticking it up in the Crown Office, and serving a copy on the solicitor to the treasury. It was a case of bigamy.

² *R. v. King*, 9 Jur. 551.

³ *R. v. King*, 7 Q. B. 782.

⁴ *Wright v. Reg.* (in error), 14 Q. B. 148.

⁵ S. C.

⁶ S. C.

⁷ S. C.

⁸ *Wright v. Reg.* 2 Cox, 91; 14 Q. B. 148. And, upon error, one defendant cannot object to a discontinuance in process against the other. S. C.

imprisoned under such execution, or any fine shall have been levied, either in whole or in part, in pursuance of such judgment, the defendant shall be entitled to be discharged, and to receive back any money levied on account of such fine from the person in whose possession the same shall be until such final determination as aforesaid: Provided that, except where a writ of error shall be brought to reverse such judgment by Her Majesty's attorney-general, no execution on any such judgment shall be stayed, nor shall any defendant be discharged from imprisonment as to such execution, unless and until he shall become bound by recognizance, before one of the judges of Her Majesty's Court of Queen's Bench, or one of the commissioners appointed to take special bail in actions depending in the superior courts, with two sufficient sureties, to be approved of by such judge or commissioner, in such sum as such judge or commissioner shall direct, to prosecute the writ of error with effect.

By 16 Vict. c. 32, s. 1, in any case of error brought to reverse a judgment in misdemeanor, unless by the attorney-general, the defendant must likewise be bound personally to appear when judgment is given, and the bail must be bound to render the defendant in case the judgment shall be affirmed; and the 8 & 9 Vict. c. 68, s. 1, goes on to enact that every such recognizance shall, after justification of bail, be filed of record in the said Court of Queen's Bench, in like manner, and upon payment of the like fees, as in the case of other recognizances filed in the Crown Office in that court; and the judge of the said Court of Queen's Bench, and the said commissioner, shall have the like powers in respect of the justifying such bail in error, and the examination of the sureties, and the like rules shall apply, as in respect of special bail in actions depending in such court: Provided always, that in the case of any defendant under legal disability it shall be sufficient if two persons, to be approved of by such judge or commissioner, shall become bound by recognizance on the behalf of such defendant, to be acknowledged and conditioned as aforesaid.

By 8 & 9 Vict. c. 68, s. 2, the clerk of the crown in the said Court of Queen's Bench shall for the purposes hereinafter mentioned make out and deliver to the defendant, or his lawful attorney, certificates in writing under his hand that such recognizance is duly filed of record in such court, upon payment of the like fee as for other certificates delivered at the Crown Office; and by 9 & 10 Vict. c. 24, s. 4, any such certificate, under the hand either of the said clerk of the crown or of the master or assistant master on the crown side of the said court, and sealed with the seal of the Crown Office in the said court, shall be a sufficient warrant to every gaoler or other person having custody of such defendant in execution of such judgment, to discharge him out of custody, and for the repayment of the fine; but by 8 & 9 Vict. c. 68, s. 2, no person who shall have received any such money, and have paid it over to any other person, according to the course of the Exchequer, shall be liable to repay to the defendant any part of the money so paid over.

By 16 Vict. c. 32, s. 2, in every case in which a defendant shall make default in prosecuting such writ of error with effect, or in personally appearing in the court of error upon any proceeding to be had upon such writ of error as aforesaid, it shall be lawful for the said court to order the said recognizance to be estreated into the Court of Exchequer, and without *scire facias*, and to order the said writ of error to be quashed without argument, and the defendant shall forthwith be liable to execution upon the judgment; and so it is enacted with regard to recognizances in general upon indictments or informations, by the 8th section of that Act.

By 16 Vict. c. 32, s. 3, whenever any writ of error shall be brought under the provisions of this Act, for reversing any judgment in misdemeanor, and error shall be assigned thereon, no judgment or reversal shall be entered, either for want of a joinder in error or otherwise, without the special order of the court in which such writ of error shall be pending, pronounced in open court; and upon a certificate signed by or on behalf of the attorney or solicitor general, that notice has been given to one of them of such intended application, and in the event of there being no joinder in error, such court of error may proceed to examine the record in error, and may give such judgment thereon as the court from which error is brought ought to have done, although no joinder in error may have been filed.

By sect. 4, where a defendant shall personally appear in court upon any proceeding had upon any such writ of error, and judgment thereupon shall be affirmed, or such writ of error shall be quashed, it shall be lawful for such court of error forthwith to commit the said defendant to the keeper of the Queen's prison, and to order the said keeper to deliver such defendant to the keeper of the gaol or prison in which he may have been adjudged to be imprisoned; and the said keeper of the Queen's prison shall thereupon deliver such defendant to the keeper of such gaol or prison, and the keeper of such last-mentioned gaol or prison shall thereupon cause such defendant to be kept in safe custody in such gaol or prison, in pursuance of and in execution of the said judgment.

And by sect. 5 of the last statute, whenever it shall be made to appear to any one of the judges of the superior courts of record at Westminster, either by affidavit or by certificate of the proper officer of the court of error, that the recognizance of a defendant, given under the provisions of this Act, has been ordered to be estreated, or that judgment upon the said writ has been affirmed, or that such writ of error has been quashed, and that default has been made by the space of four days in rendering the defendant to prison in execution of the judgment, it shall be lawful for such judge to issue his warrant under his hand and seal, and thereby to cause such defendant to be apprehended, and conveyed to the gaol or prison in which such defendant may have been adjudged to be imprisoned pursuant to and in execution of the judgment given against such defendant.

By sect. 6, in every case in which a defendant shall be com-

mitted by any court of error in execution of the judgment given against such defendant, and in every case in which a defendant shall, by virtue of any warrant, or in any other manner, be rendered to prison in execution of such judgment, the imprisonment of such defendant (if imprisonment shall not have commenced under such execution) shall be reckoned to begin from the day when such defendant shall be in actual custody in the gaol or prison in which he may have been adjudged to be imprisoned under such judgment; and if the defendant shall have been discharged from imprisonment on giving bail in error, as is hereinbefore mentioned, such defendant shall be imprisoned for such further period in the same prison as, with the time during which such defendant may already have been imprisoned under such execution, shall be equal to the period for which he was adjudged to be imprisoned as aforesaid.

By 8 & 9 Vict. c. 68, s. 4, when the judgment shall have been for payment of a fine, and imprisonment until such fine be paid, either with or without imprisonment for a certain time, and the defendant shall have paid the fine, or the same or any part thereof shall have been levied, and shall have been received back, under the provisions hereinbefore contained, and the judgment upon writ of error brought shall be affirmed, the defendant shall not be entitled by reason of such payment to be discharged from imprisonment, notwithstanding the expiration of any certain time of imprisonment for which the original judgment shall have been given, until the fine shall be again paid.

By 16 Vict. c. 32, s. 7, whenever default shall have been made in rendering a defendant to prison in execution of a judgment for misdemeanor, and a warrant shall have been issued against such defendant to enforce such render to prison, according to the provisions of this Act, such defendant shall be liable to pay the costs of such render; and if the prosecutor shall, before the expiration of the defendant's imprisonment, have caused the amount of such costs and charges to be ascertained by one of the masters or the assistant master of the crown side of the Court of Queen's Bench, and shall have left with the said defendant, and with the keeper of the prison or his deputy, a certificate under the hand of such master or assistant master of the amount of such costs so ascertained, then the defendant shall not be discharged out of custody until such costs and charges have been paid, or until an order has been made by the court for the relief of insolvent debtors or of bankruptcy for such discharge.

By 8 & 9 Vict. c. 68, s. 5, if the court in which any such writ of error shall be pending shall, upon motion in that behalf, decide that the defendant by whom it shall be brought has wilfully delayed or neglected to prosecute the same with effect, it shall be lawful for such court to order the writ to be quashed, and thereupon the defendant who brought such writ of error shall be liable to execution upon the judgment.

Lastly, by 11 & 12 Vict. c. 78, s. 5, whenever any writ of error shall be brought upon any judgment or any indictment, informa-

tion, presentment, or inquisition, in any criminal cases, and the court of error shall reverse the judgment, it shall be competent for such court of error either to pronounce the proper judgment, or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, &c.

The defendants need not have been ruled to assign errors in order to afford a ground for quashing the writ.¹ The form of the affidavit runs thus: "No process or other proceeding has been had or taken by or on behalf of the said defendant to prosecute the same since the issuing and allowance of the writ of error." This was held to be a sufficient statement that no errors had been assigned, without stating that the defendant had not assigned, or had been ruled to assign errors.² Where the recognizance was *to be dealt with as the Court of Exchequer should order*, the court ordered fresh process. A discharge upon a recognizance so insufficient is contrary to the letter and spirit of the Act.³ A judge of the Queen's Bench made an order, in vacation, to discharge a defendant out of imprisonment where judgment had been reversed in error.⁴

The Court of Queen's Bench can set aside a writ of error founded upon a compromise under 12 & 13 Vict. c. 109, s. 39, and they will exercise that power. There was judgment against the defendants for conspiracy, &c. The indictment had been removed into the Queen's Bench by *certiorari*. The attorney-general's fiat having been obtained, the transcript of the record was carried into the Exchequer Chamber. Errors were assigned, but the prosecutor did not join, upon which there was a rule reversing the judgment below. A rule was then moved for to quash the writ of error by reason of the compromise. Upon this the defendants below obtained the attorney-general's fiat for the second time, and sued out a fresh writ of error on the old judgment. Amongst other errors it was assigned, that the Court of Queen's Bench ought not to have quashed the first writ of error. The plaintiff in error then demanded a joinder in error, or a plea in error. However, on the part of the prosecution two motions for rules were made. The one to strike out the judgment of the Exchequer Chamber on the writ of error; the other to set aside the assignment of errors on the second writ for irregularity, with costs. The first rule was made absolute. The first writ of error was improperly issued, and the Court of Queen's Bench had a right to quash it, as they have the right of quashing a writ which issued contrary to good faith, and the Court of Exchequer Chamber has no jurisdiction in the matter. The second rule was discharged, on striking out all the immaterial matter, leaving only the general assignment of errors.⁵

¹ *R. v. Broome*, 5 Dowl. & L. 607.

² S. C. So held upon an affidavit in support of a motion under 8 & 9 Vict. c. 68, s. 5, to quash a writ of error for wilful delay.

³ *Dugdale v. Reg.* Dears. 254; 2 El. & Bl. 129.

⁴ Dears. 256.

⁵ *Alleyne v. Reg.* 24 L. J. Q. B. 282; Dears. 505; 4 El. & Bl. 186.

In fact, the Exchequer Chamber cannot examine into the sufficiency of the writ, and the rule had been improperly set out on the record. It ought not to have been put on the record at all.¹ The special assignment of errors was mere surplusage.²

*Paper books.*³] A defendant in error in a criminal case not having delivered paper books to two of the judges in pursuance of Rule 23 of the regulations in the Crown Office, and which rule concludes by saying, that judgment shall be given by the court against the party neglecting to deliver paper books to the judges, if the court shall so please. The court, nevertheless, directed the argument to proceed.

¹ 24 L. J. Q. B. 282.

² Id. 285.

³ Reg. Gen. Q. B. Easter Term, 16 Vict., 16th April, 1853; 1 El. & Bl. 693. "It is ordered that there be laid before the Court of Queen's Bench on the first crown-paper day in every term, a list of the several cases in which recogni-

zances have been filed to prosecute writs of error in misdemeanor returnable in that court, together with the names of the several cases in which default has been made in prosecuting such writs of error, according to the course of practice of that court."

CHAPTER XXIV.

OF ATTAINDER AND ITS CONSEQUENCES.

Forfeiture.] Trover was brought for the goods of a felon. The particular day of the conviction was allowed to be shown for the claimant, and the record was no estoppel, the assizes being one day in law. The assizes were on March 19; the assignment took place on March 20, and Maule and Williams, JJ., held that the goods had passed to the assignee.¹ In another case so much of the stolen property as was shown to be the result of a robbery in a railway carriage was delivered to the company who had made the loss good, and the remainder was given over to the chief commissioner of police to abide future orders. And the rights of the sheriffs of London to retain possession of it was rejected, they not being custodians of the crown.² But this order of the court was brought up by *certiorari* in order to be quashed, and it was held to be invalid, as there is no power at common law, or by statute, for the court to dispose of the goods of felons.³ As, upon conviction, the goods and chattels become forfeited, without office found,⁴ so, upon attainder, the profits of the freehold fall to the crown during the life of the convict,⁵ and the copyhold escheats in like manner to the lord, according to the custom of the manor. If the conviction takes place before the admittance of a party who has purchased from the felon, and the custom of forfeiture should exist, the offender continues tenant for the purpose of forfeiture, and the purchaser cannot be admitted although the seller have surrendered to him in fee,⁶ and, therefore, where the person to be admitted was hanged before admittance, it was held that the attainder worked no change in the descent.⁷ So the felon is a good lessee in ejectment where no office has been found.⁸ Indeed the lessee of an estate under such circumstances has a good title against all save the king and the lord of whom the land is holden before office found. And this is not a continuing forfeiture, so that acceptance of rent after judgment will be a waiver of a power of re-entry in case the lessee or his heirs should become insolvent and unable to

¹ *Whitaker v. Wisbey*, 6 Cox, 109.

² *R. v. Pierce and others*, 27 L. J. M. C. 31; 7 Cox, 206.

³ *R. v. Pierce and others*, Bell, 235. The 21 Hen. 8, c. 11, and 7 & 8 Geo. 4, c. 29, s. 57, repealed, were referred to. See S. C. *post*, "Larceny."

⁴ See *R. v. Whitehead*, 2 Moo. C. C. 181.

⁵ 54 Geo. 3, c. 145.

⁶ *R. v. Mildmay*, 5 B. & Adol. 254.

⁷ *Roe d. Jeffereys v. Hicks*, 2 Wils. 13.

⁸ 2 Nev. & M. 489.

go on with the management of the farm.¹ Again, where the lord did no act towards seizing a copyhold, and the copyholder, who was capitally convicted, suffered a commuted sentence of two years' imprisonment, it was held that his competency was restored, and that he might sue in ejectment.² *A fortiori*, where there has been no attainder.³ But the personal property and rights of action pertaining to the felon are vested in the crown without office found.⁴

In treason the consequences of an attainder are very penal. And murder as well as treason is excepted out of the 54 Geo. 3, c. 145. Before that statute the king had a fee simple in the offender's freehold for one year, during which he might commit any description of waste, and corruption of blood supervened; the result was that a complete forfeiture took place after the death of the owner, because the heir was incapacitated from deriving title. But that Act contenting the crown with a life forfeiture, prohibits the disherison of any heir save in treason and murder; and by another statute, the 3 & 4 Will. 4, c. 106, s. 10, the descent of land may be traced through an attainted person, unless such land shall have escheated in consequence of the attainder before a certain date therein mentioned. However a pardon after attainder will enable the issue born after the attainder to inherit in all cases. And a pardon by Act of parliament will restore the blood as to all consequences whatsoever. We mention these last particulars more especially, because they apply to treason and murder, the crimes excepted out of the statute 54 Geo. 3, c. 145. There is also an incompetency to sue which affects the convict upon these occasions, although by leave of the court or a judge he may himself be sued.

However by 5 Geo. 4, c. 84, s. 26, a felon under sentence of transportation, who has received any remission of his punishment from the governor of the colony, may, whilst he resides in a lawful place, according to his sentence, maintain any suit either here or abroad. And this capacity becomes available even against the crown, and the attorney-general must pay costs if he fails.⁵ The legatee of a promissory note bequeathed by will is convicted of felony. He forfeits, of course, the interest in the note, but the executor may still sue the maker, and he becomes a trustee for the crown in respect of the proceeds.⁶ By 10 & 11 Vict. c. 82, (the Juvenile Offenders Act,) no conviction under the Act shall be attended with any forfeiture. And the subsequent statutes concerning small larcenies follow the same rule of exemption.⁷ By

¹ *Doe d. Evans v. Pritchard*, 2 Nev. & M. 489.

² *Doe d. Evans v. Evans*, 5 B. & C. 584.

³ *R. v. Bridger*, 1 Mees. & W. 144.

⁴ *Bullock v. Dodds*, 2 B. & Ald. 258.

⁵ *Gough v. Davies*, [the case of a legacy,] 25 L. J. Ch. 677.

⁶ *Bishop v. Curtis*, 18 Q. B. 878; 21 L. J. Q. B. 391.

⁷ 13 & 14 Vict. c. 37, s. 1; 18 & 19 Vict. c. 126, s. 10.

15 & 16 Vict. c. 55, s. 8,¹ if any one convicted of felony be solely or jointly possessed of lands or entitled to stock upon trust, the Court of Chancery may upon proof of conviction appoint a trustee in his room,² and make the necessary orders for giving to the new trustee the same rights with the convicted trustee. By 24 & 25 Vict. c. 113, s. 9, no child, being proved to have been convicted of felony, shall be deemed to be within the provisions of the Industrial Schools Act; and by the Scotch Industrial Schools Act, 24 & 25 Vict. c. 132, s. 9, no child shall be admitted who is found to have been sentenced to imprisonment for more than thirty days.

¹ The Trustees Extension Act.

convicted of felony, 3 & 4 Vict.

² See an Act for the care and education of infants who may be

c. 90.

CHAPTER XXV.

OF EXECUTION.

THE last circumstance which remains is that of execution. And here we do not speak merely of a capital execution, but of carrying into effect the judgment suitable to each case. In capital cases the prisoner is always asked what he has to say why execution should not be awarded. And it is said that a person so situated might make an oath that he is not the person who was sentenced (when the award of execution and the sentence happen at different times), *i. e.* in support of the plea, to that effect, which is a plea in bar. Upon this there would be a replication of identity, and an award of a *venire*, together with a day for the production of witnesses for or against the allegation. But where he will not make oath the trial is instanter, and no peremptory challenge is allowed.¹ Should the party absent himself after conviction or attainder, the process towards execution will be by outlawry.² But he may be taken and brought to the Court of King's Bench upon *habeas corpus*, when the attorney-general will prove the identity, if the prisoner should deny it, before a jury impannelled for that purpose. His identity being confirmed by the verdict of the jury, the court, upon the prayer of the counsel for the crown, will award execution instanter. The prisoner will be delivered to the sheriffs of the county named by the court, but the court will not fix the day of execution.³ In the case of a woman who is pregnant, or who alleges herself to be so, a plea of pregnancy must be put in.⁴ The sheriff shall then be commanded to take her into a private room, and to impanel a jury of matrons, to examine whether she be or not quick with child. If they find her quick, the execution shall be respited till the delivery. And "quick with child," means having conceived.⁵ But it is agreed that a woman cannot demand such respite of execution by reason of her being quick with child more than once.⁶

The sheriff is the officer whose duty it is to perform capital execution, but he may intrust his deputy with this matter. It is customary to allow two Sundays to intervene between the receipt of the calendar (which is, in fact, the warrant) and the execution.⁷

¹ 1 Steph. 338. See *R. v. Rogers and others*, 3 Burr. 1809.

² 2 Hawk. c. 48, s. 9.

³ *R. v. Rogers and others*, supra.

⁴ *R. v. Hunt*, 2 Cox, 261 ; 2 Hawk. c. 51, s. 9.

⁵ *R. v. Wycherley*, 8 C. & P.

262.

⁶ 2 Hawk. c. 48, s. 10.

⁷ 1 Ch. Cr. L. 782.

In London, till the reign of Queen Victoria, the recorder issued a warrant to the sheriff in conformity with the orders he had received in council, commanding execution to be done upon the day and at the place assigned. But by 1 Vict. c. 77, s. 1, no report is to be made in council of any capital convict at the Central Criminal Court. By sect. 2, any judge of the superior courts might order execution upon an offender then already tried. By sect. 3, judgment of death may be recorded, and by sect. 4, entered of record. By sect. 5, judgment of death may be pronounced and execution ordered in like manner as at the assizes. Sect. 6 saves the prerogative of mercy. Sect. 7 saves the rights of the city of London, except so far as the Act expressly provides to the contrary.¹

The Court of King's Bench will either leave the execution to the sheriff, or will fix a time and place as they may see fit.² For, in general, the time forms no part of the sentence.³ Moreover, the Court of King's Bench may order the sheriff of any county, or the marshal of the court,⁴ to execute a sentence of death pronounced by a judge of gaol delivery. For which purpose the attorney-general may, as of course, have the writ of *habeas corpus* and a *certiorari* to bring up a prisoner and the record of his conviction.⁵ But not unless the record of attainder be in court.⁶

It has been held, that a sheriff is not bound to execute unless he has either the legal custody of the prisoner or the means of attaining it. Consequently, where the sheriff of the county received the signed calendar, but refused to execute because the judge had ordered the sheriffs of the city to do execution, he was considered not liable to an information. Not because the order had been given to the city sheriffs, for the signed calendar was a mere memorial, and he would have been bound to have executed without that, but because he had not the power of obtaining the custody of the persons ordered to die. There ought to have been an order to the constable of Chester Castle to deliver them to him, and a distinct order to *him* to receive and to execute.⁷ It was also held, that upon the trial of the information, an order of the court requiring the former sheriff to hang a criminal in chains,

¹ By sect. 8, the Act may be amended during the session; and by sect. 9, it is declared to be a public Act.

² For other particulars, see Steph. 339, 340.

³ *Atkinson v. Rex* (in error), 3 Bro. P. C. 517. *R. v. Doyle and Valline*, Leach, 67. Where the sheriffs doubted whether they could execute a warrant for hanging the prisoners at Bethnal Green, the recorder having sentenced them to die at the usual place of execution.

The judges held this warrant to be lawful.

⁴ *R. v. Athos*, father and son, Str. 553; 5 Burr. 2797. A conviction for murder in Wales had been removed from Herefordshire by *certiorari*. *R. v. Rogers and others*, 3 Burr. 1809.

⁵ *R. v. Garside*, 2 Ad. & El. 266.

⁶ *R. v. Beal*, 3 Mod. 124.

⁷ *R. v. Antrobus*, 2 Ad. & El. 788; 4 Nev. & M. 565. See 2 Hale, 31, 470,

and an examined copy of the cravings of the sheriff, filed in the Exchequer, and in which he craved to be allowed his expenses, and which were allowed, were admissible in evidence for the crown.¹

Should the day appointed for the execution lapse without execution, it seems that another day may be appointed upon removing the record of attainder into the Court of King's Bench.² And if the punishment (whatever it may be) be not inflicted with accuracy, the officer is punishable for misdemeanor.³

Reprieve.] The judge, or the secretary of state, or, of course, the crown, can grant a reprieve. But there are reprieves of necessity. As where a woman is found to be with child, or where the convict is found by a jury to be insane, *i. e.*, between judgment and the award of execution.⁴

*Penal servitude, &c., in lieu of transportation.*⁵] After many vicissitudes, transportation is, at length, exchanged for penal servitude. By 20 & 21 Vict. c. 3, s. 2, after the commencement of this Act, no person shall be sentenced to transportation; and any person who, if this Act and the said Act had not been passed, might have been sentenced to transportation, shall, after the commencement of this Act, be liable to be sentenced to be kept in penal servitude for a term of the same duration as the term of transportation to which such person would have been liable if the said Act and this Act had not been passed; and in every case where, at the discretion of the court, one of any two or more terms of transportation might have been awarded, the court shall have the like discretion to award one of any two or more of the terms of penal servitude which are hereby authorized to be awarded instead of such terms of transportation: Provided always, that any person who might at the discretion of the court have been sentenced either to transportation for any term or to any period of imprisonment, shall be liable, at the discretion of the court, to be sentenced either to penal

¹ S. C. But with reference to Chester, see now 5 Will. 4, c. 1, ss. 1, 2.

² *R. v. Earl Ferrers*, Fost. 138.

³ *R. v. Beardmore*, 2 Burr. 792.

⁴ See Steph. 333, 334. Where a pardon was granted on condition of transportation, the judge was bound to allow the benefit of the conditional pardon, and make an order for the transportation, upon notice from the secretaries of state. 5 Geo. 4, c. 84. See ss. 2—5, 13, 18; 6 & 7 Vict. c. 26. Jersey, 5 Geo. 4, c. 84, ss. 17, 19. See also 1 Will. 4, c. 39, s. 7; 9 & 10 Vict. c. 24, s. 1; 10 & 11 Vict. c. 67,

s. 2; 16 & 17 Vict. c. 99. By 16 & 17 Vict. c. 121, s. 1, the provisions of 5 Geo. 4, c. 84, were extended to females.

⁵ The statutes 24 Geo. 3, sess. 1, c. 12, and 20 Geo. 3, c. 46, concerning transportation, were repealed by 24 & 25 Vict. c. 101, and the reason of the repeal of 24 Geo. 3, c. 12, by 24 & 25 Vict. c. 101, was because the stat. 24 Geo. 3, sess. 2, c. 56, s. 17, which repealed the 24 Geo. 3, sess. 1, c. 12, was itself repealed by 55 Geo. 3, c. 156. Therefore the first Act was set up again.

servitude for the same term or to the same period of imprisonment; and in any case in which before the passing of the said Act sentence of seven years' transportation might have been passed, it shall be lawful for the court in its discretion to pass a sentence of penal servitude of not less than three years.

By sect. 3, the provisions of the Act concerning offenders transported are to apply to offenders under sentence of penal servitude.

By sect. 4, the provisions of 5 Geo. 4, c. 84, are declared to be applicable to the sentence of penal servitude.

Sect. 5 empowers magistrates to commit to any convict prison convicts whose licences are revoked.

By sect. 6, the term "transportation," with reference to crime, is made convertible as to penal servitude.¹

Fees.] If a punishment be executed in another county than that where sentence was pronounced, no fee is due to the tipstaff, or other officer, on the part of the prosecutor.² No fee is due to the clerk of sessions at Newgate in respect of convicts sentenced to imprisonment with hard labour. The court granted a *mandamus* to ascertain whether any fee was payable in respect of convicts sentenced to transportation. And the fact of the non-payment of such fees from 1805 to 1829, when the clerk came into office, was held not to preclude the right. So that the clerk was considered to be entitled to the fees.³

¹ The Act 16 & 17 Vict. c. 99, and the Act 20 & 21 Vict. c. 3, are to be read as one.

Note.—The 9 & 10 Vict. c. 26, concerning convict prisons abroad, is repealed by 22 Vict. c. 25. See *post*, tit. "Escapes."

² *R. v. Cholsey*, Cowp. 726, where the defendant was put into the pillory for perjury.

³ *R. v. Baker*, 7 Ad. & El. 502.

PART II.

Of Indictable Offences against the Queen and her Government.

CHAPTER I.

OF HIGH TREASON AND ITS INCIDENTS.

High treason.] High treason consists in acts of hostility against the sovereign, whether king or queen, or against the queen consort, or the eldest son and heir to the throne, by such as owe allegiance within the realm, or in certain outrages upon the queen, or the king's or queen's eldest daughter unmarried, or upon the wife of the eldest son and heir, or killing certain of the king's officers, or in attempting to disturb the Protestant succession. There was much uncertainty at common law upon the question of treasons,¹ and, at length, it became expedient to define, as clearly as might be, the offences which should be deemed to amount to that very penal crime. This circumstance gave birth to the celebrated statute, 25 Ed. 3, c. 2, an Act, which, after some fluctuations, was made "the only standard of treason ;"² and, although, since the days of Queen Mary, there have been some other enactments upon this subject, this Act of 25 Ed. 3 still continues to be the foundation upon which other Acts connected with treason are constructed. And this Act of 25 Ed. 3 was expressly saved in every respect by 11 Vict. c. 12, s. 6. The severe ordinances against the papists are, in a great measure, at an end, the apprehension of danger to the Protestant succession, on account of the Pretender, having been laid aside.

The hostile acts against the king, to which allusion has just been made, are,—compassing or imagining his death, levying war against him in his realm, or compassing for that purpose, adhering to his enemies, and attempting to interfere with his title by a violation of the Act of Settlement. And it cannot but be evident, in the first place, that the parties who are capable of committing this offence, are deserving of a separate consideration.

¹ 1 Hale, P. C. ch. 11.² 1 Hawk. c. 17, s. 2.

Who bound to allegiance.] It would be a mistake to suppose that none can be guilty of treason except natural born subjects, or such as may be required to take the oaths of allegiance and supremacy. One who dwells here, although a foreigner, must yield obedience to the monarch in whose realm he lives in return for the protection which is afforded him.¹ Even if the person be an alien enemy, yet if he be domiciled here, he receives the favour and indulgence of the law, and may be treated as a traitor, because he violates a local temporary allegiance.² *A fortiori*, a denizen, and a person naturalized by Act of parliament, are within the rules of allegiance. Whilst, on the other hand, aliens who invade the kingdom in a hostile manner, whether their sovereign be at peace with ours or not, and whether leagued with rebels here or not, cannot be punished as traitors, but can only be dealt with by martial law.³ It is said, that an ambassador committing a treason against the king's life shall be executed, although for other treasons he may be sent home.⁴ The same rule concerning allegiance extends to a queen consort, or the husband of a queen regnant.⁵ When the obligation is incurred, it is not any change of situation which will remove the effects of an allegiance. It is true that when an alien retires from the realm, his local allegiance is at end, unless he leave his family under the protection of the law. And it is also correct, that if a foreigner resides here for a time, and has children born while here, and then withdraw with his family, his children will be relieved from their temporary local allegiance. But as soon as the fealty attaches, it is not to be shaken off. A person born in England, and born a subject of the king, was sent abroad in his early infancy, and, subsequently, accepted a commission under the French king. Being taken prisoner in 1746, he urged his foreign employment as an excuse, but by Lee, C. J., the only fact for the jury to try was, whether the man were a native of Great Britain. Even the presumption of birth would be so far against the prisoner as that if he were to rely on evidence of his being born out of the kingdom, the proof would lie upon him, and he was found guilty.⁶ And the fact of the native of England being in the service and pay of a foreign monarch is but an aggravation, if alleged as a defence to the indictment.⁷ Again, on the other hand, if the sovereign be deprived of his rights, he is still king *de jure*, and it is no excuse to say, that some other power governed the kingdom at the time when the alleged offence was committed, and, therefore, Sir H. Vane

¹ *R. v. Delamotte*, East, P. C. 53.

² Foster, C. L. 186; East, P. C. 53.

³ 1 Hawk. c. 17, s. 6; 3 Inst. 11; and see Kel. 38.

⁴ 1 Hawk. c. 17, s. 5; 1 Hale, 97, 98; Fost. 187.

⁵ 1 Hale, P. C. 100.

⁶ *R. v. Macdonald*, Fost. 59. *R. v. Dr. Storie*, Dy. 300, pl. 38.

⁷ *R. v. Townly*, East, P. C. 51; Fost. 7. See *R. v. Storie*, ut supra.

endeavoured, without effect, to justify his proceedings under a parliament without a regnant monarch.¹

However, there is a case which will absolve the people from their allegiance. By 1 Wm. & M. sess. 2, c. 2, s. 9, every person who shall be reconciled to, or hold communion with the Church of Rome, or profess the popish religion, or marry a papist, shall be excluded, and be for ever incapable to inherit, possess, or enjoy the crown of this realm. The holding communion with the Romish Church may be understood to mean a conformity to her ordinances, and participation in her sacraments. A titular king, as the husband of the queen regnant, is not within this law.²

Compassing the king's death.] The offence of aiming directly at the life of the king is made treason by 25 Ed. 3, stat. 5, c. 2, and by 36 Geo. 3, c. 7. The statute of Edward has these words, "Compass or imagine the death of our lord the king, &c." The statute 36 Geo. 3, c. 7, s. 1,³ uses these expressions, "Compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of the king, his heirs or successors." This compassing or imagining, &c., is manifested by various acts of the traitors, called overt acts, or to use the words of 36 Geo. 3, c. 7, s. 1, whoever by "such compassings, imaginings, inventions, &c., shall express, utter, or declare by publishing any printing or writing, or by any overt act or deed," shall be deemed a traitor. Indeed the printing and publishing of treasonable writings had been held long before this statute of George the Third to amount to the crime of high treason.⁴ And by 5 & 6 Vict. c. 51, s. 1, all attempts upon the person of the queen, to injure her, shall be dealt with as cases of murder.⁵ By 1 Eliz. c. 1, s. 30, the third offence of affirming by printing, teaching, preaching, &c., that any foreign prince is pre-eminent in the realm, or of doing anything for the extolling of such jurisdiction, was made high treason. And by 3 Jac. 1, c. 4, s. 1, it is treason to absolve subjects from their allegiance, or to induce them to promise obedience to any foreign prince; and by sect. 23 of the same statute, the persons so absolved or promising obedience incur the same guilt, and all receivers, counsellors, &c. of such offences respectively come within the same dilemma.

The acts, therefore, of compassing and imagining under the 11 Vict. c. 12, expressed overtly, or by publications, or, as we shall see by and by, by open and advised speaking, are felonies and not treasons.

But the law stands as it did before with regard to the actual levying of war, and to the constructive treasons which such levy-

¹ Kel. 14. See 1 Hawk. c. 17, s. 12.

² 1 Hawk. c. 17, s. 21.

³ Made perpetual by 57 Geo. 3, c. 6, s. 1.

⁴ Amongst others, see *R. v. Matthews*, 9 St. Tr. 680. See East, P. C. 58.

⁵ *Post.*

ing substantiates. Therefore the doctrine laid down by Eyre, C. J., upon the trial of Tooke, that an attempt to subvert and alter the government and parliament without the consent of the legislature, was an attempt to depose the king, and a compassing of his death, because he would have been bound at all hazards to resist the usurpation,¹ is still good authority, if it be limited to the actual levying of war, and not to the mere compassing to levy war. So the gathering of men to compel the king to yield to certain demands, or remove ill counsellors, was held an overt act.² So again, any violent attempt to seize the king's person, and still more, an attempt to depose him, have long been recognized as overt acts of imagining his death, it being considered that, after the example of regicides, the temptation on the part of the traitors to take the life of a monarch in their power would be too strong to resist, and it is no defence to avow an absence of any intention to do a corporal hurt.³ So levying war is still treason.⁴ But it is not now treason, as formerly,⁵ merely to agree to bring in foreign forces, or to go abroad for that purpose,⁶ or prepare men and arms against the king's government, although to take such steps against the king himself would be a compassing of his death, and so treason. These, it is evident, must frequently be questions for the jury, and but for the humanity of the age, it would be very easy to overstep the bounds of felony and make a questionable act one of treason.⁷

Constructive treasons.] Treasons are substantive or 'constructive. To attempt the life of the sovereign directly, or to levy actual war upon him, are among the list of substantive treasons. To raise a general insurrection for the purpose of redressing an imaginary or a real grievance of a public nature, is an instance of constructive treason.

Now although a consultation to compass the king's death, &c., is treasonable,⁸ the nature of the evidence which goes to prove the consultation is rather to be considered in this place. Assent to the proposition is of itself a sufficient overt act,⁹ and if one, out of a number of conspirators, levy the forces, this is treason in all.¹⁰ And concealment, if united with circumstances which imply approbation of the proceeding, will raise an equal presumption.¹¹ It is, however, a question for the jury. An attendance at more than one meeting would, probably, be pregnant evidence of approval, whilst a casual visit at a house where such discussions were

¹ East, P. C. 60.

² *R. v. The Earl of Essex*, Kel. 21.

³ *R. v. The Earls of Essex and Southampton*, Mo. 620. *R. v. Harding*, 2 Vent. 315; East, P. C. 59.

⁴ *R. v. Sir John Friend*, 4 St. Tr. 606, vol. 13 of Howell.

⁵ *R. v. Sir Wm. Parkyn*, 4 St. Tr. 651; Treby, C. J.; Kel. 21.

⁶ *R. v. Lord Preston*, 4 St. Tr. 448, vol. 12 of Howell.

⁷ The prince regent was protected by 57 Geo. 3, c. 6.

⁸ *R. v. Friend*, Kel. 20; Holt, Ca. 681.

⁹ *R. v. Somerville*, 1 And. 104. See Id. 109; Kel. 21.

¹⁰ *R. v. Throckmorton*, Dy. 98.

¹¹ 1 Hawk. P. C. c. 20, s. 3; Kel. 21.

going on could by no means, independently of other circumstances, be connected with a guilty motive.¹ Although, in this latter case, it would become the duty of the individual to make an immediate discovery. Then, *a fortiori*, if the respective acts we have alluded to be treason, *i.e.*, imagining the king's death, &c., the procuring of weapons, ammunition, or other instruments for effecting the traitorous purpose, will be within the 25 Ed. 3, c. 25, and 36 Geo. 3, c. 7.²

Meeting in a warlike manner, enlisting, marching, with many other such movements, may be overt acts of this species of treason. This would be levying war within the realm. And the realm comprehends the narrow seas and Wales. Treasons committed in Scotland are provided for by 4 Jac. 1, c. 1³ and 7 Jac. 1, c. 1, and in Ireland by 39 & 40 Geo. 3, c. 67. The Isles of Man, Jersey, Guernsey, Sark, and Alderney, though parcel of the dominions of the crown, are not within the realm. And, therefore, enlisting men here to send over sea to assist the enemy was held not to be within the clauses as to levying war.⁴ The levying of war is, for the most part, a question of fact for the jury under the particular circumstances of each case.⁵ Where a person having a commission from the French king set out on a cruise, and surrounded a ship twice with guns and blunderbusses, it was considered to be strong evidence of a design to levy war, and so the jury found it.⁶ And it seems to be well understood, that there may be levying war without fighting.⁷ And, as we have seen in the case of compassing, it is no excuse to affirm that no harm was intended to the person of royalty,⁸ for the gravamen of the charge is the attack upon the office and authority of the sovereign. Moreover, this actual levying may be either offensive or defensive, for he who holds a place of strength against the king, or fortifies his own house with a similar intent, has evidently a will to act offensively as soon as he can, not to mention the positive resistance which he has prepared to make in case of an assault.⁹ Thus, Lord Essex, by fortifying his house and riding into London armed, and soliciting the citizens as he went, to join him, was guilty of two overt acts of treason.¹⁰ But it has been questioned whether barely detaining the king's castles or ships would be within the 25 Ed. 3. Lord Hale is of opinion, that this is not a levying of war,¹¹ and Foster, J., although he admits that such a detainer, if done in confederacy with enemies or rebels, would be treasonable, nevertheless does not deny Lord Hale's position. Although he adds, that if a fort be delivered up by treachery, and in combination with enemies, it is treason.¹² On the other hand, Sir Edward East

¹ East, P. C. 59.

² Id. 58; 1 Hawk. P. C. c. 17, s. 23.

³ Art. VIII.

⁴ *R. v. Harding*, 2 Vent. 315. See *post*, S. C.; 1 East, P. C. 76, 77.

⁵ East, P. C. 67.

⁶ *R. v. Captain Vaughan*, 5 St. Tr. 17, vol. 15 of Howell.

⁷ 1 Salk. 635.

⁸ 1 Hale, P. C. 145.

⁹ Id. 146.

¹⁰ Mo. 621.

¹¹ 1 Hale, P. C. 146.

¹² Fost. Cr. L. 219.

insists that the bare detainer is a holding against the king, "which is," he says, "as much an act of hostility and a throwing off of the allegiance due to him, as any of the ordinary preparations of war are admitted to fall within the description of levying war, though no act of force has been in fact exerted."¹ It is said, indeed, that "a conspiring to levy war in order to dethrone the king, which is the civil death of the king, is an overt act to prove the compassing the death of the king. But (that) a conspiring to levy war generally, is not an overt act to prove the compassing the death of the king, because there may be such a levying war as may be treasonable without any intention of deposing the king."² However, under the Act of 11 & 12 Vict. c. 12, the mere conspiring in such a case, not being a conspiracy to destroy the monarch, or to harm him, is, as we have seen, felony, and not treason.

Upon the trial of Frost, it was held that a mere demonstration to the magistracy of the strength of a particular party, in order to obtain the liberation of some prisoners, or to mitigate their sentence, was not treason. But, if added to that, other objects should appear, such as an attack upon the military, or the taking of a town, overt acts of treason would be manifest. That would be an insurrection accompanied by force; it would be of a general nature, which is a necessary ingredient in levying a war of a treasonable character, and an entry into a town under such circumstances would make the leader and his associates traitors.³ Again, to render aid to rebels, whether by active interference or private subsidy, is an act of treason. The proofs against Sir John Wedderburn were, that the Pretender's son appointed him collector of excise, and that he collected that impost for the use of the rebel army, and these were held sufficient.⁴ So, if arms and ammunition be forwarded to traitors, although such arms may be intercepted, the same rule will apply.⁵ So, again, sending intelligence to rebels is an overt act of levying war, and it is no answer to say that the treasonable communication never reached its destination.⁶

An idea, however, naturally occurs here, that an alliance with rebels may arise from necessity; for example, from a sense of personal danger, or from an apprehension of losing property, and it may be suggested, that the accused may not be privy to the traitorous designs. Yet with reference to the latter point, it seems, that the least signal of approval or of union with the rebels will go far to fix guilt on the parties present, and it will be for the jury particularly to decide on this point. Although, if there be a tumult in the street, which, in reality is the inception of an overt act of conspiracy, and persons, not privy to the plot, suddenly join, fling up their hats, and halloo,—these latter shall

¹ East, P. C. 69.

² *R. v. Darrel*, 10 Mod. 322.

³ *R. v. Frost*, 9 C. & P. 129.

⁴ Fost. Cr. L. 22.

⁵ East, P. C. 72.

⁶ *R. v. Gregg*, 10 St. Tr. App. 77.

receive a lenient consideration, and shall not be held answerable for more than a riot, unless they proceed to greater lengths.¹

As to personal fear: where the individual is menaced by death, or the dread of serious violence to himself, or perhaps to a near relative, he may rest his defence upon such a compulsion, as long as he remains under it. But he should be in a condition to show the continuance of the coercion, although Mr. Justice Foster adds, "I will not say that he is obliged to account for every day, week, or month."² And it will be a question for the jury whether he could at any time have conveniently effected his escape, or whether he was under so narrow a watch as to make his retreat dangerous. For it is not to be understood that the fear of present death must always operate in order to furnish an excuse; it is enough if, upon the whole, the party may be presumed to have remained amongst the rebels against his will.³ And supposing the accused to be an officer, a fact which raises a greater presumption against him than if he were a private man, the jury will be the proper judges of his willingness or reluctance to act upon the commission tendered him.⁴ The payment of contribution to traitors, in order to prevent the plunder of the country at large, is said to be excusable.⁵ Here, again, however, the apology has its limit, for no apprehension of damage to private property, nor of individual robbery, will serve as an answer to joining the rebel force, though such a circumstance may have its weight after the verdict. Several cases of this kind occurred during the rebellion of 1746. As where the threat was that houses should be burned, and the cattle of the tenants driven off, unless they would follow the rebel Duke of Perth, and the great power of the Scotch lords was earnestly urged. But by Lee, C. J., there is no tenure which obliges tenants to follow their lords into rebellion, and the prisoner was convicted.⁶ Sir Edward East observes also that even the compulsion or fear which operates to excuse will not apply to any other treason than that of joining with rebels or enemies.⁷ So that Axtell's plea of obedience to his superior officer, and so one of compulsion, availed him in nowise, because he was bound to disregard the command of a traitorous superior.⁸ And it is not an excuse upon a charge of murder to assert that if A., the accused, had not killed B., C. would not have immediately put A. to death.

However, besides the positive hostility demonstrated by the treason of levying war, there is an indirect or constructive levying of war. Whatever may have been the propriety of entertaining such a doctrine (and there have been able writers who have made it a matter of question), it is settled, that a general rising for the

¹ 1 Hawk. 91. See also 1 East, P. C. 66.

² Fost. Cr. L. 216.

³ *R. v. The Accomplices of Sir John Oldcastle*, Fost. Cr. L. 217; 1 Hale, P. C. 50.

⁴ *R. v. Gordon*, East, P. C. 71.

⁵ Id. 72.

⁶ *R. v. M'Grouther*, 1 Fost. Cr. L. 13.

⁷ East, P. C. 71.

⁸ Fost. 13.

purpose of redressing all grievances of a certain kind, or satisfying some private ill-will by a general vengeance, will amount to high treason.¹ Although it must be confessed, that the doctrine in question would be looked upon at the present day with coldness.

Consequently, a local or partial insurrection, however formidable, and even if attended with all the ensigns of military parade, will not create this serious offence if the purpose be merely limited to the destruction or removal of some one object of particular dislike. Even a general commotion (if it were possible) in order to suppress a particular market, or prostrate an inclosure, or abate a nuisance, would not be treasonable. Whilst, on the other hand, a rising, comparatively far less general, would suffice if the aims of the rioters were directed against measures of a public nature. Thus, where people in Yorkshire and Northumberland were determined to resist the militia law, and stirred up a riot for that purpose, they were convicted of treason, because their purpose was indirectly to weaken the power of the sovereign by disregarding his ordinances.² So where a rabble went to Lambeth to surprise Archbishop Laud, who was a privy councillor, because of some measures which the king had adopted, at the instigation, as it was supposed, of the archbishop, it was held to be treason, as being a violent attempt to depress the kingly authority in the person of his privy councillor.³ So to rescue a party imprisoned upon a charge of high treason, and *à fortiori* if convicted, is high treason.⁴ So an attempt by intimidation and violence to obtain the repeal of a law was deemed high treason before the passing of the 36 Geo. 3, c. 7, which made that act a substantive offence.⁵ And notwithstanding the 11 Vict. c. 12, a similar attempt attended with violence would be deemed an attempt against the person of the sovereign, and, consequently, treason. Again, although the riot be unconnected with matters relating to the government, yet if it should embrace in its alleged purpose a general abolition of certain property which has given dissatisfaction, the crime of constructive levying of war will have been committed. As where, in 1675, the weavers destroyed the engine looms which caused ribands to be made at a much cheaper rate, because one man could do as much in one day with, as twenty men could without them. Here it was held, by five judges, that as the object was the destruction of all the looms, and not in one county only, but in several, the prisoners were guilty of treason. Five judges, however, were of the contrary opinion.⁶ So where a

¹ Poph. 122.

² East, P. C. 73.

³ *R. v. Benstead*, Cro. Car. 583; East, P. C. 73.

⁴ 2 Hawk. 267.

⁵ *R. v. Lord George Gordon*, 2 Dougl. 591; East, P. C. 60. *R. v. Hardy, Tooke, and others*.

⁶ *R. v. The Apprentices*, 1 Hale, P. C. 143; absent, Windham and Atkins, JJ.; 2 And. 4; see Id. 66. The case of inclosures under the statute 13 Eliz., now expired, Poph. 122.

mob assembled in order to pull down all bawdy-houses, the same rule was adopted.¹ But two persons who were found by the special verdict not to have done any forcible act, but who were merely stated to have been present, were discharged.² So to set a price upon victuals,³ to conspire generally for the advance of wages,⁴ to rescue all soldiers from prison,⁵ together with other acts of a similar description, are treasonable deeds. So where there was a rising with the avowed intention of destroying all meeting houses, the same doctrine prevailed, for first, the offence was in defiance of the law, and so within the rule in *Kelyng*; and secondly, as Protestant dissenters were under the protection of the law since the Toleration Act, the insurrection was considered a public declaration of the rabble against the Act.⁶ And with respect to Purchase, all the judges except three, held, that although he was not concerned in the original rising, yet that his encouragement of the mob, his assaulting the commanding officer with his drawn sword, and striking several of the horses with the same weapon, were sufficient to warrant his conviction.⁷ The three dissenting judges⁸ considered him to be not guilty of treason, because it had not been expressly found that he was aiding and assisting or present at the demolition of any meeting house, though they agreed that when Purchase joined the mob, the acts of treason were in continuance.⁹ But where a mob at Norwich rose in consequence of the high price of provisions, and did many acts of damage, Wilmot, C. J., observed that they had not committed treason. There was, said the learned judge, no universality of purpose to destroy, a circumstance which distinguishes a rebellious from a common mob.¹⁰

Adhering to the king's enemies in his realm, and aiding them in the realm or elsewhere.] In *R. v. Harding* we have seen¹¹ that enlisting persons here to serve abroad is not within the clause of 25 Ed. 3 against levying war. But it was held that such conduct was adhering to the king's enemies, and an overt act of compassing the king's death, and the prisoner was executed; and Lord Preston, who was taken within the realm with treasonable papers, was charged upon the breach of the statute 25 Ed. 3, as well as with levying war, the traitorous correspondence being laid as an overt act of each species of treason.¹²

¹ *R. v. Messenger and others*, by eleven judges, *diss.* Hall, C. B. Kel. 70.

² *Id.* 79.

³ Poph. 122.

⁴ 1 Hale, P. C. 153.

⁵ 2 Ventr. 251, per Hale, C. J.

⁶ *R. v. Damaree and Purchase*, Fost. Cr. L. 213.

⁷ *Id.* 217.

⁸ Trevor, C. J., Powell, J., Price, B.

⁹ East, P. C. 75.

¹⁰ *Drinkwater v. London Assurance*, 2 Wils. 363.

¹¹ *Ante*, 2 Ventr. 315.

¹² Fost. Cr. L. 198. *R. v. Gregg*, 1 Burr. 640; by Lord Mansfield in *R. v. Hensey*.

The test of adherence is any aid or assistance given to the enemy, whether it be by surrendering a castle, or selling arms, or cruising for the purpose of destroying the king's subjects,¹ by carrying off or destroying the king's stores in conjunction with enemies, or giving intelligence to the enemy how to shape their defence or attacks:² all these are acts of treason, although it was once ingeniously urged that to advise a foreign enemy against an invasion by representing the improbability of success, could not be considered treasonable, but rather praiseworthy than otherwise. The court, however, directed the jury to form a judgment as to the intent, because notwithstanding that the intelligence might be beneficial, yet if it tended to assist the enemy, the act of treason would be accomplished.³ So if persons living abroad in time of peace were to assist the enemy in case of a rupture, they would come within the latter part of this clause, and if they should refuse to return home upon privy seal or proclamation, their neglect might be evidence of aid and comfort to the enemy.⁴ But a refusal to render assistance to the king is not like an active agency in opposition to him, and therefore, although a high misdemeanor, it is not within the clause of adhering.⁵

By 2 & 3 Ann. c. 20, s. 34, it is made treason for any officer or soldier out of England, or upon the sea, to hold correspondence with any rebel or enemy, by letters, messages, signs, tokens, or otherwise, or to enter into any condition with enemies without authority. It is, however, not an offence within the statutes of treason to give succour to a rebel *qua* rebel, and not enemy, out of the realm, for the law in this respect is construed strictly.⁶

Compassing the death of the queen or of her eldest son and heir.] Upon this clause Lord Hale observes, that the queen contemplated by the statute must be a queen consort.⁷ Therefore a divorce *à mensâ et thoro* will take the case out of the statute.⁸ So will a divorce *à vinculo matrimonii causâ affinitatis*; and Lord Hale adds, that the case of such a divorce *causâ adulterii*, need not be put, because in that case the queen herself would have committed high treason.⁹ And a queen dowager is not within the Act.¹⁰ As to the eldest son and heir, Sir Edward East, citing from Hale, lays it down that these words include "second born son after the death of the elder, and the like of the rest."¹¹ And if the king should marry again, so that the surviving son would be neither eldest in point of

¹ *R. v. Vaughan*, [cruising,] 1 Hawk. 91; 5 St. Tr. 37, vol. 15 of Howell. *R. v. Evans*, [cruising,] East, P. C. 80.

² *R. v. Stone*, 6 St. Tr. 27, vol. 25 of Howell.

³ *Id.*

⁴ East, P. C. 80, 81; and see 1 Hale, P. C. 165, 167.

⁵ See 1 Hawk. 149; East, P. C. 80.

⁶ 1 Hawk. 92.

⁷ 1 Hale, P. C. 124.

⁸ East, P. C. 64.

⁹ 1 Hale, P. C. 124.

¹⁰ *Id.*

¹¹ East, P. C. 64.

birth nor the son of the new queen, still he is the eldest son within the statute 25 Ed. 3.¹ And it would seem probable that the eldest son of the prince, after the death of his father, might be the king's eldest son within the Act.² And so again the eldest son of a queen regnant is certainly included.³ But not a collateral heir apparent,⁴ nor the eldest daughter, although there be no son, for a son may be after born,⁵ unless indeed there be a special provision for that purpose by an Act of parliament.⁶ With reference to the compassing, this distinction is taken. The king is above the coercion of the law, but the queen and prince are subjects of the crown, so that to compass the imprisonment of the queen or prince for a lawful purpose, is not treason.⁷ So that such an act must be where a man without due process of law expressly compasseth the wounding or death of these personages by force or poison.⁸

Violating the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir.] As to the queen, it seems that these words do not extend to a queen dowager, nor to a princess dowager,⁹ nor to the eldest daughter, if a widow,¹⁰ nor to the princess consort after the coverture.¹¹ But an eldest surviving daughter is within the Act, though there be sons,¹² and the eldest son and daughter of a queen regnant are within the same provision.¹³

Killing the king's officers.] By 25 Ed. 3, st. 5, c. 2, if a man slay the chancellor, treasurer, or the king's justices of one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places, doing their offices, he shall be guilty of high treason. The barons of the Exchequer are said to be virtually included here.¹⁴ And so the lord keeper of the great seal when there is no chancellor.¹⁵ And the lord commissioners of the great seal.¹⁶ But not justices of the peace.¹⁷ By 7 Ann. c. 21, s. 8, a similar protection is given to the lords of sessions or justiciary of Scotland during the exercise of their offices. It is to be remarked, that a mere striking or wounding is not within the Act.¹⁸ Although the offender is guilty of a

¹ 1 Hale, P. C. 125.

² 1 Hale, P. C. 125, 126, 129.

³ East, P. C. 64.

⁴ 1 Hale, 125.

⁵ Id. 126.

⁶ Id. 125; East, P. C. 64.

⁷ 1 Hale, P. C. 127.

⁸ Id. 128.

⁹ East, P. C. 65.

¹⁰ Id. Lord Hale makes a qu. ? P. C. 128, but concludes against the widow, 129.

¹¹ East, P. C. 65.

¹² 1 Hale, P. C. 129.

¹³ East, P. C. 65; and see 1 Hawk. 89.

¹⁴ East, P. C. 88; 4 Com. 84, *contra*. See 1 Hale, P. C. 231.

¹⁵ 1 Hale, P. C. 231.

¹⁶ See 1 Wm. & M. sess. 1, c. 21.

¹⁷ 1 Hale, P. C. 231.

¹⁸ 3 Inst. 18.

very great crime and would be punished, as in a case of wounding. And the violence must be done while the officers are in the execution of their duty, which, in the case of the chancellor, is construed to be whenever the seal is open, whether in the Court of Chancery or in his own house.¹ And the same rule would seem to apply to the judges sitting in chambers, but the opinions of the most eminent lawyers appear to unite in limiting this provision of the statute to courts. Thus, Lord Coke says, that this killing is treason, because sitting judicially in their places (that is, in the king's courts), these officers represent the king's person.² And Lord Hale doubts expressly whether the lord treasurer, sitting in his house for the dispatch of business, can be said to be in his place.³ Lastly, it is added by Coke, that the Act extends only to the persons particularly named,⁴ not even to the High Court of Parliament, nor to the Court of the Admiralty, nor to any other, indeed, than those described. It is "*casus omissus*" in all other instances.⁵ If several conspire to kill one of these officers, and one only of them slays, it is treason in all.⁶

Of the indictments under 25 Ed. 3, st. 5, c. 2.] The indictments under these sections are as follow :—That A., being a subject of our lady the queen, on, &c., and on divers other days and times, did, together with divers other persons, whose names are at present unknown to the jurors aforesaid, traitorously compass and imagine the death of our said lady the queen, and the said traitorous compassing, &c. did then traitorously express and declare by divers overt acts hereinafter mentioned, that is to say, in order to fulfil, &c. his said most wicked treason and treasonable compassing, &c., he, the said A. did, and the said several persons aforesaid traitorously did, meet and consult together [set out the overt acts], contrary to the duty of his allegiance, against the form, &c., and against the peace, &c.

Second count :—And the jurors, &c., that A. being a subject, &c. on, &c., together with, &c., did traitorously compass, imagine, invent, devise, and intend the death [imprisonment] of our said lady the queen, and the said traitorous compassing, &c. did then traitorously express, &c. by divers overt acts hereinafter mentioned, that is to say [state the overt acts], contrary, &c.

A count for levying war is similarly framed. It states, amongst other things, that the prisoner came with a multitude, armed and arrayed in a warlike manner, and levied war.⁷

An indictment for adhering to the king's enemies sets out, that an open and public war was carried out between his majesty and

¹ East, P. C. 88 ; 1 Hale, 232.

² 3 Inst. 18.

³ 1 Hale, P. C. 232.

⁴ Except where special provisions have included other officers, as we have just seen.

⁵ 1 Hale, P. C. 230.

⁶ Id.

⁷ Stark. Cr. Pl. 380 ; East, P. C. 116.

another monarch, and that the prisoner, being a subject, and withdrawing his allegiance, and intending to aid and assist the monarch aforesaid, being an enemy to the king, was maliciously and traitorously adhering to and aiding and comforting that monarch, and that in the prosecution of his treason he did (the overt acts set out in the indictment), contrary to the duty of his allegiance, &c.

Time and place.] The day laid is not material, provided the treason be proved to have been committed before the finding of the bill.¹ And as to the place, it is necessary to lay it within the county where the trial is had.² We have seen above that the overt acts should be carefully set out. It would not suffice to allege, generally, that the prisoner compassed the king's death, or levied war, &c. Such a charge would be too uncertain. It is to the overt acts that the prisoner must lend his attention, for they constitute the real charges against him.³ But where the indictment charged that P. and D., with a multitude of 500, to the jury unknown, armed and arrayed in a warlike manner, with clubs and staves, and other arms, offensive and defensive, levied war against the queen, it was held sufficient, because levying war is of itself an overt act of treason, and it did appear in the indictment, that war had actually been levied.⁴ So to state that certain parties met and proposed the king's death will be good, without particularizing the means.⁵ And further, one species of treason may be laid and proved as an overt act of another, as if upon a charge of compassing the king's death, the overt act were to express a levying of war, or adhering to enemies. It is therefore enough to add something explanatory of the general charge of treason, the more correct and safe course of doing which is by setting out overt acts, although, as in the case of *Purchase*, it may, under certain circumstances, be done otherwise.

So that it is not by any means necessary to enter into a full detail of the proofs intended to be offered. The statute of 7 & 8 Will. 3, c. 3, does not require the statement of any facts in addition to those necessary to the support of the charge before that Act passed, and, therefore, a reasonable certainty, so as to apprise the prisoner of the accusation against him, will satisfy the ends of justice.⁶ To illustrate this point, it may be added that where the treason consists in correspondence or in declarations, the substance and purport only of the letters or declarations need be mentioned.⁷ And, in charging a traitorous correspondence beyond the seas, it is proper to allege that the letters were sent from the place where

¹ *R. v. Townley*, Fost. 8. *R. v. Lord Balmerino*, Id. 9.

² East, P. C. 125.

³ East, P. C. 116.

⁴ *R. v. Purchase*, Id.

⁵ *R. v. Rookwood*, 4 St. Tr. 696, vol. 13 of Howell.

⁶ See East, P. C. 121.

⁷ Id. 123, citing *R. v. Coleman*, 2 St. Tr. 661. *R. v. Lord Preston*,

4 St. Tr. 411, vol. 12 of Howell.

R. v. Francia, 6 St. Tr. 93. *R. v.*

Laver, Id. 330, vol. 16 of Howell.

the venue is laid, in order that they should be delivered abroad to the enemy.¹

The treason itself should be laid to have been done traitorously, but it is not necessary to lay every overt act to have been so prosecuted.² But "seditiously" will not be good without "traitorously," and, indeed, the former word is inapplicable, And it is usual to conclude, "against the duty of his allegiance," although some have been of opinion that the omission of these words would not be fatal where the treason is declared by statute.³ And it is agreed that the general word "allegiance" is better than to use the expression "natural allegiance,"⁴ for it includes any kind of allegiance, and, in the case of an alien, the introduction of the word "natural" might embarrass the indictment.⁵ Sir Edward East considers that the word "natural" might be rejected as surplusage.⁶

It is competent for the court to allow the withdrawal of the plea of not guilty, and to suffer a plea of guilty to be recorded,⁷ and, by special mandate from the crown, the attorney-general may come and confess the truth of a plea of not guilty, upon which the prisoner will, probably, be discharged.⁸

Copy of indictment, &c.] A copy of the indictment and a list of the witnesses and jurors must be delivered to the prisoner.

By 7 & 8 Will. 3, c. 3, s. 1, and 7 Ann. c. 21, s. 11, every person who shall be accused and indicted for high treason causing corruption of blood, or for misprision of any such treason, shall have a true copy of the whole indictment, and of the jury, also a list of the witnesses that shall be produced on the trial (mentioning the names, profession, and place of abode of the said witnesses and jurors), delivered to him ten days at least before the trial, in the presence of two or more credible witnesses, whereby to enable him to advise with counsel thereupon, to plead and make his defence, paying a sum not exceeding 5s. for the copy; and every such person so accused and indicted, arraigned or tried, for any such treason or misprision, shall be received and admitted to make his full defence by counsel,⁹ and to make any proof that he can produce by lawful witness, who shall then be upon oath, for his defence; and in case any person so accused or indicted shall desire counsel, the court before whom such person shall be tried, or some judge of that court, shall and is hereby authorized and required, immediately upon his request,

¹ *R. v. Dr. Hensey*, 1 Burr. 646.

² East, P. C. 116.

³ See 1 Hawk. 86. *R. v. Jackson*, 4 Mod. 166; 12 Mod. 51; 1 Ld. Raym. 1.

⁴ Fost. Cr. L. 186.

⁵ *R. v. Cranburn*, Fost. Cr. L. 186; 1 Salk. 633.

⁶ East, P. C. 115.

⁷ *R. v. Knightly*, Holt's Ca. 398.

⁸ *R. v. Lady Oglethorpe*, 11 Mod. 114.

⁹ All of whom may address the jury. *R. v. Collins*, 5 C. & P. 305. *R. v. Atkins*, Id. 310. And *R. v. Brunt* was cited.

to assign to such person such and so many counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours.

And further, by 6 Geo. 4, c. 50, s. 21, and 7 & 8 Will. 3, c. 3, s. 7, when any person is indicted for treason or misprision of treason, in any court other than the Court of Queen's Bench, a list of the petit jury, mentioning the names, profession, and place of abode of the jurors, shall be given at the same time that the copy of the indictment is delivered to the party indicted, which shall be ten days before the arraignment, and in the presence of two or more credible witnesses; and when any person is indicted for treason or misprision of treason in the Court of Queen's Bench, a copy of the indictment shall be delivered within the time and in the manner aforesaid; but the list of the petit jury, made out as aforesaid, may be delivered to the party indicted at any time after the arraignment, so as the same be delivered ten days before the day of trial.

The stat. 7 Ann. c. 21, s. 11, was extended to Ireland in consequence of the case of *R. v. O'Brien*, and the decision in the House of Lords.¹

Witnesses.] It is a rule founded upon various Acts of the legislature,² that there must be two witnesses in order to warrant a conviction, "or unless the party shall without violence confess the same."³ The statute of William requires these two witnesses in all cases of treason attended with corruption of blood, and misprision, and either or both may testify to the same overt act, or one of them to one, and the other of them to another overt act of the same treason.⁴ This law was laid down by the judges before the passing of the 7 Will. 3, c. 3.⁵ Assassination, or attempts against the life of the sovereign, are always excepted.⁶ But if two or more distinct species of treasons be alleged in the same indictment, one witness to prove one treason, and another to prove another, shall not be deemed to be two witnesses to the same treason within the Act.⁷ Still, according to the statute, two witnesses to the same overt act of the same treason will suffice.⁸ And the witnesses are not confined to overt acts done in the county where the trial is had, or, under a special commission, where the overt acts are laid. Certainly one overt act must be proved in such a county, because it is the foundation of the charge before the grand jury, but this

¹ 17 & 18 Vict. c. 26. *O'Brien v. Reg.* 2 H. L. Ca. 465; Taylor on Evidence, 1109.

² 1 Edw. 6, c. 12, s. 22; 5 & 6 Edw. 6, c. 11, s. 12; 7 & 8 Will. 3, c. 3, s. 2. This last rule, *i. e.*, distributing the testimony, was insisted upon for the first time by Sir T. Widdington for the prosecu-

tion in *R. v. Love*, Fost. Cr. L. 235.

³ Statutes of Edw. 6, *ut supra*.

⁴ The exceptions are, confession, standing mute, or challenge beyond thirty-five. 7 Will. 3, c. 3, s. 2.

⁵ East, P. C. 129.

⁶ 57 Geo. 3, c. 6, s. 4.

⁷ 7 Will. 3, c. 3, s. 4.

⁸ East, P. C. 130.

being done, another witness may prove another overt act of the same species of treason in another county,¹ and this even if such overt act last mentioned be not laid in the indictment, provided it tend to the proof of the overt acts which were laid.² And any fact necessary to the support of the indictment, as that the party is a natural born subject, which is a collateral circumstance, and not an overt act, may be proved by one witness.³ It seems, that as under 39 & 40 Geo. 3, c. 93, and 5 & 6 Vict. c. 51, the trial is to take place as in cases of murder, one witness only would be sufficient. But Sir Edward East remarks, that the right of two witnesses rests as well upon 1 Ed. 6, c. 12, and 5 & 6 Ed. 6, c. 11, as upon 7 Will. 3, c. 3, and that the statute 1 & 2 Ph. & M. c. 10, which ordained the trial of treasons according to the common law, did not repeal the Acts of Edward, but, on the contrary, went to restore the common-law trial in the proper county, together with the peremptory challenge of thirty-five.⁴ Whence he would infer, that the 39 & 40 Geo. 3, c. 93, by neglecting to exclude the statute of Ed. 6, had failed to accomplish the purpose intended, that is, to restrict the proof to one witness. However, the principal point in difference upon the statute of William above referred to relates to the confession. The words are, "Unless the prisoner shall, willingly and without violence, [in open court,] confess the same." It has occurred to those who from time to time have been intrusted with the defence of unfortunate men charged with treason, that a confession made out of court ought not to be received in court as in cases of felony, although two witnesses might be called to give evidence of such confession. In the case of *Willis*, who was acquitted, Ward, C. B., much inclined to the objection, observing, at the same time, that if the treason were proved by two witnesses *aliunde*, the confession should not be excluded.⁵ And Lord Hale says expressly, that the examination of a prisoner before a magistrate in a case of treason is not allowable in evidence, inasmuch as the statute requires two witnesses to be produced upon the arraignment.⁶ And upon another occasion, Foster, J., intimated considerable doubts as to the propriety of receiving a confession made out of court, whilst Willes, C. J., and Abney, J., considered that such a confession, deposed to by two witnesses, would be receivable.⁷ Whence it seems to follow that one witness to an overt act, and one to prove a confession to the same overt act, or of any other overt act, would not be sufficient

¹ *R. v. Deacon*, by Abney and *Smith*, East, P. C. 130; Fost. Foster, JJ., Fost. Cr. L. 10; East, Cr. L. 242.

² *R. v. Deacon*, Fost. 9, 10; and 1 Salk. 634. *R. v. Garan*, 2 St. Tr. 873. *R. v. Jellias*, East, P. C. 130. *R. v. Layer*, 6 State Trials, 314, vol. 16 of Howell. ⁴ East, P. C. 128. ⁵ 8 State Trials, 255, vol. 15 of Howell. *R. v. Crossfield*, 26 Howell's State Trials, 55; Taylor on Evidence, 714.

³ *R. v. Vaughan*, 5 State Trials, 38, vol. 15 of Howell. *R. v. see Id.* 240, 244. ⁶ 1 Hale, P. C. 306. ⁷ *R. v. Berwick*, Fost. 10 And

to warrant a conviction. For the confession would, upon such an occasion, be like another species of treason, that is to say, it would be a matter so foreign to the ordinary mode of proving overt acts as to come within the same rule. Nevertheless, the judges had agreed in 1716 that this doctrine of admitting confessions made out of court was sound.¹ And in *R. v. Gregg*, a considerable majority had sanctioned a similar conclusion.² And the only difference which the case of *Francia* seems to have introduced was, that by the old ruling the confession ought to have been made before a justice, or some one in authority, whereas in that case it was decided that such a confession might be proved by two witnesses, even although it had been communicated to a private person. Therefore, we may conclude that confessions are now governed by the same rules in treason as in felony, provided that more than one witness is brought forward to substantiate them. And with respect to the confirmation of an accomplice, persons who give information upon repentance, or with an original design to detect the conspiracy, are not to be looked upon in that light, although their evidence may be viewed with some degree of disfavour.³ A promise of pardon will not disqualify a witness from giving his evidence in a case of high treason.⁴

Limitation of time.] By 7 Will. 3, c. 3, s. 5, no person shall be prosecuted for treason, or misprision, unless the indictment be found by a grand jury within three years next after the treason done or committed. Unless by sect. 6, he be guilty of designing, endeavouring, or attempting any assassination on the body of the king by poison or otherwise. In 1715, after the nomination of the special commission in England, another special commission was sent into Scotland for the purpose of finding bills of indictment in the proper counties and stewartries, in order to arrest this period of limitation.⁵

Jurisdiction. Foreign treason.] The statutes of Hen. 8,⁶ provide that treasons committed out of the realm may be tried here in the Court of King's Bench, or before commissioners, as if such treasons had been committed in England. And the statute 5 & 6 Ed. 6, c. 11, s. 6, follows the same rule. Although repealed as to constructive treasons, the 26 Hen. 8, c. 13, survives as to the trial of foreign treasons.

Evidence.] The evidence to be produced in cases of treason, which must be confined to matters before the finding of the indict-

¹ *R. v. Francia*, East, P. C. 133. Trials, 489. Cited, Taylor on Ev.

² Id. 134, by Holt, C. J., and five judges. Lord Trevor, *contra*, Tracey, J., *dub.*, three absent.

³ *R. v. Despard*, 28 How. State

⁴ *R. v. Darrel*, 10 Mod. 321.

⁵ East, P. C. 109.

⁶ 26 Hen. 8, c. 13, s. 4; 35 Hen. 8, c. 2, s. 1.

ment,¹ consists either of acts or words,² and the parties against whom it is to be offered are either chief conspirators or their accomplices. For, although it is true that all are principals in treason, we shall have presently to notice some distinctions between the adviser and counsellor of a traitorous act, and the party importuned to commit the treason, the principle being how far the acts of one conspirator will bind the rest. With respect to words, the proceedings which in ancient times were not uncommon upon this score, are now nearly obsolete, although if one were to declare that he would kill the sovereign, and were to make a movement apparently tending to that purpose, as coming to London, the journey would be laid as an overt act, and the words would be tendered in evidence as explanatory of the fact; and that was the rule in an old case where the words spoken, at Lisbon, were, "I will kill the King of England if I can come to him." The coming over was charged as an overt act.³ This doctrine seems still sound, but there has been a considerable difference of opinion as to bare words, and since the temper of moderate times would bear strongly against a severe construction of words referable to treason, perhaps it may be sufficient merely to refer to the text writers upon that point,⁴ although it had been long considered that words, unless they related to a treasonable act or design in agitation, amounted only to a misdemeanor.⁵

Still, words, a seditious speech, for example, although not set out as an overt act, may be admitted in evidence upon a charge of treason.⁶ If one overt act be well laid and proved it will be sufficient. It is no objection to say, that part of the allegations of the treason is ill-stated, if proof be had of the principal features of the transaction. In such a case the rest would be surplusage.⁷ And we have seen, that if an overt act be proved in the county where the prisoner is tried, it is competent to go into the investigation of similar acts in any other county.⁸ And the acts of one conspirator are evidence against all.⁹

By 7 Will. 3, c. 3, s. 8, no evidence shall be given of any overt act not laid in the indictment. Not that a circumstance which is of itself an overt act must be excluded if it tend directly to prove an overt act well laid, but that an independent overt act, even although it relate to the same species of treason charged, shall not be brought forward unless it be laid in the indictment. Upon a charge of compassing the king's death it was deemed quite competent to give a list of names in evidence, the prisoner's name being at the head of the list as commander, although the fact did

¹ *R. v. Charnock*, Holt's Ca. 301. *R. v. Alcocke*, 1 Keb. 231.

² *R. v. Perkins*, Holt's Ca. 683.

³ *R. v. Crohagan*, Cro. Car. 332; Fost. Cr. L. 202.

⁴ 1 Hale, P. C. 111; 1 Hawk. 93; East, P. C. 117; 4 Com. 79.

⁵ *R. v. Pine*, Cro. Car. 117.

⁶ *R. v. Watson*, 2 Stark. 132.

⁷ East, P. C. 124.

⁸ *Ante*.

⁹ *R. v. Stone*, 6 T. R. 527. *R. v. Hardy*, cited, Id. 528. *R. v. Tooke*, cited, Id.

not appear in the indictment, because it was good proof of an overt act to provide forty men for the purpose of killing the king, which last-mentioned overt act was laid.¹ But an overt act of conspiring abroad to destroy the king, and not alleged, could not be offered to support an act of compassing here, if there were no union between the two events, although they both relate to the same species of treason. And where Captain Vaughan was accused of cruising against the king's subjects in a certain vessel, it was not permitted to be shown, that he had cut away the custom-house barge, which was another vessel, in order to go out cruising in that.² Where it was charged as an overt act that the prisoner discharged a pistol loaded with powder and a bullet at the sovereign, thereby compassing and attempting her life, the jury were directed that they need not limit themselves to the strict meaning of a bullet. Anything which might be classed with what is understood to be a bullet would satisfy the indictment. But they must be satisfied that there was something beyond powder and wadding, to make good the charge of firing a pistol loaded with powder, &c.³

The onus of proof, it will be remembered, lies on the crown. The prisoner need not explain or show the meaning of his acts, unless the crown has first laid the foundation by making these acts evidence of treason.⁴ It may be observed, that anything said or done by a conspirator in furtherance of the common object is evidence against the accused, another conspirator, whether he were present or absent.⁵

We now come to writings, and here it may be said, that there is a distinction in some cases between such as are published, and those which are found upon the parties, and especially where they have been found subsequently to the apprehension of the prisoner.⁶ Because the papers might not have been in existence at the time of the apprehension. But articles secreted, though found after the apprehension, are subject to a different rule, and the finding of such articles may be proved in evidence.⁷

If a paper unconnected with any treasonable design be discovered, although its contents may be dangerous to the throne, it will not, *per se*, be evidence to support an indictment for treason, much less will it avail as an overt act, whereas if it refer to some purpose in agitation it may actually be read against the prisoner, or be alleged as an overt act.⁸ Still, whether it may be so read only on the ground of its close connection with the conspiracy, may be a question. Seditious questions and answers, found in the possession of a conspirator but not published, were objected to as

¹ *R. v. Rookwood*, 4 State Trials, 662, vol. 13 of Howell. *R. v. Lowick*, Id. 718. *R. v. Deacon*, Fost. Cr. L. 9. *R. v. Wedderburn*, Id. 22.

² *R. v. Vaughan*, 5 State Trials, 22, vol. 15 of Howell.

³ *R. v. Oxford*, 9 C. & P. 525.

⁴ *R. v. Frost*, 9 C. & P. 129.

⁵ *R. v. Brandreth*, 32 How. State Trials, 857; Taylor on Ev. 488.

⁶ *R. v. Tooke*, Leach, 823, cited.

⁷ *R. v. Watson*, 2 Stark. 137.

⁸ See East, P. C. 119, citing several authorities, and *R. v. Sidney*.

evidence, and the attorney-general withdrew the paper, the court entertaining some doubt on the point. But they said that if any use had been designed to have been made of the paper in furtherance of the treason, there could have been no doubt.¹ And no proof of handwriting is requisite.² Where the prisoner took away twenty-five placards from a printer's, one of those remaining was allowed to be read without further proof, and without giving the prisoner notice to produce the twenty-five.³ But unpunishable as the possession of an improper writing may be in the closet, no sooner does it see the light than the very fact of publishing may be an overt act, or evidence of treason, according to circumstances. Thus if the tendency of the piece be the dethronement of the monarch, or the incitement of the people to accomplish his destruction, or to levy war against him, it is, *ipso facto*, a treasonable writing, and may be treated so and used as evidence. And so it was held when the prisoner had been active in distributing a book, containing, amongst other things, an address to the people urging them to take up arms against the king and his family.⁴ So again if the writing in question should have reference to some plot or traitorous design; here, as such a paper might be used if found unpublished, it may, *à fortiori*, be made a ground of accusation in its printed form.⁵ Thus pamphlets containing republican opinions, and distributed by the prisoner during the existence of a supposed conspiracy, were admitted in evidence.⁶ Whilst the prisoner, Horne Tooke, was permitted, on his part, to produce a book written by him and printed in 1782, which refuted the idea that every man was entitled to an equal share in the government of the country, and which was in commendation of the regal and aristocratic parts of the constitution.⁷ Although Lord Ellenborough once said, that he very much doubted whether he should, under similar circumstances, have admitted such evidence.⁸ And proof of one treasonable letter is sufficient to support an indictment for writing several such letters, in like manner as evidence of attending one traitorous consultation will satisfy a charge of assisting at more than one such.⁹ A witness may give evidence of the contents of part of a paper which he may have happened to see.¹⁰ It is not competent to require a crown witness, upon cross-examination, to state, either directly or indirectly, through what channel he made a disclosure to the government.¹¹

¹ *R. v. Watson*, 2 Stark. 141; and *R. v. Sidney* was mentioned as stronger in favour of such evidence.

² East, P. C. 119.

³ *R. v. Watson*, 2 Stark. 129.

⁴ *R. v. Twyn*, Kel. 22.

⁵ East, P. C. 119, 120.

⁶ *R. v. Hardy and others*, Id. 61.

⁷ *R. v. Hardy and others*, East, P. C. 61.

⁸ 2 Campb. 400.

⁹ See the observations of Lord Ellenborough, 2 Campb. 400.

¹⁰ Leach, 300. *R. v. Laver*, cited.

¹¹ *R. v. Watson*, 2 Stark. 135; and by Lord Ellenborough: "Lord Kenyon had decided the same in *R. v. Stone*," Id. 136.

Accomplices.] We will here advert for a moment to the law of treason as it respects accomplices. The principle is, that if it be shown satisfactorily that a treason has been committed, the act of one conspirator is evidence against all his fellows. And hence, upon such proof given, the procurer may be tried before the actor. But the union of purpose must be demonstrated. Where there had been an insurrection in the North, and another in the West Riding of Yorkshire, but each party was entirely ignorant of the purpose of the acts of the other, it was agreed that the former could not be implicated in the latter.¹ Yet it was settled at the same time that where several agree to levy war, all are guilty of treason, notwithstanding that all do not appear in arms.² In the case of the Corresponding Society, and the society for constitutional information, of which latter Horne Tooke was a member, letters addressed from similar societies in different parts of the country to the secretary of these two societies, together with the minutes of the societies last mentioned, were read as evidence of a general conspiracy. And other documentary proof of a similar nature was allowed, as well as the second part of the "Rights of Man," for which the Constitutional Society had tendered their thanks to the author—for the purpose of connecting the prisoner with the transactions of the societies.³ So, in order to connect the accused with one Jackson, a paper in the handwriting of one G., the prisoner's clerk, was permitted to be read, upon proof that it contained parts of certain papers which the prisoner had obtained from two gentlemen named Vaughan and Smith.⁴ Whilst the court rejected, on the other hand, a paper in the same handwriting, and found in the same possession, in the absence of the proof above given, for G. might have been called to show that he had written it by the direction of the prisoner.⁵ With regard to this latter paper, Sir Edward East observes, that if it had appeared to have related to the conspiracy in question, it must have undergone, in that stage of the trial, a different consideration.⁶

The prosecutor may either prove the conspiracy which makes the acts of conspirators evidence, or he may prove the acts of the parties separately, and thus elicit the conspiracy. Thus when it was shown that a party of persons had assembled, and that the prisoner joined the party on the following day, the counsel for the prosecution was allowed to ask what directions one of the party gave at the meeting, such as where they were to go, and for what purpose.⁷ An armed party having attacked an hotel, the prisoner called a witness to prove that the object of the attack was merely to obtain a surrender of certain prisoners, then in custody. Upon this the crown were allowed to call evidence in reply, to prove that

¹ East, P. C. 97.

² Id. 98.

³ Id. 98.

⁴ *R. v. Stone*, 6 T. R. 529. See

² Stark. 140. *R. v. Watson*, 5 Esp. 125.

⁵ *R. v. Stone*, 6 T. R. 529.

⁶ East, P. C. 100.

⁷ *R. v. Frost*, 9 C. & P. 149.

certain words, *i. e.* "surrender up your prisoners," were not spoken at the hotel gate.¹

Bearing in mind that a treason must be committed in order to involve one person in the guilt of another, it is impossible that the aider and abettor can be a principal unless he himself or his confederates have perpetrated some traitorous act. As if A. should solicit B. to adhere to the king's enemies, and B. do not follow the advice so given; here A. cannot be a principal in treason, because B. did not commit the proposed crime, and the suggestion is not treasonable in itself, without more. But if A. solicit B. to compass the king's death, or to levy war against him, although B. refuse to comply, A. is here a principal, inasmuch as he evidently shows, in his own person, an intent to destroy the king, which is a substantive treason, and his inciting B. is an overt act of that treason. And so if B. accede, A. may be tried before B., since the rule that in treason all are principals then applies.² But, moreover, the limitation of this maxim, *i. e.*, that all are principals, as before mentioned, is still stronger in the case of comforters after the fact. Here two things must be proved,—the commission of the treason, and the guilty knowledge of the harbourer. Consequently, if one be charged with encouraging a traitor, it will be a good defence to allege, that the principal has not been convicted,³ and it is for the crown to prove that fact in the first instance by the record. Evidence must then be produced to bring home to the defendant a guilty cognizance of the transaction, or, if both be indicted together, the jury must first be directed to inquire of the guilt of the principal.⁴ For want of this caution, the attainder of Mrs. Lisle was reversed, because, according to the recital of the Act, she was indicted for concealing J. H. "though the said J. H. was not at the time of the trial attainted nor convicted of any crime."⁵

Trial.] In speaking of the trial we have to consider treasons committed in England and Wales—in Scotland—in Ireland, or the high seas—and abroad. As to the first, *i. e.* England, we have seen, that the inquiry should take place in the county where the offence was committed, subject to the rule that where one overt act is proved in that county, evidence of acts done in a foreign country may be received, and that subject to the especial provisions of temporary statutes, which have occasionally directed trials to be had elsewhere than in such foreign country.⁶ If the court

¹ *R. v. Frost*, 9 C. & P. 159.

² *East*, P. C. 100.

³ For as there can be no accessories in high treason, the statutes concerning accessories in felony do not apply. Every treason is felony, but every felony is not treason. And thus it was that the friends of the abolition of capital punishment

had like to have made a mistake when they proposed to except the case of murder only. For some cases of treason may amount to murder, but "treason," *per se*, does not satisfy the word "murder."

⁴ 1 Hale, P. C. 238.

⁵ *Fost. Cr. L.* 346.

⁶ *Ante*.

should remove into a different county from that in which the indictment was found, the trial must still be by persons returned from the first county.¹

How the trial shall be had.] At common law the defendant in a case of treason could not make a full defence by counsel; he could not even have counsel to cross-examine the witnesses for the prosecution, much less make an address to the jury. He could not examine his own witnesses upon oath, the principal indulgence allowed him being the privilege of having points of law argued by his counsel. So strictly was this rule of denying the aid of counsel adhered to, that in the cases of *Charnock* and *Sir William Parkyns*, the court declared that counsel could not be allowed them for matters of fact, although they urged that the statute 7 Will. 3, would come into operation immediately afterwards, indeed, in *R. v. Parkyns*, the very next day after his trial, and although they, consequently, insisted upon the equity of the Act.² Again, the prisoner could not at common law have a copy of the charge against him, nor of the pannel of the jury who were to try him, but when there was a question whether the prisoner were or not the party mentioned in a record of conviction or attainder, counsel were allowed to speak for him to the jury upon the point of identity, although a copy of the record was denied.³ And notwithstanding that *R. v. Ratcliffe* was cited after the statute of William, yet the practice referred to was agreeable to the rules of the common law, which permitted the full interference of advocates upon a collateral issue. Upon another occasion where the question was, whether the prisoner was out of the realm at the time when outlawry against him was pronounced, he had four counsel assigned him, three of whom were heard on the reply, and the jury found in favour of his plea.⁴ Otherwise, the court will not allow counsel upon outlawry. The court will be the prisoner's counsel. It is upon the pointing out of some particular error that counsel will be assigned in outlawry.⁵

As to treason on the high seas, Foster, J., has laid it down that it is clearly within the operation of the statutes above mentioned, and that the only ground for hesitation would be a doubt which had been entertained without justice, *i. e.*, whether such a treason would work corruption of blood.⁶ And, lastly, as it can hardly be questioned that foreign treasons also work this disability, there seems to be a just right to conclude that persons in jeopardy on that account are likewise entitled to the same benefits.

Each prisoner has a right to two counsel, although indicted

¹ East, P. C. 103, 104. Case of the Kinloch's. See Fost. Cr. L. 15, 16. *R. v. Hay*, Id. 26.

² See 4 St. Tr. 563, 630.

³ *R. v. Ratcliffe*. See Fost. Cr. L. 40; 1 Wils. 150.

⁴ *R. v. Johnson*, Fost. Cr. L. 46.

⁵ *R. v. Lord Griffin*, 11 Mod. 168.

⁶ Fost. 226; and see East, P. C. 106.

jointly with others for the same treason.¹ The stat. 7 & 8 Will. 3, c. 3,² using the words "upon his or her request," Buller, J., doubted at the trial of Lord George Gordon, whether the prisoner himself, instead of counsel, should not have applied; but the attorney-general consented, and the motion of counsel that they might be assigned, was allowed.³ However, an application may be made to the clerk of the crown during an adjournment of the commission, between the finding of the indictment and the arraignment.⁴ Otherwise, the prisoner may apply when he comes to trial.⁵ There cannot be more than two counsel assigned. The court will not notice any assistant counsel.⁶ Nor, unless they be partners, can the prisoner have two attorneys.⁷ Speaking of counsel, it was held in a case where the subject of treason was much considered, that, before the fifteen judges, a counsel may be heard who was not assigned at the trial, because he is in the nature of *amicus curiæ*. But upon such occasions the court will not hear more than one counsel.⁸ Nevertheless upon an argument for the prisoners upon the same point, the judges will hear each case separately, unless, indeed, another arrangement be agreed upon by counsel.⁹ Upon a reply by the crown, the witness in reply was called before the second counsel for the prisoner addressed the jury, and the leading counsel for the prisoner commented upon the evidence in reply, also before the second counsel for the prisoner addressed the jury.¹⁰ Next with reference to the lists, the words, "at the same time" in 7 Ann. c. 21, s. 11, were much discussed under the following circumstances:—A bill of indictment was found by the grand jury on the 11th of December, 1839; a copy of the indictment, and a list of the jury pannel, were served on each of the prisoners personally on the 12th, in the presence of two witnesses. On the 17th of December the list of the witnesses was delivered. It was contended for the prisoner that the words, "at the same time," meant that the copy of the indictment and the two lists should be delivered simultaneously. The objection was taken after the plea of not guilty, and after the jury were sworn and charged. The first witness being called, the examination of him or of any other witness was resisted for want of the due delivery of the lists. The statutes of 7 & 8 Will. 3, c. 3, and 7 Ann.

¹ East, P. C. 111.

² Sect. 1.

³ 2 Dougl. 591, note 2.

⁴ *R. v. Frost*, 9 Car. & P. 132.

⁵ See S. C. Id.

⁶ S. C. Id. 135.

⁷ *R. v. Frost*, 9 C. & P. 132. The time for access of the attorney to the prisoner was, in this case, fixed by the court to be from the rising of the court till 10 P. M., and before the sitting of the court from

7 A. M., although the governor of the prison stated that the prison was not open for any other purpose till 7½ A. M. and was shut at 9 P. M. for the night upon other occasions. Id. 138; 2 Moo. C. C. 144. *R. v. Williams*.

⁸ 9 C. & P. 165; 2 Moo. C. C. 145.

⁹ 9 C. & P. S. C. Id.

¹⁰ 9 C. & P. 160, S. C.

c. 21, s. 11, were cited, and the Jury Act, 6 Geo. 4, c. 50, s. 21, which enacts, amongst other things, that in high treason a copy of the indictment and a list of the jurors shall be delivered at the same time, ten days before the arraignment, and in the presence of two or more credible witnesses. The crown answered that the service was a good service, and that, if not, the objection came too late. The point was reserved.¹ In the next case, however, the same objection was made before any of the jury were sworn, but the prisoner's counsel consented to the trial going on, being explicitly asked by the attorney-general whether he had any objection to that course. The objection was renewed upon the examination of the first witness, and a conversation was proved between the solicitor of the treasury and the solicitor for the prisoners, having for its object to show a kind of acquiescence on the part of the prisoners' solicitor in the separate delivery. This point was reserved.² But when the case came to be argued, the facts mentioned were not relied on as making any difference in the argument.³

The same point was raised and reserved in the case of *Jones*, the third prisoner.⁴ The discussion subsequently took place before all the judges. There were two questions: 1st, whether the statute of Anne had been complied with; 2ndly, whether the objection had been made in time. It was relied on for the prisoners that the words, "with such lists," which occur in a subsequent part of the Act 7 Ann. c. 21,⁵ made the time identical. It could not be sufficient to deliver the copy and lists ten days before the trial without mutilating the enactment. If *with* should be construed as *and*, there would be no requirement at all of the two witnesses to the delivery of the lists. *R. v. Lord George Gordon* was then cited⁶ and relied upon. The cases upon the statute of wills, where two witnesses must be present at the same time, was likewise mentioned, and the construction of statutes generally was made a point in favour of the prisoners, by reason of the strictness of such construction. The Scotch law was also introduced, but the judges did not favour its being imported into the argument before them. As to the second point, it was urged that, by the pleading, the prisoner waives any objection to the indictment by not objecting to the swearing of the jury, and he only waives the mistake as to the jury list, but that would not be a waiver to the non-delivery of the list of witnesses when the first witness should appear.⁷ The attorney-general insisted that the object of delaying the making the objection was, because had it been made earlier, the trial would have been postponed, and he observed that no pre-

¹ *R. v. Frost and others*, 2 Moo. C. C. 140; 9 C. & P. 163.

² 2 Moo. C. C. 140.

³ *Id.*

⁴ *Id.* 145.

⁵ Sect. 11.

⁶ 2 Dougl. 591. Several other cases were cited.

⁷ *R. v. Frost and others*, 2 Moo. C. C. 140, &c.

judice could have arisen to the prisoners, inasmuch as service had been made of the lists in sufficient time for them to have prepared for trial. He said that if the words of 7 Ann. c. 21, were to be taken quite literally, and the jury pannel were to be exhausted, so that the court must adjourn, the prisoner could never be tried upon the indictment then before the court. Then, secondly, an irregularity cannot be brought forward as a substantive defence at the trial. An objection to an irregularity not being taken at the earliest possible stage must be considered as waived. The crown might have been called on to prove the delivery when the prisoner was arraigned, and then the trial, before plea pleaded, might be postponed.¹

There was a considerable difference of opinion amongst the judges. Six thought the delivery of the list to the witnesses good.² Nine were of the contrary opinion.³ Six thought the objection taken in good time,⁴ but nine were of opinion that it was not so taken,⁵ and ALL thought that if it had been taken in time, the trial might have been postponed, in order to give an opportunity for a due delivery of the lists. The conviction was therefore affirmed.⁶ Previously however to this case, it had been decided that an objection to the description of a witness could not be made after the prisoner had begun to examine his witnesses. Indeed, the court said it ought to be made in the first instance, which would be when the witness was sworn for the crown, otherwise a party might take the chance of getting evidence which he liked, and if he disliked the testimony, he might then get rid of it on the ground of misdescription.⁷ The objection to the names or description being assumed to be in time, it may be observed that if a witness be designated as "lately abiding" at such a place, and it turns out upon the *voir dire* that he had a later place of residence, it is a misdescription. Lord Ellenborough said, that with reference to the time of delivering the list, the description must necessarily be as *lately*, unless the person delivering the list was actually in the place at the time, and, therefore, that the place described as the place of residence must be that which it had lately been; but that it would be proper to inquire as to the residence itself. The witness was then examined, but failing to show that he had resided lately at the place mentioned,—on the contrary, proving that his place of abode was

¹ *R. v. Frost and others*, 2 Moo. C. C. 159-169.

² Lord Denman, C. J.; Tindal, C. J.; Lord Abinger, C. B.; Bosanquet, J.; Gurney, B.; Maule, J.

³ Littledale, J.; Park, J.; Patteson, J.; Alderson, B.; Williams, J.; Coleridge, J.; Rolfe, B.; Coltman, J.; Erskine, J.

⁴ Littledale, J.; Parke, B.; Pat-

teson, J.; Williams, J.; Coleridge, J.; Erskine, J.

⁵ Lord Denman, C. J.; Tindal, C. J.; Lord Abinger, C. B.; Bosanquet, J.; Alderson, B.; Gurney, B.; Coltman, J.; Maule, J.; Rolfe, B.

⁶ *R. v. Frost and others*, 2 Moo. C. C. 170, 171.

⁷ *R. v. Watson*, 2 Stark. 158. *R. v. Frost*, 9 C. & P. 183.

elsewhere,—he was withdrawn.¹ A witness was described as “of Cross y Cylog, in the parish of L.,” but it turned out that his dwelling was at “Cross y Clog.” There were two public-houses of that name: the witness’s house was between them, and was sixty yards from each. This was held insufficient.² So, “M. J., of P., in the parish of S. W., in the county of M., sometimes residing in the house of his son, J. J., in the parish of B., in the said county.” The proposed witness used to be at his son’s house, at P., about three days in every two months, and the court said, that he was rightly described as of P. so far, but his son’s house was not in B., but in M., and that misdescription vitiated the whole.³ Again, “S. S., of the parish of S. W., in the borough of N., in the county of M., labourer.” N. formed only part of the parish of S. W., which extended beyond N. This was held not to be too general, nor a misdescription.⁴

The ten days in 7 Ann. c. 21, s. 11, must be reckoned after the finding of the bill, and before the arraignment. They must be exclusive of the day of delivery, and of the arraignment, as to the copy of the indictment, and exclusive of the day of delivery and of trial, as to the copy of the pannel.⁵ And, moreover, the precedents have been in favour of life to except an intervening Sunday, not of necessity, but as an indulgence, if time will permit, Sunday not being a day usually devoted to advising with counsel, or preparing for defence.⁶ And if the copy of the pannel should happen to be delivered before the return of the precept, which is commonly made returnable before the day of trial, it will be sufficient, since it satisfies the words of the statute.⁷

Moreover, the prisoner ought to have the caption of the indictment delivered to him with the indictment, for, says Mr. J. Foster, “this, in many cases, is as necessary to enable him to conduct himself in pleading as the other.”⁸ And this, although the statute mentions only the copy of the indictment.⁹ In *R. v. Hardy*, Eyre, C. J., remarked, that care had been taken to prevent the prisoners from being harassed with reference to the practice of the court. So that where the bill was found, it was intimated from the bench, that counsel would be assigned, upon application to the judge, thus enabling the accused to apply for counsel in the first instance, instead of being brought up on purpose to hear that the grand jury had found the bill of indictment.¹⁰ And the difference between this mode of proceeding and that in 1746 was, that in the latter case the rebels were brought up and informed of the bills which had been found against them, and were also acquainted,

¹ *R. v. Watson*, 2 Stark. 116.

² *R. v. Frost*, 9 C. & P. 150.

³ *Id.* 152.

⁴ *R. v. Frost*, 9 C. & P. 147.

⁵ East, P. C. 112; Fost. 2, 230; and see the observations of Foster, J., as to the policy of publish-

ing the names of the jury and witnesses.

⁶ Fost. C. L. 2; East, P. C. 112.

⁷ Fost. C. L. 230.

⁸ *Id.* 229.

⁹ *Id.*

¹⁰ East, P. C. 114.

at the same time, that they should have copies.¹ Whereas, in *R. v. Hardy*, the delivery of the copy of the indictment was deemed sufficient notice of the finding, and the prisoners were the sooner enabled to resort to professional advice.² So, again, copies of the depositions against prisoners will be furnished to them under the provisions of 6 & 7 Will. 4, c. 114, s. 3.³ But the prisoners will not be allowed copies of papers which have been taken from their houses, nor, indeed, will the court order such papers to be restored to them.⁴ It is not necessary to read the whole of the indictment at length to the jury. It is sufficient to state the subject of it.⁵ But if the prisoner or his counsel desire it, the court will order that it shall be slowly read.

Whilst, however, the advantages above mentioned have been secured and extended to prisoners, there has, in matters of practice, been some limit put to the indulgence, and certain facilities have also been given, by Act of parliament, to the prosecutor. Thus, with regard to the copy of the caption, where the prisoner had pleaded without demanding it, it was held that he had waived his privilege,⁶ and it would seem that his pleading admits his having a copy of the indictment itself, so that it would be no objection to allege the want of such a copy after plea, because the prisoner might not have thought it for his service to require it, and so might consider himself able to plead without it.⁷ And, by the same rule, it is then too late to object to it by reason of any defect.⁸ Upon another occasion the court refused, after conviction, to allow the *venire* to be read to the prisoner.⁹ The money taken from a prisoner charged with high treason was applied for, but the court declined to order its restoration, unless it were made clear that such money formed no part of the charge against him.¹⁰

We will now say some few words upon the subject of the juries and challenges. The challenge must be before the oath has commenced. As soon as the juror takes the book, the oath has begun, if the taking be under the direction of the officer of the court; and the same rule governs both the crown and the prisoner. Of course, if the juror should take the book without authority, the power of challenge remains.¹¹

Upon one occasion, the prisoner's counsel asked that the names of the jurors should be taken from the ballot box instead of being called over in the order in which they stood in the pannel, which was alphabetical. This application was granted by the court, but only upon the consent of the attorney-general, whose objection to it would have induced a contrary determination.¹²

¹ Fost. Cr. L. 1.

² See East, P. C. 114, 115.

³ *R. v. Frost*, 9 C. & P. 132.

⁴ *Id.* 133.

⁵ *R. v. Frost*, 9 C. & P. 138.

⁶ Fost. Cr. L. 230.

⁷ *R. v. Cook*, 2 Salk. 634.

⁸ Fost. Cr. L. 230.

⁹ *R. v. Laver*, 6 St. Tr. 323, vol. 16 of Howell.

¹⁰ *R. v. Frost*, 9 C. & P. 131.

¹¹ *Id.* 137, S. C.

¹² *Id.* 136, S. C.

There may be a challenge so extensive as to exhaust the pannel. Where this was the case, a new pannel was awarded by the court, *ore tenus*, and an adjournment was ordered, so that copies might be furnished according to the statute.¹ And so it was in 1746, at the trials at St. Margaret's Hill.² And although the counsel for Cook insisted that a *habeas corpus*, with a *tales*, should have been awarded, the court said, that there might be a distinction between commission of oyer and terminer and commission of gaol delivery; that in the first case a *tales* might possibly issue, but not so upon a commission of gaol delivery.³ Again, when the pannel returned was incorrect for want of stating the professions of the jurors, and in other respects, it was moved that the sheriff should have liberty to amend it by adding the professions, and making other corrections, and the judges assented.⁴ So where the description of a juryman's residence was "Grafton Street," without specifying which Grafton Street, it was held sufficient.⁵ So is the principle of *idem sonans*, as Longbotham instead of Longbothom.⁶

The challenge of jurors by the crown was not altered by the 6 Geo. 4, c. 50, s. 29. The old law was merely re-enacted.⁷ By 7 Will. 3, c. 3, s. 9, no indictment for treason or misprision, nor any process or return, shall be quashed on the motion of the prisoner or his counsel for miswriting, mis-spelling, false or improper Latin, unless the objection be made in court before any evidence given. Nor shall any such faults operate after conviction to stay or arrest the judgment. There is then a proviso that such judgment may, nevertheless, be reversed upon a writ of error in the same manner, and no other, as if the Act had not been made. However, notwithstanding the wording of this Act, the practice has been conformably to the common law, that the exception must be taken before plea pleaded, and several cases have happened where the court has refused to entertain any such objection after plea.⁸ And, moreover, as in cases of felony, the judges are not favourable to the quashing of indictments, even where the exceptions are made before plea, and where they are satisfied that part of the indictment is well laid, they will reject the insufficient part as surplusage.⁹

Lastly, we have already seen that the privileges of the Acts of William the Third and Queen Anne are not to be used by persons charged with attempting the king's life, or seeking to do any violence to his person.

Trial by peers.] Before the statute of William, the lord high steward was accustomed to summon a certain number of peers called peers' triers, and in number about twenty-three.¹⁰ A majority

¹ *R. v. Cook*, 4 St. Tr. 741, vol. 13 of Howell.

² Fost. Cr. L. 63.

³ 4 St. Tr. 742, vol. 13 of Howell.

⁴ *R. v. Hardy and others*, East, P. C. 113.

⁵ *R. v. Stone*, 6 T. R. 531.

⁶ *R. v. Laver*, 6 St. Tr. 246.

⁷ *R. v. Frost*, 9 C. & P. 136, 137.

⁸ East, P. C. 110.

⁹ Id.

¹⁰ 4 Com. 262, and see Mo. 622.

was necessary in order to warrant a conviction, and it was requisite that such majority should consist of twelve. But now by 7 Will. 3, c. 3, s. 11, all peers shall be summoned twenty days at least before the trial of any treason or misprision, and upon taking certain oaths mentioned in that section, all such peers shall be entitled to vote.¹

At present, therefore, a conviction may take place by a majority of one vote. Nevertheless, by sect. 12, nothing in the Act shall be construed to extend to any impeachment or other proceedings in parliament, of any kind whatsoever, and these words are so general as to lead to the expectation that they would include the trial of all peers impeached of treason or misprision. On the contrary, however, where the proceedings were adopted in full parliament, and in the ordinary course of justice, the prisoners were not only entitled to the full attendance of peers, but also to the benefit of the Act generally, and the rebel lords in 1746 were informed of this privilege by the lord high steward upon their arraignment.² And even in cases of impeachment, it was provided, by 20 Geo. 2, c. 30, that in all treasons attended by corruption of blood, or misprision of such treasons, persons impeached shall have the same benefit in making their defence as upon indictments and other prosecutions, and, accordingly, that such persons shall have the benefit of two counsel for the purpose of making a full defence, to be assigned on the application of the parties impeached, at any time after the exhibition of the articles of impeachment by the commons.

Judgment.] Upon the conviction of an offender for high treason by the verdict of a jury, or in the event of his standing wilfully mute upon his arraignment, (in which case he is excepted out of the benefits of the stat. 7 Will. 3, c. 3,) or upon outlawry,³ and failure of surrender within one year, judgment of death is pronounced. "The punishment," says Mr. Justice Blackstone, "is very solemn and terrible."⁴ However in these more enlightened times, the execution of which the learned judge speaks,⁵ and which prevailed before the alteration of the law, cannot be

¹ Fost. Cr. L. 246.

² Fost. Cr. L. 247.

³ By 5 & 6 Ed. 6, c. 11, s. 7, process of outlawry is to be as effectual against persons out of the realm, or beyond seas, as though they were resident here; and by sect. 8, if a party outlawed shall render himself within a year to the chief justice of England, and offer to traverse his indictment, he shall be admitted to such traverse, and, if acquitted, shall be discharged of his outlawry. By 7 Will. 3,

c. 3, s. 3, whilst persons guilty of the treasons and misprisions mentioned therein may be outlawed, and attainted, they shall, nevertheless, have the benefit of the same statute if they come in and reverse the outlawry.

⁴ 4 Com. 92.

⁵ 4 Com. 92; and see East, P. C. 137, where the account of the ancient punishment will be found. But in later times the more disgusting part of the ceremony was remitted.

considered otherwise than barbarous and inhuman ; and now by 54 Geo. 3, c. 146, in all cases of high treason the sentence or judgment to be pronounced or awarded shall be that such person shall be drawn on a hurdle to the place of execution, and be there hanged by the neck until such person be dead, and that afterwards the head shall be severed from the body of such person, and the body, divided into four quarters, be disposed of as His Majesty and his successors shall think fit. By sect. 2, His Majesty or his successors may, after such sentence or judgment, by warrant under the sign manual, counter-signed by one of His Majesty's principal secretaries of state, declare it to be his or their will and pleasure, and may direct and order, that such person shall not be drawn, but shall be taken in such manner as in the said warrant shall be expressed to the place of execution, and that such person shall not be there hanged by the neck, but that instead thereof the head shall be there severed from the body of such person whilst alive, and in such warrant may direct and order how and in what manner the body, head, and quarters of such person shall be disposed of ; and it shall be lawful for the sheriff or other person to whom such warrant shall be addressed, and whom it shall concern, to carry the same into execution accordingly.

It seems thus to be part of the judgment that the offender should be drawn upon a hurdle, although formerly the omission of these words did not vitiate the sentence.¹

In a judgment against two, it was held sufficient to say " the bodies of them shall be divided," without " and the body of each of them."²

This punishment, however, applies only to males. By 30 Geo. 3, c. 48, s. 1, female offenders convicted of high treason shall be drawn to the place of execution, and then hanged by the neck until dead.

Corruption of blood, and consequently the forfeiture of lands, goods, and chattels, are amongst the consequences of an attainder for high treason.³ The penal effect of this rule has, however, been relaxed in a slight degree. Indeed it was at one time attempted, and with success, to restrict the pains of forfeiture to the traitor himself for his life, (for his sentence might have been commuted,) and to prevent any disherison from affecting those who were innocent of their ancestor's transgression.⁴ Yet afterwards it was deemed right to repeal this law of indulgence, as far as attempts against the king's life were concerned, and the penalty remains, therefore, in that respect, with the exceptions we are about to mention, as in Lord Hale's time, and as indeed at common law.⁵

By 3 & 4 Will. 4, c. 106, s. 10, when the person from whom the descent of any land is to be traced shall have had any rela-

¹ *R. v. Tucker*, 4 Mod. 162.

² 4 Mod. *ut sup.*

³ 1 Hale, P. C. 354.

⁴ 7 Ann. c. 21, s. 10. To take effect after the death of the Pre-

tender. 17 Geo. 2, c. 39, s. 3. After the death of the Pretender's sons.

⁵ 39 Geo. 3, c. 93.

tion, who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the 1st day of January, 1834. By sect. 11 the Act shall not extend to any descent which shall take place on the death of any person who shall die before the 1st day of January, 1834.

Moreover, by 4 & 5 Will. 4, c. 23, s. 3, no land, chattels, or stock vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to His Majesty, his heirs or successors, or any corporation, lord of a manor, or other person, by reason of the attainder or conviction for any other offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his co-trustees or descend or vest in his representatives, as if no such attainder or conviction had taken place.

And it seems that goods which a man attainted has, as executor, shall not be forfeited.¹ Another penalty, where the offender is a male, is the loss of dower to the female.² And tenant by the curtesy is subject to a similar forfeiture.³ But, if the wife be attainted, the husband shall be tenant by the curtesy.⁴ Likewise, the offender's copyhold estates become forfeited, upon attainder, to the lord of the manor.⁵

If the chief justice, as superior coroner, record the death of one slain in rebellion, and return the record into his own court, both lands and goods may be forfeited without attainder.⁶

The rescue of one who is apprehended for treason is an act of high treason.⁷ In this case the misdeed of the rescuer is higher than that of him who breaks prison, or escapes when under a charge of treason, because the latter is only guilty of felony. Indeed, whoever gives assistance or protection to a traitor after the fact in all cases, or permits or favours the escape of such a person from custody, becomes himself a principal traitor.⁸ The fact however of the principal's guilt must be established, and notice must appear to have been received of the treason by the rescuer.⁹ Although it would be a high misdemeanor to rescue one committed for high treason although he should afterwards turn out to be innocent.¹⁰

¹ Lonsdale, 1.

² Hale, P. C. 354.

³ Upon this subject of forfeiture, see 4 Com. 381; 26 Hen. 8, c. 13, s. 5; 33 Hen. 8, c. 20, s. 2; 5 & 6 Ed. 6, c. 11, ss. 9, 13; Lonsdale, 1.

⁴ 4 Com. 381.

⁵ Com. Dig. Copyhold (M. 1); and see Lonsdale, 1.

⁶ East, P. C. 138.

⁷ 2 Hawk. c. 21, s. 7.

⁸ East, P. C. 96, 101.

⁹ Id. 101.

¹⁰ Id. See, generally, on high treason, 1 Hale, P. C. 58—377, ch. 10 to 28 inclusive; 1 Hawk. c. 17; Burn's Justice, tit. "Treason;" East, P. C. 37—144; Foster's Discourse on High Treason, 183—251

CHAPTER II.

OF TREASONABLE LIBELS AND SLANDER.

By 6 Ann. c. 7, s. 1, if any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm that our sovereign lady the queen is not the lawful and rightful queen of these realms, or that any other person has any right or title to the same otherwise than according to the Act passed in the second session of the first year of King William and Queen Mary, chapter two, intituled "An Act declaring the Rights and Liberties of the Subject, and settling the Succession to the Crown," and one other Act made in England, in the twelfth year of the reign of King William the Third, intituled "An Act for the further Limitation of the Crown, and better securing the Rights and Liberties of the Subject," and the Acts made in England and Scotland mutually for the union of the two kingdoms, or that the kings or queens of this realm, with and by the authority of parliament, are not able to make laws and statutes of sufficient force and validity to limit and bind the crown, and the descent, limitation, inheritance, and government thereof, he shall be guilty of high treason, and being convicted shall be adjudged a traitor, and suffer death and forfeiture.

By sect. 2, if any person shall maliciously and directly, by preaching, teaching, or advised speaking, declare, maintain and affirm, as in the last preceding section mentioned, he shall incur the danger and penalty of *præmunire* mentioned in 16 Ric. 2, c. 5.

CHAPTER III.

OF TREASONS RELATING TO THE SUCCESSION AND REGENCY.

By the Act of Settlement, 12 & 13 Will. 3, c. 2, the crown of England was limited to the Protestant successors of Sophia, daughter of King James the First, after the deaths of King William and Queen Anne.

By the Bill of Rights, 1 Wm. & M. sess. 2, c. 2, s. 9, whoever shall be reconciled to the see of Rome, &c., or shall marry a papist, shall lose his title to the crown, which shall thenceforth descend to the next heir, being Protestant. And there is a provision in the Act of Settlement which declares that the incapacity mentioned in the Bill of Rights shall affect any person inheriting the crown by virtue of that Act, who, amongst other things, shall marry a papist.

By 1 Ann. st. 2, c. 17, s. 3, if any person shall endeavour to deprive or hinder any person who shall be the next in succession to the crown for the time being, according to the limitations in the two Acts of 1 Wm. & M. sess. 2, c. 2, and 12 & 13 Will. 3, c. 2, from succeeding to the imperial crown of this realm, and the dominions and territories thereunto belonging, according to the limitations in the before-mentioned Acts, and the same maliciously, advisedly, and directly shall attempt by an overt act or deed, every such offence shall be adjudged high treason. All danger as to the sons or grandsons of James the Second seems to have passed away, but the Act of Settlement still remains the law of the land.¹

By 9 Geo. 4, c. 31, s. 37, nothing in that Act contained shall affect or alter any Act, so far as it relates to the crime of high treason.

Similar provisions will be found in the 3rd section of 17 & 18 Vict. c. 123, an Act for prohibiting any dealing with securities issued during the war between Russia and England.

Regency.] By 3 & 4 Vict. c. 52, s. 4, it shall not be lawful for the king or queen of this realm, for whom a regent is thereby appointed, to intermarry, before his or her age of eighteen years, without the consent in writing of the regent, and the assent of both houses of parliament. Every marriage without such consent and assent shall be null and void, and every person who shall be acting, abetting, or concerned in obtaining, procuring, or bringing about any such marriage, and the person who shall be so married to such king or queen under the age of eighteen years, shall be guilty of high treason, and suffer and forfeit as in cases of high treason.¹

¹ With regard to offences against the Royal Marriage Act, see *post*.

CHAPTER IV.

OF MISPRISION OF TREASON.

Misprision.] By 1 & 2 Ph. & M. c. 10, s. 8, the concealment or keeping secret of any treason is only misprision, and the offender shall only suffer the pains of misprision. Misprision is said to be "where a person knows of a treason, though no party or consentor to it, yet conceals it, and doth not reveal it in convenient time."¹ It is negative or positive, *i. e.*, where a knowledge or concealment without assent exists; or where certain misdemeanors are expressly declared to be misprisions by particular statutes.² As soon as it appears that a concurrence or approbation has taken place, that which might have been misprision becomes treason.³ And we have seen that to harbour a traitor wilfully is high treason.⁴

It may be added that there must be a full discovery, and to a competent authority, in order to avoid the misprision. Therefore, intelligence of a rising communicated to a private person will not be a sufficient disclosure.⁵ Nor will a partial mention of the circumstances to a magistrate be full enough, as if one should relate an intention to levy war, but persist in suppressing the names of the conspirators.⁶ But still there must be some knowledge, either of design or of persons. If A. be informed of a rising, without any communication as to the plot or the traitors, he will not be guilty of misprision by concealing the intelligence. But if he should know the names of the parties, without being let into the secret of the conspiracy, he will be liable to be indicted. And so again, if he be made cognizant of the particulars of an intended treason, although the names of persons may have been kept from him.⁷

The onus of proof likewise lies on the defendant. Strictly speaking, he should negative the avowment of concealment by offering, on his part, proof of discovery.⁸ There cannot be a misprision of a treason which is not contained either positively or virtually in Acts of parliament. But where a new treason is created by statute, it follows that a concealment of it will be a misprision.⁹ By 13 El. c. 2, s. 5, it is a misprision of treason to conceal an offer of absolution or reconciliation, or any bull, &c., unless the matter be disclosed within six weeks to the privy council.

¹ 1 Hale, P. C. 371; 1 & 2 Ph. & M. c. 10, s. 8, not repealed.

² 1 Hawk. c. 20, ss. 2, 7.

³ *Id.* s. 3.

⁴ *Ante.*

⁵ 1 Hawk. c. 20, s. 5; Kel. 22.

⁶ 1 Hawk. c. 20, s. 5.

⁷ See Kel. 22.

⁸ *R. v. Thistlewood*, 38 How. St. Tr. 691. Charge of Abbott, C. J.

⁹ East, P. C. 140.

Trial.] With respect to the trial of misprision, Lord Hale observes, that although the statute 1 & 2 Ph. & M. c. 10, has repealed the 33 Hen. 8, c. 23, as to the trial of treasons, yet he says it did not repeal that Act touching murder and misprision of treason. Consequently, a misprision committed in one county might be tried in another.¹ And the king, if he please, may waive the treason, and indict for misprision, for all treason includes misprision.² And when the proceeding is against a peer he shall be tried by his peers upon an indictment by a common grand inquest.³ And in all cases, whether of peers or commoners, there must be a free confession, or two witnesses to prove misprision.⁴ The prisoner may likewise be convicted if he stands mute, or refuses to plead.⁵

Judgment.] The punishment for misprision of treason is loss of the profits of land during life, forfeiture of goods, and imprisonment for life.⁶

¹ 1 Hale, P. C. 374.

² 1 Hale, 374.

³ Id. 7 & 8 Will. 3, c. 3, s. 11.

⁴ 1 Ed. 6, c. 12, s. 22; 7 Will. 3, c. 3, s. 2.

⁵ 7 Will. 3, c. 3, s. 2.

⁶ 1 Hale, 374; 4 Com. 120.

CHAPTER V.

OF OFFENCES IN THE NATURE OF TREASON,
WITH REFERENCE TO PERSONS OF THE
ROMAN CATHOLIC RELIGION.

MOST, if not all, of the treasons formerly attributed to Roman Catholics, and for which they were punishable, have now been removed from the statute book. But there are two sources of punishment which have not been entirely abolished, although the exercise of them has not been frequent. The first is *præmunire*. *Præmunire*¹ is, doubtless, obsolete, but the statute, 16 Ric. 2, c. 5, concerning the purchase of bulls or other instruments from Rome, is not repealed, and this offence incurs a *præmunire*.

Again, the treasons of early statutes have been abolished in modern times, but there is a saving clause which leaves the offence a misdemeanor at common law. As under 1 Eliz. c. 1, and 13 Eliz. c. 2; these Acts, as far as the treasons therein contained, are repealed, but it is expressly declared by the statute, 9 & 10 Vict. c. 59, (the repealing statute,) that nothing in the enactment shall authorize or render it lawful for any person to affirm, &c., or defend any foreign power, nor extend further than to repeal the particular penalties of the Act.² And again, "nor to import, bring in, or put into execution any such bulls, writings or instruments." The law is to remain the same, save the penalties and punishments. Therefore it is open to the crown to prosecute for misdemeanor at common law.³

¹ It involves being out of the king's protection, forfeiture of lands and tenements, goods and chattels, and imprisonment during pleasure. Co. Litt. 130 (a).

² 9 & 10 Vict. c. 59, s. 1.

³ 9 & 10 Vict. c. 59, s. 1; see 16 Ric. 2, c. 5; 1 Eliz. c. 1, s. 29; 5 Eliz. c. 1, s. 2; 13 Eliz. c. 2, s. 4; 1 Jac. 1, c. 4; 3 Jac. 1, c. 4, &c.; 10 Geo. 4, c. 7, s. 23; 7 & 8 Vict. c. 102; (Roman Catholic Penal Acts repealed;) Lonsdale's Statute Criminal Law of England, 12—22.

CHAPTER VI.

OF FELONIES AND MISDEMEANORS AGAINST HER MAJESTY
THE QUEEN.

Felonies.] In order to prevent the evils of constructive treason, or of any imperfections which might exist in rightly interpreting the statute of Edward the Third, it was determined to reduce certain disloyal acts to the grade of felony, yet without depriving them of the rank of treasonable offences. So that a provision follows that should treasonable matter appear in evidence, the prisoner shall not be therefore acquitted of the felony, but he shall not be liable to be prosecuted a second time upon the same facts for treason.

By 11 Vict. c. 12, s. 3, if any person shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose the Queen, her heirs or successors, from the style, honour, or royal name of the imperial crown of the United Kingdom or of any other of Her Majesty's dominions and countries, or to levy war against Her Majesty, her heirs or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels, or in order to put any force or constraint upon or in order to intimidate or overawe both houses or either house of parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom or any other Her Majesty's dominions or countries, her heirs or successors, and such compassings, &c., shall express, utter, or declare by publishing any printing or writing, or by any overt act or deed, he shall be guilty of felony, and liable to transportation for life,¹ or not less than seven years, or to imprisonment not exceeding two years, with or without hard labour: Provided, by sect. 6, that nothing in this section contained shall affect the Act 25 Ed. 3, c. 2. Provided also, by sect. 7, that if the facts alleged in an indictment for any felony under this Act shall amount in law to treason, such indictment shall not by reason thereof be deemed void, erroneous, or defective; and if the facts proved on the trial shall amount to treason, such person shall not by reason thereof be entitled to be acquitted of such felony; but no person tried for such felony shall be afterwards prosecuted for treason upon the same facts.

And by sect. 5, it shall be lawful, in any indictment for any felony under this section, to charge against the offender any number of the matters, acts, or deeds by which such compassings, &c., shall have been expressed, uttered, or declared.

But by sect. 10, it shall not be lawful for any court before

¹ Now penal servitude: 20 & 21 Vict. c. 3, s. 2.

which any person shall be prosecuted or tried for any felony under this Act, to order payment to the prosecutor or the witnesses of any costs which shall be incurred in preferring or prosecuting any such indictment.

By sect. 4, the time for prosecution, in the case of "open or advised speaking,"¹ is limited to two years, and there must be two witnesses, or a confession in open court.

Indictment.] The indictment states that A. on, &c., and on divers other days and times, did, together with divers other persons who are to the jurors aforesaid unknown, feloniously compass, &c. to depose our most gracious Lady Queen Victoria from the style, honour, and royal name of the imperial crown of the United Kingdom, and the said compassing, &c., did then feloniously express, &c., [by—state the overt acts,] against the form, &c.

In order to satisfy this section, no actual conflict is necessary. Any attempt by force or intimidation is a levying of war. To substitute any form of government in the room of that established, or to dismember the United Kingdom, is sufficient to sustain a count for attempting to depose the Queen. Where several join in the same conspiracy, some with one intent, and some with another, all are guilty of each act of sedition. And as to the witness, a person who betrays conspirators, having entered into their society for that purpose, does not require confirmation, although, undoubtedly, the jury may view his testimony and conduct with suspicion. He is not a co-conspirator, and therefore he is a good witness for the crown.² Upon another trial for these offences, no copy of the indictment was allowed. No list of the names and the addresses of the witnesses was permitted to be furnished, but the prisoners were allowed to inspect the back of the indictment, and, by permission of the crown, they might have the jury pannel read over. No challenge was allowed till a full jury had appeared. A witness was asked whether he had acted as a special constable. This was not allowed. But he might be asked whether he had not expressed an opinion as to the guilt of the prisoners. There was proof of a meeting, but none of the prisoners were present.

The passport to a second meeting was a leaf of a book. Upon production of that leaf the party was admitted. The prisoners were not present even then, not having joined the conspiracy. But evidence of what passed at that second meeting was received, and also what was said upon giving the leaf.

There was another meeting at a public-house. Not one of the people there was connected with the prisoners, nor with any party to the conspiracy; yet what was done and found there was evidence for the crown.³

¹ Sect. 9 relates to bail and trial in Scotland.

² *R. v. Dowling*, 3 Cox, 509. See *R. v. Mullins*, Id. 526.

³ *R. v. Lacey and others*. Verdict, Guilty. 3 Cox, 517.

Assaults, &c.] Assaults upon the Queen, with intent to injure or alarm her.

By 5 & 6 Vict. c. 51, s. 2, if any person shall wilfully discharge or attempt to discharge, or point, aim, or present, at or near to the person of the Queen, any gun, pistol, or any other description of fire-arms, or of other arms whatsoever, whether the same shall or shall not contain any explosive or destructive material,—or shall discharge or cause to be discharged, or attempt to discharge or cause to be discharged, any explosive substance or material near to the person of the Queen,—or shall wilfully strike or strike at, or attempt to strike or to strike at, the person of the Queen, with any offensive weapon, or in any other manner whatsoever,—or shall wilfully throw or attempt to throw any substance, matter, or thing whatsoever at or upon the person of the Queen, with intent in any of the cases aforesaid to injure the person of the Queen, or to break or endanger the public peace, or to alarm Her Majesty,—or shall, near to the person of the Queen, wilfully produce or have any gun, pistol, or any other description of fire-arms or other arms whatsoever, or any explosive, destructive, or dangerous matter or thing whatsoever, with intent to use the same to injure the person of the Queen, or to alarm Her Majesty,—shall be guilty of a high misdemeanor, and liable to be transported for seven years,¹ to penal servitude for four years, or to imprisonment not exceeding three years, with or without hard labour, and public or private whipping during the imprisonment not exceeding thrice. Provided, by sect. 3, that nothing shall be deemed to alter in any respect the punishment which by law may now be inflicted upon persons guilty of treason or misprision of treason.

Indictment.] That A. &c., did unlawfully and wilfully [state the offence], near to the person of the Queen, with intent thereby then to injure the person of her said Majesty. Against the form, &c.

¹ Now penal servitude, not exceeding three years: 20 & 21 Vict. c. 3, s. 2.

CHAPTER VII.

OF SEDITION AND OFFENCES OF THAT NATURE.

1. *Unlawful Oaths.*2. *Unlawful Societies.*

1. *Unlawful oaths.*] By 52 Geo. 3, c. 104, s. 1, and 1 Vict. c. 91, s. 1, every person who shall, in any manner or form whatsoever, administer or cause to be administered, or be aiding or assisting at the administering of any oath or engagement purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, shall be guilty of felony, and liable to be transported for life or not less than fifteen years,¹ or imprisonment not exceeding three years, with or without hard labour, and with or without solitary confinement;² and whosoever shall take any such oath, &c., not being compelled thereto, shall be guilty of felony, and liable to transportation for life,³ or for such term as the court may adjudge.

By 37 Geo. 3, c. 123, s. 1, whosoever shall, in any manner or form whatsoever, administer or cause to be administered, or be aiding or assisting at or present at and consenting to the administering or taking of any oath or engagement purporting or intended to bind the person taking the same to engage in any mutinous or seditious purpose; or to disturb the public peace; or to be of any association, society, or confederacy formed for any such purpose; or to obey the orders or commands of any committee or body of men not lawfully constituted; or of any leader or commander or other person not having authority by law for that purpose; or not to inform or give evidence against any associate, confederate, or other person; or not to reveal or discover any unlawful combination or confederacy; or not to reveal or discover any illegal act done or to be done; or not to reveal or discover any illegal

¹ Now penal servitude: 20 & 21 Vict. c. 3, s. 2.

² 1 Vict. c. 91, s. 2; see 24 & 25 Vict. c. 100, s. 4. So the aiding and assisting (52 Geo. 3, c. 104, s. 4) is made punishable in like manner. 1 Vict. c. 91, *ut supra*. By 52 Geo. 3, c. 104, s. 8, persons

acquitted for offences under the Act shall not be tried for high treason or misprision, nor shall persons guilty of an offence against the Act, but not tried under it, be released from being charged with high treason or misprision.

³ Now penal servitude.

oath or engagement which may have been administered or tendered to or taken by such person, or to or by any other person, or the import of any such oath or engagement,—shall be guilty of felony, and may be transported for seven years;¹ and whosoever shall take any such oath or engagement as last aforesaid, not being compelled thereto, shall be guilty of felony, and be liable to the same punishment.

By sect. 2, compulsion shall not justify or excuse any person taking any such oath or engagement, unless he shall, within four days after the taking, if not prevented by actual force or sickness, and then within four days after the hindrance produced by such force or sickness shall cease, declare the same, together with the whole of his knowledge touching the same, and the person or persons by whom, and in whose presence, and when and where such oath or engagement was administered or taken, by information on oath before one of Her Majesty's justices of the peace, or one of Her Majesty's principal secretaries of state, or Her Majesty's privy council; or, in case the person taking such oath or engagement shall be in actual service in Her Majesty's forces by sea or land, then by such information on oath as aforesaid, or by information to his commanding officer.

By sect. 3, persons aiding, &c. are to be deemed principals.

By sect. 5, provided, that any engagement or obligation whatsoever in the nature of an oath shall be deemed an oath within the intent and meaning of the Act, in whatever form or manner the same shall be administered or taken, and whether the same shall be actually administered by any person to any other person, or taken by any person without any administration thereof by any other person.

By sect. 4, it shall not be necessary, in any indictment for any offence in the last preceding section mentioned, to set forth the words of such oath or engagement; and it shall be sufficient to set forth the purport of such oath or engagement, or some material part thereof.

The trial of these offences committed on the seas may be tried in any county of England, under 37 Geo. 3, c. 123, s. 6, and 52 Geo. 3, c. 104, s. 7. It is manifest that the main scope of the 37 Geo. 3 was to discourage mutiny and sedition. But it has been determined that these are not the only mischiefs which the statute can reach. Some journeymen shearmen in Wiltshire entered into a conspiracy to raise their wages, and, in the prosecution of their attempt, they entered into an engagement in these terms: "You shall be true to every journeyman shearman, and not to hurt any of them, and you shall not divulge any of their secrets. So help," &c. This was held to be an unlawful oath within the Act, upon an application to bail the defendants, who

¹ Now penal servitude not exceeding three years: 20 & 21 Vict. c. 3, s. 2.

were brought up by *habeas corpus*.¹ And Lord Ellenborough observed, that the provisions which bore upon the defendants were those which forbade the revealing or discovering of any unlawful combination or conspiracy, or any illegal act done or to be done.² And the same doctrine was recognized upon a more recent occasion.³ Again, an indictment charged the defendants with having administered an oath intended to bind the party taking it not to inform or give evidence against any member of a society formed for the disturbance of the public peace, for any act or expression of his or theirs done or made, collectively or individually. It was objected, that the oath should have been more particularly set out, in order that the prisoners might know what they were to defend themselves against, and that, in fact, neither an oath, nor the purport of one, as required by the Act, was stated. But the judges were of opinion that the count was good, and the conviction was affirmed. It was decided, that although the oath did not purport, on the face of it, to be for a seditious purpose, evidence was admissible to show that the brotherhood referred to in the oath was a seditious society.⁴

Indictment.] The indictment states, that A., on, &c. feloniously did administer [cause, &c.] to one B., a certain oath then accordingly taken by the said B., which oath was then intended to bind the said B. so then taking the same [state the nature of the oath], against the form, &c.

2. *Unlawful assemblies.*] Secondly, as to unlawful assemblies.

By 39 Geo. 3, c. 79, s. 2, all societies the members whereof shall, according to the rules or to any provision or agreement for that purpose, be required or admitted to take any oath or engagement which shall be an unlawful oath or engagement within 37 Geo. 3, c. 123, or to take any oath not required by law, and every society the members whereof shall take or in any manner bind themselves by any such oath, &c. on becoming or in consequence of being members of such society,—and every society the members whereof shall take, subscribe, or assent to any test or declaration not required by law, nor authorized,—and every society of which the names of any of the members shall be kept secret from the society at large, or which shall have any committee or select body so chosen or appointed that the members constituting the same shall not be known by the society at large to be members of such committee or select body, or which shall have any president, treasurer, secretary, delegate, or other officer so chosen or appointed that the election or appointment of such person to such office shall not be known to the society at large,

¹ *R. v. Marks and others*, 3 Moo. & Rob. 349; 6 C. & P. 496, East, 157.

² *Id.* 162.

³ *R. v. Lovelass and others*, 1 East, 419 (n) 421.

⁴ *R. v. Moors and others*, 6

or of which the names of all the members, and of all committees or select bodies of members, and of all presidents, treasurers, secretaries, delegates, and other officers, shall not be entered in a book or books to be kept for that purpose, and to be open to the inspection of all the members of such society,—and every society which shall be composed of different divisions or branches, or of different parts acting in any manner separately or distinct from each other, or of which any part shall have any separate or distinct president, secretary, treasurer, delegate, or other officer elected or appointed by or for such part, or to act as an officer for such part,—shall be deemed and taken to be unlawful combinations and confederacies; and every person who, from and after the passing of the Act, shall become a member of any such society, or who, being a member of any such society at the passing of this Act, shall afterwards act as a member thereof, and who, after the passing of this Act, shall directly or indirectly maintain correspondence or intercourse with any such society, or with any division, branch, committee, or other select body, president, treasurer, secretary, delegate, representative, or other officer or member thereof, as such, or who shall, by contribution of money or otherwise, aid, abet, or support such society, or any member or officer thereof, as such, shall be guilty of an unlawful combination and confederacy.¹

The stat. 57 Geo. 3, c. 19, s. 25, includes the provisions of 52 Geo. 3, c. 104, and extends the law to clubs. And it embraces every manner or form of taking the oath, either by words, signs, or otherwise. And likewise representatives and missionaries.²

By 39 Geo. 3, c. 79, s. 8, persons guilty of any unlawful combinations and confederacies, whether under that Act or under 57 Geo. 3, c. 19, may be proceeded against for such offences either in a summary way before one or more justices of the peace, or by indictment; and, if convicted upon an indictment, may be transported for seven years, or imprisoned not exceeding two years.³

By 39 Geo. 3, c. 79, s. 13, and 57 Geo. 3, c. 19, s. 28, if any person shall knowingly permit any meeting of any society or club thereby declared to be an unlawful combination and confederacy, or of any division, branch, or committee of such society, to be held in any house or apartment, building, or other place belonging to him, shall for the first offence forfeit 5*l.* and for every such offence committed after the date of such conviction shall be guilty of an unlawful combination and confederacy in breach of this Act.

¹ Sect. 3, declarations before two justices, but these are now done away with. Sect. 4, former members not liable. Sect. 5, exempts freemasons. See *ante*.

² Directed against the Spencean Philanthropists.

³ Now penal servitude not exceeding three years, 20 & 21 Vict. c. 3, s. 2. But by 9 & 10 Vict. c. 33, proceedings under these two Acts shall not be commenced without the sanction of the law officers of the crown.

The mutual promises and engagements must be such as are clearly prohibited. And it lies upon the persons objecting to the lawfulness of them to prove their statement. A proposition to hold a convention,—a national convention, for example,—is clearly illegal, for it is not possible to anticipate with certainty the peaceable result of such a design. And, therefore, where a meeting was called for the purpose of adopting preparatory measures for holding such a convention, it was held to be unlawful, and it was no good defence to allege, that the proclamation had not been read.² This was in fact, an unlawful assembly with an original intention to do a wrongful act.³

¹ *R. v. Rouse and others*, 4 Cox, C. C. 7.

² *R. v. Fursey*, 6 C. & P. 81.

³ All persons assembled to sow sedition, and bring into contempt the constitution, are in an unlawful assembly. All persons assembled in furtherance of this ob-

ject are unlawfully assembled too. By Bayley, J., in *R. v. Hunt*, cited, 3 Stark. 103; by Holroyd, J., in *Redford v. Birley and others*. See 1 Ld. Kenyon, 108, *R. v. Hunt*, all persons countenancing a riot are liable to an information.

CHAPTER VIII.

OF TUMULTUOUS PETITIONING.

Tumultuous petitioning.] By 13 Car. 2, c. 5, s. 2, no person whatsoever shall solicit, labour, or procure the getting of hands or other consent of any persons above the number of twenty to any petition, complaint, remonstrance, declaration, or other address to the king, or both or either of the houses of parliament, for alteration of matters established by law in church or state, unless the matter thereof have been first consented unto and ordered by three or more justices of the county, or by the major part of the grand jury of the county or division of the county where the same matter shall arise, at their public assizes or general quarter sessions, or, if arising in London, by the lord mayor, aldermen, and commons in common council assembled; and no person whatsoever shall repair to His Majesty, or both or either of the houses of parliament, upon pretence of presenting or delivering any petition, accompanied with excessive number of people, nor at any one time with above the number of ten persons, upon pain of incurring a penalty not exceeding the sum of 100*l.* in money and three months' imprisonment for every offence, without bail or mainprise; such offence to be prosecuted in the Court of King's Bench, or at the assizes or general quarter sessions, within six months after the offence committed, and proved by two or more credible witnesses: Provided, by sect. 3, that this Act shall not be construed to extend to debar or hinder any person or persons, not exceeding the number of twenty aforesaid, to present any public or private grievance or complaint to any member of parliament after his election and during the continuance of the parliament, or to the king's Majesty, for any remedy to be thereupon had, nor to extend to any address whatsoever to His Majesty by all or any of the members of both or either of the houses of parliament, during the sitting of parliament, but that they may enjoy their freedom of access to His Majesty as heretofore hath been used.

This Act, although not repealed by the Bill of Rights,¹ is in some measure qualified by the declaration which recognizes the right of subjects to petition the king, and ordains that all commitments, &c. for such petitioning shall be illegal. Nevertheless the petition must be offered in a peaceable and orderly manner, and the two Acts may then stand well together.

¹ Nor by any other Act. Dougl. 593, Lord Mansfield. See also 1 Hawk. c. 65, s. 9; 5 C. & P. 154.

CHAPTER IX.

OF UNLAWFUL TRAINING.

Unlawful training.] By 60 Geo. 3, c. 1, s. 1, all meetings and assemblies of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercise, movements, or evolutions, without any lawful authority from Her Majesty, or the lieutenant or two justices of the county or riding, or of any stewartry, by commission or otherwise, for so doing, shall be and the same are hereby prohibited, as dangerous to the peace and security of Her Majesty's liege subjects and of her government; and whosoever shall be present at or attend any such meeting or assembly, for the purpose of training and drilling any other person to the use of arms, or the practice of military exercise, movements, or evolutions, or shall train or drill any other person to the use of arms, or the practice of military exercise, movements, or evolutions, or shall aid or assist therein, shall be liable to be transported for seven years, or to imprisonment not exceeding two years; and every person who shall attend or be present at any such meeting or assembly for the purpose of being, or shall at any such meeting or assembly be trained or drilled to the use of arms or the practice of military exercise, movements, or evolutions, shall be liable to fine and imprisonment not exceeding two years: provided that no person shall be prosecuted unless within six months after the offence committed.

A formidable public meeting in military array, and with seditious ensigns, especially if the parties be armed with clubs and other weapons, is an unlawful assembly.¹ So to advance upon a town with an imposing force, in order to make a demonstration to procure the liberation of certain persons convicted of political offences, is an aggravated misdemeanor.² And a previous concert to disturb the peace in this manner may be charged as a conspiracy.³ In order to connect Henry Hunt with an illegal assemblage, and to verify his intentions, resolutions passed a short time since at a former meeting where he presided, and which meeting was called avowedly to forward the gathering mentioned in the indictment, were admitted in evidence, although those resolutions were passed at Smithfield in London, and the proposed

¹ *R. v. Hunt and others*, 3 B. Tindal, C. J.; Parke, B.; Williams, J. & Ald. 566.

² *R. v. Frost*, 9 C. & P. 129; ³ *R. v. Hunt and others*, 3 B. & Ald. 566.

meeting was to take place at Manchester.¹ Again, in order to prove the general character of the meeting, evidence was likewise introduced to the effect that a number of persons had been seen in the neighbourhood practising the marching step before daybreak two days before the meeting, and that this body of men illtreated a person who saw them, compelling him, at the same time, to take an unlawful oath.² All these matters were evidence not only to show the nature of the congregating at that time, but also as matters of aggravation, and, which is still more material, as proof in support of those counts which charge a conspiracy.³ For such an assemblage as may be calculated to inspire terror into the minds of individuals at large is of itself, and without any further overt act, a misdemeanor.

So, again, Alderson, B., in the case of Vincent, desired the jury to consider the way in which the meetings in question were held, the hour of the day when the parties met, and the language used by the persons assembled, and by those who addressed them. "I quite agree," said the learned judge, "that the alarm must not be merely such as would frighten any foolish or timid persons, but must be such as would alarm persons of reasonable firmness and courage."⁴

And meetings for the purpose of military exercise are prohibited under a severe penalty. The appearance of bodies of men marching along the road, and expressions used by them as to the drill, are evidence to show that they were proceeding to a given spot in order to learn the military exercise.⁵ So, where a witness was called to prove that he was asked by a party of men to join them, as well as declarations on the part of some of these persons, Holroyd, J., held that he might give evidence to that effect, because the character of the transaction would appear from such conduct.⁶

¹ *R. v. Hunt and others*, 3 B. & Ald. 566; S. P. 3 Stark. 93, in *Redford v. Birley and others*. And a copy of the resolutions delivered to the witness by Henry Hunt at the first meeting as and for the resolutions intended to be proposed, and corresponding with those which the witness heard read from a written paper, was admitted without producing the original. 3 B. & Ald. 566. And, in the same case, parole evidence of inscriptions upon banners displayed at the meeting was likewise permitted without producing the banners. S. P. 3 Stark. 96, n.

² 3 B. & Ald. 566. Drillings which excite the alarm of an individual witnessing them are evidence

to show the general character of a confederacy. 3 Stark. 87.

³ There was also a count for a riot.

⁴ *R. v. Vincent and others*, 9 C. & P. 91, 109. Persons who have really been alarmed need not be called. The evidence of a constable or other person is sufficient to show this. Id. 275, *R. v. Vincent and others*; see also Id. 431, *R. v. Neale and others*.

⁵ 3 Stark. 85, in *Redford v. Birley and others*.

⁶ Id. 87. The rulings of Holroyd, J., on these points of evidence, were subsequently confirmed by the Court of King's Bench. 3 Stark. 112, note, et seq.

Yet, a man may "drill for a mere innocent purpose, as children at schools are taught, instead of being with a dancing master to learn to walk; yet if the object is to overawe the government, that object is high treason."¹ And, as in the case of the man who hired a boat with the intention of embarking in order to assist Louis XIV. in his attempt to dethrone William III., a bare intent to commit a treason is a high misdemeanor against the public safety.² "Any preparation to assist the king's enemies is a prejudice to the public, and an offence at common law."³

¹ 3 Stark. 105, by Holroyd, J. and committed till paid. S. C. Skin.

² *R. v. Cowper*, 5 Mod. 207. 637.

The defendant was fined 100 marks, ³ Id. 208. *Per cur.*

CHAPTER X.

OF AIDING FOREIGN POWERS WITHOUT LICENCE
FROM THE CROWN.

Foreign enlistment.] The subject of foreign enlistment may be mentioned here, since it might be inconvenient for an unrestricted enlistment to take place in foreign service, although the provisions of the statutes may not have been rigidly enforced.

By 59 Geo. 3, c. 69, s. 2, if any natural-born subject of His Majesty, without the leave or licence of His Majesty under the sign manual, or signified by order in council, or by proclamation of His Majesty, shall take or accept, or agree to take or accept, any military commission, or shall otherwise enter into the military service as a commissioned or non-commissioned officer, or shall enlist or enter himself to enlist, or shall agree to enlist or to enter himself to serve as a soldier, or to be employed or shall serve in any warlike or military operation, in the service of or for or under or in aid of any foreign prince, state, potentate, colony, province, or part of any province or people, or of any person exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people, either as an officer or soldier, or in any other military capacity ;—or if any natural-born subject of His Majesty shall without such leave and licence accept, or agree to take or accept, any commission, warrant, or appointment, as an officer, or shall enlist or enter himself, or shall agree to enlist or enter himself, to serve as a sailor or marine, or to be employed or engaged, or shall serve in and on board any ship or vessel of war, or in and on board any ship or vessel used or fitted out, or equipped or intended to be used for any warlike purpose, in the service of or for or under or in aid of any foreign power, &c., or of any person exercising or assuming to exercise the powers of government in or over any foreign country, &c.;—or if any natural-born subject of His Majesty shall, without such leave and licence, engage, contract, or agree to go or shall go to any foreign state, &c., or to any place beyond the seas, with an intent or in order to enlist or enter himself to serve or with intent to serve in any warlike or military operation whatever, whether by land or by sea, in the service of or for or under or in aid of any foreign prince, &c., or in the service of or for or under or in aid of any person exercising or assuming to exercise the powers of government in or over any foreign country, &c., either as an officer or a soldier, or in any other military capacity, or as an officer or sailor or marine, in any ship or vessel, although no enlisting money or pay or reward shall have been or shall be in any or either of the cases aforesaid actually paid to or received by him,

or by any person to or for his use or benefit;—or if any person whatever within the United Kingdom, or in any part of His Majesty's dominions elsewhere, or in any country, colony, settlement, island, or place belonging to or subject to His Majesty, shall hire, retain, engage, or procure, or shall attempt or endeavour to hire, &c., any person to enlist, or to enter or engage to enlist, or to serve or to be employed in any such service or employment as an officer, soldier, sailor, or marine, either in land or sea service, for or under or in aid of any foreign prince, &c., or for or under or in aid of any person exercising or assuming to exercise any powers of government as aforesaid, or to go or to agree to go or embark from any part of His Majesty's dominions, for the purpose or with the intent to be so enlisted, &c., whether any enlisting money, pay, or reward shall have been or shall be actually given or received or not, in any or either of such cases every such offender shall be guilty of a misdemeanor, and punishable by fine and imprisonment.

Then with regard to fitting out vessels of war for foreign states.

By 59 Geo. 3, c. 69, s. 7, if any person, within any part of the United Kingdom, or in any part of His Majesty's dominions beyond the seas, shall, without the leave and licence of His Majesty for that purpose first had and obtained, equip, furnish, fit out, or arm, or attempt or endeavour to equip, &c., or shall knowingly aid, assist, or be concerned in the equipping, &c. of any ship or vessel, with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, state, or potentate, or of any foreign colony, province, or part of any province or people, or of any person exercising or assuming to exercise any powers of government in or over any foreign state, &c., as a transport or store ship, or with intent to cruise or commit hostilities against any prince, state, or potentate, or against the subjects or citizens of any prince, &c., or against the person exercising or assuming to exercise the powers of government in any colony, &c., or against the inhabitants of any foreign colony, &c. with whom His Majesty shall not then be at war,—or shall, within the United Kingdom, or any part of His Majesty's dominions elsewhere, or in any settlement, colony, territory, island, or place belonging to or subject to His Majesty, issue or deliver any commission for any ship or vessel to the intent that such ship or vessel shall be employed as aforesaid,—shall be guilty of a misdemeanor, and punishable by fine and imprisonment or either of them; and every such ship or vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores, which may belong to or be on board of any such ship or vessel, shall be forfeited; and it shall be lawful for any officer of His Majesty's customs or excise, or any officer of His Majesty's navy, who is by law empowered to make seizures for any forfeitures incurred under any of the laws of customs or excise, or the laws of trade and navigation, to seize such ship or vessel, and in such place and in such manner in which the officers of His Majesty's customs or excise and the

officers of His Majesty's navy are empowered respectively to make seizures under the laws of customs and excise, or under the laws of trade and navigation; and every such ship or vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores which may belong to or be on board of such ship or vessel, may be prosecuted and condemned in the like manner and in such courts as ships or vessels may be prosecuted and condemned for any breach of the laws made for the protection of the revenues of customs and excise, or of the laws of trade and navigation.

To assist in the warlike equipment of vessels of foreign states without licence, is provided against by the 8th section.

If any person, in any part of the United Kingdom, or in any part of His Majesty's dominions beyond the seas, without the leave and licence of His Majesty, shall, by adding to the number of guns or by changing the guns, &c., increase, or procure to be increased, or shall be knowingly concerned in increasing the warlike force of any ship or vessel of war, or cruiser, or other armed vessel, which at the time of her arrival in any part of the United Kingdom, or of Her Majesty's dominions, was a ship of war, cruiser, or armed vessel in the service of any foreign prince, state, or potentate, or of any person exercising or assuming to exercise any powers of government in or over any colony, province, or part of any province or people, belonging to the subjects of any such prince, &c., under the control of any person so exercising or assuming to exercise the powers of government, he shall be guilty of a misdemeanor, and be punishable by fine and imprisonment either upon information or indictment.

And by sect. 9, offences made punishable by the provisions of the Act, committed out of the United Kingdom, may be prosecuted and tried in Her Majesty's Court of Queen's Bench at Westminster, and the venue in such case laid at Westminster, in the county of Middlesex.

CHAPTER XI.

OF AIDING PRISONERS OF WAR TO ESCAPE.

By 52 Geo. 3, c. 156, s. 1, any person who shall knowingly and wilfully aid or assist any alien enemy of His Majesty, being a prisoner of war in His Majesty's dominions, whether such prisoner shall be confined as a prisoner of war in any prison or other place of confinement, or shall be suffered to be at large in His Majesty's dominions or any part thereof on his parole, to escape from such prison or other place of confinement, or from His Majesty's dominions, if at large upon parole, shall be guilty of felony, and liable to be transported for life or for fourteen or seven years.¹

Provided, by sect. 2, that every person who shall knowingly and wilfully aid or assist any such prisoner at large on parole in quitting any part of His Majesty's dominions where he may be on his parole, although he shall not aid or assist such person in quitting the coast of any part of His Majesty's dominions, shall be guilty of aiding the escape of such person under the provisions of the Act.

And by sect. 3, if any person owing allegiance to His Majesty, after any such prisoner has quitted the coast or any part of His Majesty's dominions in such his escape, shall knowingly and wilfully, upon the sea, aid or assist such prisoner in his escape to or towards any other dominions or place, he shall be guilty of felony, and liable to be transported as aforesaid, and the trial may be within any court.²

In a case which occurred before this offence was made felony, it was held, that where there was a plan to detect the defendant in facilitating the escape of French prisoners, upon which occasion the party whose escape was intended by the defendant acted as a lure, the conviction could not be supported, for there was neither an escape, nor an intent to escape.³

¹ Now penal servitude for fourteen or not less than three years: 20 & 21 Vict. c. 3, s. 2.

² Note 1.

³ *R. v. Martin*, Russ. & Ry. 196.

PART III.

Of Larceny and offences of that nature.

"THE LARCENY ACT, 1861."

CHAPTER I.

OF SIMPLE LARCENY¹ AND OF BAILEES.

Larceny.] By 24 & 25 Vict. c. 96, s. 2, every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all

¹ The respective judgments for simple larceny under the Act of 1861 will follow the titles "Indictment" and "Trial."

By 24 & 25 Vict. c. 96, s. 1, the term "document of title to goods" shall include any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to:

The term "document of title to lands" shall include any deed, map, paper, or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real estate, or to

any interest in or out of any real estate:

The term "trustee" shall mean a trustee on some express trust created by some deed, will, or instrument in writing, and shall include the heir, or personal representative, of any such trustee, and any other person upon or to whom the duty of such trust shall have devolved or come, and also an executor and administrator, and an official manager, assignee, liquidator, or other like officer acting under any present or future Act relating to joint-stock companies, bankruptcy, or insolvency:

The term "valuable security" shall include any order, exchequer acquittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society,

respects as grand larceny was before the 21st day of June, 1827.¹

Larceny, or, more properly, Larciny, has been variously defined. We refer to the books which supply the numerous descriptions of the act of larceny,² being content with saying, that the elements and requisites necessary to complete it will furnish as good a guide as a definition which sometimes is not accurate, and is seldom satisfactory. In commencing this comprehensive subject we can hardly do better than follow the exordium of Sir Edward East, who speaks first of a taking, and then of a carrying away,³ or asportation. Now it is manifest that there must be a taking, either by the hand of the party, or by procuration,⁴ and it may be openly, or clandestinely, or by fraud.⁵ Force would constitute a higher species of larceny. And there must be a severance from the possession of the owner.

But, secondly, it will not be sufficient to lay hands on the property unless it be likewise entirely removed from its original position. This is the asportation. As, where the thief took plate out of a trunk, and laid it on the floor, but, being surprised, left it there.⁶ So where the guest took articles out of his room, and placed them in the hall; this was a carrying away.⁷ So, moving a parcel from one end of a waggon to the other.⁸ A leathern bag was placed in the front boot. The prisoner was on the box of the coach, took hold of the upper end of the bag, and lifted it up from the bottom of the boot. Then he and a confederate tried to

whether within the United Kingdom or in any foreign state or country, or to any deposit in any bank, and shall also include any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, and any document of title to lands or goods as hereinbefore defined :

The term "property" shall include every description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and shall also include, not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged,

and anything acquired by such conversion or exchange, whether immediately or otherwise :

For the purposes of this Act, the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day.

¹ The day on which the 7 & 8 Geo. 4, c. 29, received the royal assent.

² East, P. C. 553, citing Lord Coke, Hawkins, Hale, Foster, and Staundforde ; 4 Com. 229, "Larciny." East, 553. *R. v. Pear*, Leach, 1089, Eyre, B. *R. v. Hammond*, 2 Russ. C. M. 2, Grose, J. ; Bract. lib. 3, c. 32. *R. v. Thurborn*, Den. 388, Parke, B.

³ East, P. C. 553.

⁴ 1 Hawk. c. 33, East, 555.

⁵ East, 554.

⁶ Kel. 31.

⁷ 27 Ass. 39.

⁸ *R. v. Coslet*, Leach, 236.

pull it quite out of the boot, but they were stopped in the attempt by the guard. The judges held this to have been a complete asportation.¹ So where the prisoner bored a hole in a porter cask, by which the porter ran into a can on the ground while the prisoner was present. This was an asportavit.² "By the same rule, drawing a sword partly out of the scabbard will constitute a complete asportation."³ But where the purse was seized, and would have been captured but for a bunch of keys tied to the strings of the purse, the asportation was not finished, for it remained fastened to the place where it was before, although in the hand of the thief.⁴

In *Cherry's case*, Eyre, B., mentioned a case before him, where goods in a shop were tied to a string fastened by one end to the bottom of the counter. A thief took the goods, and carried them towards the door as far as the string would permit, and was then stopped. He held this no severance.⁵ So where the prisoner drew the end of a piece of lace through a hole in a window, and shook the card on which the remainder of the piece of lace was wrapped, but not so as to remove it from its place, it was held not to be "larceny."⁶

A poacher took a gun from the gamekeeper lest it should be used against him, and afterwards declared that he would sell it. In fact, the gun was not recovered, but the question of intent was entirely for the jury, and as soon as the jury negatived the intent, the judge directed an acquittal.⁷ So where poachers left a gamekeeper senseless on the ground, and one returned to steal his money: this one was only guilty of larceny.⁸ So where a person pretended to be a confederate, in order to obtain the reward for apprehension, the judges held that this evidence negatived the felonious intention.⁹ The prisoner took some timber at sea, defaced the marks, and gave notice on the next day to the receiver-general of the droits of admiralty. Cresswell, J., left it to the jury to say whether the prisoner took the timber for his own use, or with a view

¹ *R. v. Walsh*, 1 Moo. C. C. 14.

² *R. v. Wallis*, 3 Cox, 67.

³ 2 Russ. C. M. 6. This doctrine must be supported upon the fact of there being a total change of position, and that the sword and scabbard are not *on the person* of the owner.

⁴ *R. v. Wilkinson*, 1 Hale, 508; East, P. C. 556. And if the indictment had contained a charge of stealing a purse and a bunch of keys, the removal from one side of the pocket to the other would not have helped, because of the possession of the owner. So the case of the girdle. B. tried to rob A., but the girdle broke, and his purse dropped.

B. had not touched it, nor did he pick it up. 1 Hale, 533.

⁵ East, P. C. 556.

⁶ *R. v. Newman*, 2 Russ. C. M. 6, note (u), citing Talf. Dick. Q. S., 216.

The cases as to robbery will be found under "Robbery," as *R. v. Lapier*, &c.

⁷ *R. v. Holloway*, 5 C. & P. 524.

⁸ *R. v. Hawkins*, 3 C. & P. 392.

⁹ *R. v. Dannelly and Vaughan*, Russ. & Ry. 310. This was the case of Vaughan the Bow Street officer, who persuaded Dannelly, a desperate thief, under a promise of the reward, to betray his confederates in committing a burglary.

of getting salvage.¹ On the other hand, the person who endeavours to tamper, as with a servant, is guilty of larceny if he take the property. As where A. tried to get B. to join in robbing B.'s master. B. told the master, and by concert some marked money was placed on the counter by connivance. A. took it and was guilty of felony.²

Questions of mistake or carelessness must be left to the jury. As if A. should drive one of B.'s sheep with his own flock, and shear it.³ It would be against him, if he should have marked the animal with his own mark.⁴ So where the prisoner took up a deed in the presence of a clerk, and went away it. According to the verdict there was no mistake. This was a larceny. Had the clerk given up the deed, the case would have been different.⁵

It is common to prove a loss of some property. But where no loss was proved, the judge was held to be justified in leaving the case to the jury upon proof of this remark and answer,—“I think there is something wrong about you;” answer, “I hope you will not be too hard with me.”⁶ But there was nothing for the jury when a lad charged with stealing a doll said that “the doll was his own,” for the speech might have been that of an honest boy.⁷

Finding.] It is a dangerous defence to allege a finding or delivery by a person unknown, simply because it is rarely correct. The evidence in favour of it would be that the prisoner made no secret of the acquisition, or that he used every exertion to discover the owner.⁸ It is not an excuse that the property was deposited in an unusual place, as where the master hid his purse in a corn mow, and that the servant found it, if there be circumstances to denote a felonious taking.⁹ Although so unusual a depository would have its weight in the prisoner's favour.¹⁰ *A fortiori* if the place be an ordinary depository, the prisoner's case is much weakened.¹¹ The question of knowledge is a considerable ingredient in these cases, either as to the owner or the place,¹² as where the servant picked up notes in the passage of her master's house.¹³ But, if a man picks up a purse in the turnpike road, he cannot know whose it is, and he is not guilty of larceny in appropriating it,¹⁴ unless, indeed, there were some obvious mark upon it, or it were claimed on the instant.¹⁵ So likewise in the case of the ballast heavers who brought up a box of plate from the river, for they could not reasonably tell whose was the property.¹⁶ Although this case comes very near to the boundary; for, if the heavers

¹ *R. v. Watts*, 1 Cox, 349.

² *R. v. Egginton*, Leach, 913; East, P. C. 666. *R. v. Williams*, 1 Car. & K. 195.

³ 1 Hale, 507.

⁴ *Id.*

⁵ *R. v. Lawrance*, 4 Cox, 438.

⁶ *R. v. Burton*, 6 Cox, 293.

⁷ *R. v. Dredge*, 1 Cox, 235.

⁸ East, P. C. 665.

⁹ 1 Hale, 507; East, 664.

¹⁰ 1 Hale, *ut supra*.

¹¹ East, P. C. 664, Anon. 2 Russ. C. M. 13, Lawrence, J.

¹² *R. v. Pope*, 6 C. & P. 346.

¹³ *R. v. Kerr*, 8 C. & P. 176.

¹⁴ *R. v. Mole*, 1 Car. & K. 417.

¹⁵ S. C. as to the mark.

¹⁶ *R. v. Scully*, 1 Cox, 189.

knew that plate had been lost at that place, and that the box contained plate, and they immediately converted it to their own use, without making any inquiries, the jury might well be instructed to consider whether the *animus furandi* did not come upon them at the moment of their finding. Thus, when an actor dropped a 50*l.* note upon the stage, which the prompter picked up, and appropriated, making no effort to discover the owner, he was held guilty of larceny, for there was every reason to suppose that the owner might be speedily found, and that the prisoner not doing more than converting the note to his own use, had the *animus furandi* upon him as soon as he looked at the note.¹ Indeed the only excuses are where the owner has abandoned his property, or where he cannot be found.² A person bought a bureau at a sale, and a purse containing money was found in it, which the buyer possessed himself of. Here it was held, that the finder would have been guilty of larceny, if he had express notice that the bureau was sold alone without the contents (for then he could have had no difficulty in searching for the owner) or if the buyer believed at the time that nothing inside the bureau was sold. Still, if he had reasonable ground for believing that he had bought the bureau with its contents, he was not guilty.³ Again, where an ignorant person found a 5*l.* note and used it, the court put it to the jury whether she did not believe that the note was hers by right of finding, and directed, that if they thought such to be her belief, they should acquit her.⁴ The stealing must be traced to the finding. For where the jury found a verdict "not guilty of stealing, but guilty of keeping possession in hope of reward, from the time he found the watch," the judges held, that there was no original stealing, and that the verdict should not have been recorded.⁵

It seems now to be the better opinion that to detain a chattel, with the hope of receiving a reward, where there are good grounds for believing that the owner may be found, is larceny. And a restoration upon the advertisement of a reward will not purge the misconduct. Although it has certainly been made a question whether it is larceny to keep back an article under such circumstances till the day after the finding, with the view of getting a present.⁶ And it seems settled, that if there be evidence to show that the prisoner knowing, or having reason to know the owner at the time of the finding, would not have returned the property without a reward, he must be taken to have had the *animus furandi*, and to be guilty accordingly of larceny.⁷ And it was said in the last case, that an intent to return the goods absolutely, if the prisoner waited for the chance of a reward,⁸ would not

¹ *R. v. Coffin*, 2 Cox, 44, and *R. v. Mole* was cited, *ante*, 1 Car. & K. 417. & K. 841; 18 L. J. M. C. 38. The court cannot amend the verdict: Pollock, Q. B.

² 1 Car. & K. 245.

³ *Merry v. Green*, 7 Mees. & W. 623.

⁴ *R. v. Reed*, Car. & M. 306.

⁵ *R. v. York*, Den. 335; 2 Car.

⁶ *R. v. Peters*, 1 Car. & K.

245.

⁷ *R. v. Spurgeon*, 2 Cox, 102.

⁸ *Id.* But the recorder, if necessary, would have saved this point.

have varied the case; but this dictum may well be doubted, for such evidence clearly evinces that the *animus* was to get the reward, not to steal the property.

The whole of this law underwent the fullest consideration in *R. v. Thurborn*, which is now express authority. Thurborn found a note accidentally dropt on the high road. There was neither name nor mark on it, nor could the owner at the time be ascertained. The jury found that the prisoner meant to take it for his own use when he picked it up. However, on the next day, he was made acquainted with the name of the owner, but he changed it, and appropriated the money, and the jury found the appropriation to have been made under the belief that the note was another's. Parke, B., and Maule, J., thought the taking not felonious, and that when the note was changed, there was still no felonious taking. The points were not argued before the judges, but there was considerable dissension amongst them, and the conviction was held wrong.¹ They said, that when a man finds lost property, and appropriates it under the idea that the owner cannot be found, it is not larceny to take it. But if the taker entertains the idea at the time that the owner may be found, then the *animus furandi* attaches.² Here the original taking was not larceny, because not only was the note lost, but there was no clue whatsoever to the ownership, and no evidence to rebut the presumption that the prisoner must have believed that the owner could not be found.³ The judges, however, had considerable doubt upon the second point as to the subsequent dealing with the note after notice of the ownership.⁴ Upon another occasion, the doctrine was still reduced to a still more simple limit. The prisoner was not the original finder, but he had got possession of a 50*l.* note. He made some suspicious and evasive statements, and ultimately appropriated it. The recorder of Birmingham entertained an idea that the prisoner might not have intended originally to steal the chattel, but that the dishonest feeling might have arisen subsequently, and he directed the jury to consider *at what time* the felonious thought (if any) took place. But the judges held the direction wrong, for, when was the taking? A thought in the mind could not be a taking. There could not be an *ex post facto* taking. The inquiries which the prisoner made concerning the property might have been strong evidence for the jury that the original taking was *animo furandi*, and the name on the note might have proved that the prisoner had the means of knowing the owner. But here were no facts inconsistent with an honest intention in the first instance. The *animus furandi*, and the means of knowing the owner, should have been presented to the jury

¹ *R. v. Thurborn*, Den. 387; 2 J., Rolfe, B., Coltman, J., Parke, Car. & K. 831; 18 L. J. M. C. 140; B.
² Den. 396.
³ New. S. C. 581; S. C. nom. *R. v. Wood*. Per Pollock, C. B., Cresswell, J., Patteson, J.; v. Williams,
⁴ Id. 397.
⁴ Id.

in order to convict.¹ So, where A. found a note and brought it to his master. If the master had reason to know that the owner could be found without difficulty, the *animus furandi* might be presumed at the time of receiving the note from A., and if he did not know, nor had reasonable means of knowing the owner, still if the jury found that the master afterwards knew who the owner was, and that he meant to appropriate the note under any circumstances at the time of the taking, he is guilty of larceny.²

1. There must be a felonious intention at the time of finding.
2. The means of knowing the owner immediately.³

A man found some notes, and passed one of them, and offered another; he made no inquiry, but there were no patent means of learning who the owner was. The jury, however, found that the owner might have been traced, and that the prisoner believed he might have been traced. But the judge said that the prisoner was not bound to trace the owner. Here was no felonious taking.⁴

The following are cases with different issues. The prisoner drove a lamb by mistake in company with his own lambs out of a field. This act the judges held to be a trespass. But he discovered his error, sold the lamb, denied the fact, and appropriated the proceeds. Here the trespass became felonious as soon as the mistake was discovered, for the *animus furandi* then took place, and the original taking was not lawful. That was the distinction.⁵ If a person finds an animal straying, and takes with intent to convert it, he is guilty of larceny, and the question in one case for the jury was, whether he so took the animals, or whether, being mixed with the sheep he was driving, he took them by mistake.⁶ A man left his purse on a stall. The owner of the stall, a woman, being questioned, said it was hers, and put it into her pocket. She then concealed it, and, when the man re-appeared, disowned all knowledge of it. The court said this was not *lost* property, and, therefore, the question of due diligence to find the owner did not apply. And they held a clear distinction between property lost and this purse put down and left. The conviction was affirmed.⁷ Hackney coachmen and per-

¹ *R. v. Preston*, Den. & P. 353; 21 L. J. M. C. 41.

² *R. v. Moore*, 30 L. J. M. C. 77. *R. v. Gifford* (not reported) cited, 30 L. J. M. C. 78; Leigh & Cave, 1.

³ 8 Cox, 95, Hill, J.

⁴ *R. v. Dixon*, 25 L. J. M. C. 39. *R. v. Christopher*, 28 L. J. M. C. 35; Bell, C.C. 27; 8 Cox, 91.

⁵ *R. v. Riley*, Dears. 149. The chairman at sessions ruled that the sale of the lamb constituted the taking. This seems to be better law than to embarrass the case with

the points of trespass, and a subsequent *animus furandi*. The lamb was removed from the field, or rather followed, by mistake. There was, therefore, hardly any taking at all. The error, however, being pointed out, and the sale then being made, a felonious asportation accrued.

⁶ *R. v. Cook*, 2 Russ. C. M. 12, Cresswell, J.; Dears. 154, cited, 1 Hale, 507.

⁷ *R. v. West*, Dears. 402; 24 L. J. M. C. 4.

sons of that class are indictable upon a different principle. The driver very frequently can know the abode of the person who hired him, had taken him up, or set him down at a particular house. So that when evidence of knowledge of the house was given, the prisoner was convicted of stealing a trunk left in his coach.¹ So where the prisoner, a coachman, opened a box and destroyed part of the contents, the evidence was deemed sufficient to warrant his conviction.² And now it is the duty of all hackney coachmen or cab-drivers, &c., to carry property found in their vehicles to the office. In default of their so doing the *animus furandi* may be presumed, and the property, at all events, laid to be that of a person unknown. So, the servant of a railway company who takes property from a railway carriage is not within the rule as to finding. He is liable in almost every case, and is guilty of larceny.³ Concealment, likewise, is a dangerous ingredient upon all these occasions. The prisoners endeavoured to negotiate a bill of exchange, and in so doing attempted to conceal it. Here, Gibbs, C. J., said, that concealment was strong evidence of larceny.⁴

Nevertheless, as soon as a fair account of the possession has been rendered, the prosecutor must answer the evidence. As where a piece of wood had been found in the prisoner's possession five days after it had been lost. The prisoner, when charged, said he had bought it of N., who lived at a short distance from him. It was held that this allegation should be answered.⁵ But if the account be improbable or unreasonable, the case is altered, and the prisoner must prove his questionable statement.⁶ Sometimes the shortness of time after the finding has turned out favourably for the prisoner, but the majority of instances are the other way. A coat was found upon A. It had been left on the road side. Bayley, J., intimated that the prisoner might have intended to restore it.⁷ So, in a case of horse-stealing.⁸ After a lapse of sixteen months after the loss and the finding, Bayley, J., refused to call on the prisoner for his defence.⁹ And where only three months had elapsed, Park, J., pursued the same course, being of opinion that some other evidence than mere possession ought to have been brought forward.¹⁰ But, on a charge for stealing sheets, found on the prisoner's bed, after three calendar months, Wightman, J., left the matter to the jury. He would not lay down any

¹ *R. v. Lamb*, East, P. C. 664.

⁶ *R. v. Harmer*, 2 Cox, 487.

² *R. v. Wynne*, Leach, 413. *R. v. Austin*, East, P. C. 664, cited, *R. v. Sears*, Leach, 415, note (b).

R. v. Wilson, Dears. & B. 157; 26 L. J. M. C. 45.

³ *R. v. Pierce and others*, 6 Cox, 117.

⁷ *R. v. Milbourne*, 1 Lew. C. C. 251.

⁴ *R. v. James and Walters*, 2 Russ. C. M. 14. *Cartwright v. Green*, Leach, 952.

⁸ *R. v. Yend and another*, 6 C. & P. 176.

⁹ Anon. 2 C. & P. 459.

⁵ *R. v. Crowhurst*, 1 Car. & K. 370.

¹⁰ *R. v. Adams*, 3 C. & P. 600.

definite time. There was some, though very slight, evidence in the case before him.¹ So, where six months had elapsed between the theft and the finding of a shovel in the prisoner's house, the prisoner not being at home when the shovel was found, the court would not call on him for his defence.² So, where a horse was given to a servant to turn out, and was missed on the next morning, the servant was not called. Upon the trial of the prisoner, who was found with the horse in the morning, *non constat*, but that the servant might have delivered it to the prisoner.³ So, where a sheep was lost in September, and found in the prisoner's flock in March.⁴ So, where a mare was lost on December 17, and found on June 20 following, in the prisoner's possession.⁵ The evidence against the prisoner consisted of proof of recent possession, and that he sold the property in a public-house, and that when taken, he stated that C. D. brought the things to his house, and that W., who was at his house, would vouch for the truth. All these persons might have been produced for the prosecution, but were not called before conviction. The Court of Criminal Appeal was asked whether, as those witnesses had not been called, the conviction could stand. Pollock, C. B., said he should be sorry to have had a conviction before him under such evidence, and Cresswell, J., said, there certainly was evidence for the jury, but he could not say more. But the conviction was affirmed.⁶ Where a person was apparently the instrument of others for the purpose of disposing of the property found upon *him*, the presumption of larceny, which would of course have attached, arising from the recent possession of the property, was considered to have been rebutted.⁷ And this kind of recent possession is not like that of a man coming out of a barn, and being found with corn upon him (which is a highly unfavourable fact) resembling that in the barn.⁸ So, where persons were taken with sugar and other articles of the same description as those just stolen from ships and wharves, the same rule has obtained.⁹ Where two ends of woollen cloth of twenty yards each, in an unfinished state, were found upon the prisoner in the same state, two months after the theft, the possession was deemed sufficiently recent to call upon him for his defence, by reason of the nature of the property.¹⁰ Yet, however long the time may have been since the theft, as fifteen months, yet if the prisoner claim an article found on him, and say he has bought it, and further disputes the identity of the thing

¹ *R. v. Hewlett*, 2 Russ. C. M. 278. *R. v. Adams* was cited. guilt. *R. v. Cockin*, 2 Lew. 235, Coleridge, J.

² *R. v. Cruttenden*, 6 Jur. 267.

³ *R. v. Fellows*, 2 Russ. C. M. 123.

⁴ *R. v. Harris*, 8 Cox, 333.

⁵ *R. v. Cooper*, 16 Jur. 78; 3 Car. & K. 318. Even one month would weaken the presumption of

⁶ *R. v. Wilson*, Dears. & B. 157, 160.

⁷ *R. v. Collier*, 4 Jur. 703.

⁸ East, P. C. 657.

⁹ Id.

¹⁰ *R. v. Partridge*, 7 C. & P. 551.

supposed to have been lost with that found upon him, he must then account for the possession.¹ He is not, however, obliged to render an account, so that when no loss was proved, his refusal to give any explanation was held not to be evidence against him.² And, if he should give an account, and refer to some known person, before the magistrate, the magistrate ought to call that person before him, for his evidence might either exonerate the prisoner, or show that the prisoner had given a false account.³ A servant came out of a place where brass was kept. There was nothing more, and no possession. This was deemed to be not a scintilla of evidence.⁴

We have already intimated, that as in the case of finding, the accused might have thought he was acting under an idea, however mistaken, of right.⁵ Some Acts of the legislature sanction this excuse. A colourable pretext will be insufficient. As the allegation of a supposed right to glean, in the absence of a local custom.⁶ Or the gaining of booty by some legal device, as a false replevin, false affidavits, &c.⁷ Or a false pretence of any other nature.⁸ The prisoner, by making use of a false name, obtained some teas, which belonged to another person, from a carrier's servant who had no authority to deliver them to any one except the right owner; here it was held that the conviction for larceny was right.⁹ Some wheat consigned to the prosecutors was placed with E., a servant, in one of their storehouses. It was to be delivered to the prosecutors, or to their order, or to their managing clerk. The prisoner, who was in their employ, got the key from E., and upon a false pretence got some of the wheat. This was held to be larceny.¹⁰ So again, the prisoners got the prosecutrix to open her hand and to let them have some money. Having obtained it, they refused to give up a dress they had promised on that condition. This was held to be larceny.¹¹ So where the gipsy woman by tricks and menace got possession of property, the offence was held to be larceny, there being no intention to return any part of the values, the possession, but not the property, having been severed.¹² But where the postman delivered a letter to J. B. under the idea that he was the only person of that name, which letter came into the

¹ *R. v. Evans*, 2 Cox, 270.

² Hale, P. C. 590.

³ *R. v. Smith*, 2 Car. & K. 207, Lord Denman, C. J.

⁴ *R. v. Walker and another*, Dears. 280. See another case as to evidence, *R. v. Samways and another*, Id. 371.

⁵ East, P. C. 659; 1 Hale, P. C. 513.

⁶ 2 Russ. C. M. 11. The cases will be found in a future page.

⁷ 1 Hawk. c. 33, s. 12. *R. v. Parr*, 2 Ventr. 94.

⁸ A false pretence which causes the owners to part with the ownership of goods or money is a misdemeanor. But one which succeeds in divesting him of the possession may be a larceny.

⁹ *R. v. Longstreeth*, 1 Moo. C. C. 137.

¹⁰ *R. v. Robins*, Dears. 318.

¹¹ *R. v. Morgan and another*, Dears. 395.

¹² *R. v. Bunce*, 1 Fost. & F. 523.

hands of his son, the prisoner, who appropriated a draft inclosed, the judges held his conviction wrong, because there did not appear to be any *animus furandi* when he received the letter, although the jury were satisfied that he was afterwards well aware that both the letter and the draft were designed for another.¹ Erle, J., was ruling otherwise when his attention was called to *R. v. Mucklow*, upon which he reserved the point, and the conviction was held wrong.² In another case it appeared that the prisoner was the master of a Prussian vessel, which was captured by the British, and after the seizure, he broke open the place where some of the goods were, and took them away. It was determined by the judges, that this convict should be recommended for a free pardon, because there was no evidence to show that he meant to convert the property to his own use. He might have broken the place for the benefit of the owners. There was, in fact, no proof of a felonious intention.³

It is a dangerous course to take property and pledge it, although there be an intent to restore it. The court will look coldly at such a defence, yet it will not be wholly rejected. For if the jury should be of opinion that the prisoner took the property with a view to raise money for a temporary purpose, and that he had a reasonable ground for believing that he would shortly be in a condition to restore it, they ought to acquit him.⁴ So it was where a servant pawned his master's plate.⁵ This is a very different act from taking a railway ticket in order to use it, although it was intended to return the ticket at the end of the journey.⁶ Each case depends on the view which the jury take of it. If the intention be obviously to restore, and there be reasonable grounds for supposing that the intent can be easily realized, *Phetheon's case* may be good law, and *Wright's* likewise. The felony is negatived if the intent to steal be negatived. But, although there may exist a desire, and even an intent to redeem *when it can be done, i. e.*, generally, the larcenious conversion then attaches to the taking, because the intent must be positive, not conditional. So that, although the prisoner had redeemed some articles from pawn, the partial redemption was held to be no defence, and the case was left to the jury.⁷ The next question is, how far an intent to commit another offence will purge an act done in order to effect that secondary intent. As where the prisoner took some female apparel for the purpose of inducing a girl to go to a hay mow to seek after her property, so that he might have connection with her, but not against her will. The jury found, that the prisoner had no wish to deprive her of her things, and a pardon was

¹ *R. v. Mucklow*, 1 Moo. C. C. 160.

² *R. v. Davis and another*, 25 L. J. M. C. 91.

³ *R. v. Van Mayen*, Russ. & Ry. 118.

⁴ *R. v. Phetheon*, 9 C. & P. 552.

⁵ *R. v. Wright*, Burn's Just. by Chitty, 640. Tit. "Larceny." Citing Car. Cr. L. 278, *post*.

⁶ *R. v. Beecham*, 5 Cox, 181.

⁷ *R. v. Medland*, 5 Cox, 292.

recommended.¹ It was the law in ancient times,² and it is still the same, that a taking, although induced by the pressure of hunger or want, is felonious.

The property must be taken from the possession of the owner. Two persons went to receive money. They bought a stamp, and one of them signed the receipt. *But neither had possession of the receipt after it was signed.* Upon the pretence, however, of fetching the cheque book, C., who was deputed by his father to pay the money, took away the receipt. It was held that this act was not larceny.³

Against the will of the owner or possessor.] There is an ingredient in a felonious taking, which occupies a considerable portion of the space devoted by text writers to larceny. It is the absence of consent on the part of the owner or master of the goods to the taking. And this, at first sight, might seem to be of course; yet, as two facts must be ascertained,—first, the *animus furandi*, and next, the dissent of the proprietor,—we must not be supposed unreasonable if it should become necessary for us to dwell upon the point for a short time. If A. lend a horse to B., upon condition of B. returning it the next day, and B. forthwith sell it, here A. had never parted with the property, and B. had done all in his power to show that he never intended to return it; it is probable that a jury would convict B. of larceny, and such a conviction would be sustained. So if A. deliver a parcel to B. to keep or carry for him, and B. run away with it, a jury will probably entertain a strong suspicion that B. intended to convert the parcel feloniously to his own use, when he received it. So if A. sell goods to B. upon condition of immediate payment, and whilst A.'s back is turned, or while he is lulled by some pretence, B. carries off the goods, A. shall not be said to have parted with the property, and the taking is felonious, *invito domino*. But if it be discovered that A. sold his horse, upon condition of prompt payment, and that he suffered the purchaser to ride away with it, or sold his goods, so as to give the buyer credit, although A. never meant to agree to the loss of his property, yet, by yielding up both ownership and possession, although still cheated, he could not be said to be feloniously plundered. And, on the other hand, if it should appear that the prisoner's dishonest conversion was an afterthought, he will be acquitted. It is then a principle that when the owner of goods surrenders up his property to the taker, the latter is not guilty of larceny, however he may be of a misdemeanor, or may be under the obligation of a debt. As where the bargain and sale were completed, and the prisoner having mounted the horse (the subject of the sale), rode off, saying

¹ *R. v. Dickinson*, Russ. & Ry. 420.

³ *R. v. Frampton*, 2 Car. & K. 47.

² 1 Hale, P. C. 565.

he would return and pay immediately, to which the prosecutor assented.¹ So where the clerk paid the prisoner for goods which the latter was instructed to buy, but, instead of doing so, the prisoner produced a false ticket, and deceived the clerk. This, although a false pretence, was not larceny.² The prisoner borrowed a horse, under the pretence of carrying a child to a surgeon. Whether he did or not carry the child did not appear, but, on the day following, when the purpose of the borrowing must have been over, he sold the horse upon a request made to him. The jury found, that when he borrowed the animal, he had no felonious intent, and the judges decided, that the conviction could not be supported.³ And they said, that although, at one time, there was a notion that a felonious act might be done at the expiration of the contract, yet they repudiated that doctrine, and the authorities upholding it.⁴ And as the prisoner was found by the jury to be free from the felonious taking at first, they would not recognize a new felonious taking upon withholding and disposing of the animal.⁵ Again, the prisoner bought goods, and had a bill of parcels for them as goods sold, with a debit in the day book, which was, in due course, transferred to the journal and ledger, and, in return, he gave fabricated bills to the prosecutor's servant, which the servant accepted as payment: the jury found that there was an intent to defraud throughout, and the tradesman evidently did not mean to give credit, but the judges said that a sale and delivery had taken place, although the bills were of no value.⁶ So where a servant who had a general authority to manage the business of his master, a pawnbroker, delivered up a pledge to the prisoner, who was the pawner, upon receiving a parcel which he supposed to be diamonds, it was unanimously held that this was not larceny, for property, ownership, and possession were entirely abandoned. This taking was not *invito domino*.⁷ So, in loans. A woman came from a neighbour's house, saying, that the neighbour requested the loan of half a guinea's worth of silver, and would send the half guinea presently. The money was lent, but the case was said not to amount to larceny, for this was a loan of the silver.⁸ So again, the obtaining of bank notes by writing a counterfeit letter, was held to come under the same rules.⁹ So

¹ *R. v. Harvey*, Leach, 467.

² *R. v. Barnes*, 5 Cox, 112.

³ *R. v. Banks*, Russ. & Ry. 441.

⁴ *R. v. Charlewood*, East, P. C. 689. *R. v. Tunnard*, Id. 694. See also *R. v. Leigh*, East, P. C. 694; Leach, 411, n. *R. v. Box*, 9 C. & P. 126. *R. v. Jones*, Car. & M. 611. *R. v. Evans*, Id. 632.

⁵ *R. v. Banks*, ut supra.

⁶ *R. v. Parkes*, Leach, 614.

⁷ *R. v. Jackson*, 1 Moo. C. C. 119. *R. v. Meilham*.

⁸ *R. v. Coleman*, East, P. C. 672; Leach, 302, n. *R. v. Bromley*, 2 Russ. C. M. 298. But an indictment for a false pretence would succeed if the pretence were shown to be false. See *R. v. Atkinson*, Leach, ut supra. *R. v. Walsh*, Id. 1054; 4 Taunt. 258; Russ. & Ry. 215.

⁹ *R. v. Atkinson*, East, P. C. 673. *R. v. Adams and another*, [on a forged order,] Den. 38.

where, through falsehood, the prisoner contrived to get another person's hat from the maker, who had observed that he could not let the prisoner have a hat without paying for it, but nevertheless delivered up the property freely to a boy, under the impression that he had been duly sent, the same doctrine prevailed.¹ So where a hat maker was persuaded by the prisoner to let him have a hat to show to a customer, it was the same, *i. e.*, fraud, not felony.² So it was where the prosecutor put down a sovereign, and asked for change, the prisoner took it, and pretended he would go and get change; the prosecutor objected, but afterwards allowed the prisoner to go. The prisoner did not return. Here the prosecutor divested himself of the coin, for he could not have expected to have received the specific piece of money again.³ Had the prisoner gone away with the sovereign against the will of the other, the act would have been felonious. So in gambling transactions, although fraud and collusion be manifest and be found by the jury; for the prosecutor freely parts with his money. As in a hiding under the hat, where the prosecutor laid down the stake, intending to take it up if he won, and to pay if he lost.⁴ Although there be a decoy and the jury find fraud, *ab initio*, it makes no difference.⁵ So in ring-dropping, where the prosecutor parted with 7*l.*, manifestly with no intention of regaining possession of it.⁶ So where the prisoner obtained 2*l.* by means of a false entry, the same principle applied.⁷ The prisoner obtained from his employers, managers of a savings bank, a cheque for 50*l.*, under the pretence of its being wanted by a depositor to that amount. This was a false pretence. For the prisoner acted, not as an agent of the managers, but of the depositor.⁸

But a very slight circumstance will change the characters of all these transactions. A horse was hired for a day by the prisoner, but on that same day it was sold by the prisoner, and the jury found that the prisoner had contemplated the conversion and disposal of the horse at the time of the hiring. The judges, after much consideration, held this taking to be felony.⁹ So where the prisoner ordered a horse of the prosecutor upon the pretence that his father, whom the prosecutor knew, had sent him, and did not return the horse at the time appointed, he was held guilty of larceny.¹⁰ But the mere offer to sell, in the absence of other proof, would not be sufficient evidence of the conversion, being

¹ *R. v. Adams*, Russ. & Ry. 225.

² *R. v. Cookwaine*, Leach, 498.

³ *R. v. Thomas*, 9 C. & P. 741.
R. v. Reynolds, 2 Cox, 170.

⁴ *R. v. Nicholson and others*, Leach, 610.

⁵ *R. v. Riley*, 1 Cox, 98. *R. v. Campbell*, 1 Moo. C. C., 179, was cited.

⁶ *R. v. Wilson and another*, 8 C. & P. 111.

⁷ *R. v. Green*, Dears. 323.

⁸ *R. v. Essex*, 27 L. J. M. C. 20; Dears. & B. 371.

⁹ *R. v. Pear*, East, P. C. 685; Leach, 212. *R. v. Armstrong*, 1 Lew. 195. *R. v. Spence*, 1 Lew. 197.

¹⁰ *R. v. Vicar*, 1 Lew. 199.

incomplete under such circumstances.¹ It is said, *in the absence of other proof*, for if that proof be supplied, the guilt of larceny attaches. As where the prisoner hired a horse and gig to go to Sheffield, but he went in the contrary direction, and then he offered them for sale. Coleridge, J., and Parke, B., held this to be a larceny.² *Brooks's case* is untouched by this decision, because of the plain distinction. Here the possession only, not the property, was surrendered. The master expected to get his horse again. So it was where the prisoner, by means of a lie, got possession of a horse, which the prosecutor had expressly directed a livery-stable keeper not to part with.³ The owner never, for an instant, abandoned his property. So where the prisoner was sent to deliver a horse, and the person to whom it was delivered asked him to sell a pony for 5*l.* The prisoner sold the pony for 3*l.* and absconded. The court held him to have been a servant, not a bailee, and guilty of larceny, for neither the property nor the possession (being that of the servant) had left the master.⁴

There is a distinction in ring-dropping between cases where the owner does or does not expect to see his property again. If there be an arrangement that he may naturally look for the return, however he may have given up possession, the distinction obtains, and the sharpers are guilty of larceny.⁵ In *Moore's case* it was considered, by the majority, that the money had been delivered, not as a loan, but as a pledge, and that the prosecutor clearly understood that, so far from parting with his property, he was to have it again the next day in specie.⁶ So where several conspired to cheat another by a fraudulent bet, and after inducing him to deposit his stake in the hands of a confederate, duped him out of his money, the judges held it a felonious taking, because the prosecutor never intended to pay unless the wager had been really won, and, by merely depositing his notes, he only parted with the possession of them.⁷ And there is a distinction between this case and *R. v. Nicholson*,⁸ for, in the latter case, the prosecutor staked his money down and assented to its being taken up,

¹ *R. v. Brooks*, 8 C. & P. 295, Tindal, C. J.

² *R. v. Janson*, 4 Cox, 82. The question is, "Had the prisoner the intention of stealing the horse when he hired it?" *R. v. Cole*, 2 Cox, 340. In the last case the prisoner said he wanted to go to Bradford, but he went elsewhere, and then sold the horse.

³ *R. v. Steer*, 2 Car. & K. 988.

⁴ *R. v. Stanbury*, 2 Cox, 272.

⁵ *R. v. Patch*, Leach, 238; East, P. C. 678. *R. v. Anderson*, Leach, 239, n. *R. v. Moore*, Id. 314; East, P. C. 679. *R. v.*

Marsh, Leach, 345. *R. v. Watson*, Id. 640. And see *R. v. Owen*, Id. 572.

⁶ *R. v. Moore*, East, P. C. 679. But Lord Loughborough and Skynner, C. B., considered the advance of the money as a loan upon the security of the ring, and that the prosecutor had parted with his property, because he did not expect to receive the identical money back again.

⁷ *R. v. Robson and others*, Russ. & Ry. 413.

⁸ *Ante*.

considering that he had lost, whereas in *Robson's case*, it was the will of the prosecutor to have received back his deposit, or to have directed the payment of it, in case he had been satisfied of his having lost, and he never parted with the control over his money. And it is observable, that those who were present assisting in the fraud upon these occasions were deemed equally guilty with the principal players.¹ The prosecutor was induced to draw a cheque, by two persons who conspired to cheat him. He went to the bank to see the cheque cashed by one of the prisoners, who had possession of it, and the money was paid by desire of the prosecutor. The prisoner made an excuse and decamped with the money. The prosecutor never intended to part with his money. He was merely the victim of a fraudulent trick. The judges held, that he had maintained a control over this money, that the possession remained in him, that this taking was *invito domino*, and that the prisoners were rightly convicted of stealing the notes and money, given in exchange for the cheque.² So, in the case of goods, if a man show plainly that he does not intend to give credit, nor to authorize his servant to do so, and he becomes a victim to the prisoner's artifice, he can only be said to part with the temporary possession of his goods, and against his will.³ Chissers came to a shop and asked for certain articles, and upon their being delivered into his hand, offered a less price than was asked, and ran away with them. This was larceny.⁴ *A fortiori*, where the goods were not delivered. The prisoners induced a tradesman to bring goods to a house, where one of them pretended to make a bargain, and under pretence of wanting some other articles, persuaded the prosecutor to leave his goods for a time, whilst he went home to fetch the rest. In his absence, the prisoners decamped with the property. This was held to be larceny, for the tradesman never intended to give up his property without the money, although the possession might be gone during his absence.⁵ So where a woman went with one of the prisoners in order to get the money for some coats he had bought of her, leaving the coats in the hands of the prisoner's companion, an accomplice, who immediately absconded, it was held that felony had been committed.⁶ So where the London Dock Company parted, *by mistake*, with some casks to a carrier, who broke bulk, it was held, that the carrier and his confederate, having been thereby guilty of larceny, the property was rightly laid in the company.⁷ So where a master sent his servant with

¹ *R. v. Standley*, Russ. & Ry. 305. *R. v. Homer*, Leach, 270. See Leach, 239; Russ. & Ry. 414.

² *R. v. Johnson and another*, Den. & P. 310; 21 L. J. M. C. 32.

³ *R. v. Sheppard*, 9 C. & P. 121. The case of a horse.

⁴ *R. v. Chisser*, Tho. Raym. 275.

⁵ *R. v. Sharpless and another*, Leach, 92.

⁶ *R. v. County*, 2 Russ. C. M. 50.

⁷ *R. v. Vincent and another*, 21 L. J. M. C. 109; Den. & P. 464.

some silver ewers in order that the prisoner might make a choice, the same rule prevailed. The circumstance of the election clearly proved that the master's possession remained with the servant, for, until the prisoner had elected, the contract could not have commenced, and the contract of the servant could not extend to an unqualified delivery when the choice was made.¹ So where the prisoner bought goods, but upon the express condition that they should be paid for before he took them out of his cart, upon which he received the delivery order, and converted the goods to his own use without payment, (having likewise deceived the clerks of the warehouse, who went for payment to the place affixed by him,) this was held to be larceny, for the property had never been, for an instant, surrendered.² Even where the owner consented to place the goods in the hands of a third person, not a confederate, there was the same ruling. The prisoner contrived to induce a tradesman to leave a large package with a book-keeper, and then made an appointment with him to receive the money. He broke his promise, and getting the goods from the book-keeper, made off with them. The judges had no doubt upon the subject.³ The distinction may be thus illustrated. The prisoner bought a hat upon condition that he should not have it without payment. But he found out that another person had bought a hat at the same shop. Upon this he sent a boy, and told him to go to the shop for the other person's hat, upon the pretence that the other person had sent for it. It was then not difficult to get the hat from the boy. Here both property and possession were parted with. This was not larceny.⁴ So where the prisoner bought some oxen, declining to clip them, (which was usual, but which, nevertheless, would make no difference,) but agreeing to pay for them at dinner time, yet, so far from fulfilling his undertaking, watched his opportunity, and sold them to persons in the fair, the judges held him guilty of larceny, since the jury found that he had no intention of paying for them, and the prosecutor's bailiff had sworn that he would not have delivered them without the money.⁵ So where the prisoner had hired a chaise for an indefinite time, he was held rightly convicted, there being no return of it within a reasonable time, for his subsequent conduct tended to satisfy the jury that the original taking was felonious.⁶ So where a chest of tea was obtained through the fraudulent use of a request note and permit, it was felony, for the servant at the India House had no authority to deliver the tea to any except the right owner.⁷ So where the prisoner obtained some cheese, by

¹ *R. v. Davenport*, 1 Archb. Peel's Acts, 5.

² *R. v. Pratt*, 1 Moo. C. C. 250.

³ *R. v. Campbell*, 1 Moo. C. C. 179. So was *Lyons v. De Pass*, [stealing slippers,] 11 Ad. & El. 326; 3 Per. & D. 177.

⁴ *R. v. Adams*, 2 Russ. C. M. 28.

⁵ *R. v. Gilbert*, 1 Moo. C. C. 185.

⁶ *R. v. Semple*, Leach, 420.

⁷ *R. v. Hench*, Russ. & Ry. 163. *R. v. Longstreeth*, ante, 1 Moo. C. C. 137.

the payment of a counterfeit crown, and the master swore he had given no authority to part with it without payment, the case amounted to felony, there being grounds for believing in the prisoner's guilty knowledge.¹ So where some deer horns were put into a cart, it was held, that the possession of the master enured at the delivery to the servant.² The servant cannot yield up the ownership, although he nominally abandons the possession. The master sent goods to H. by his servant: the prisoner meeting the servant, persuaded him to deliver up the goods, saying that he was H. This was deemed felony, for the wrongful taking would not alter the property, nor the possession.³ So where a watchmaker sent a watch, by post, addressed to his customer, being deceived by the prisoner's letter, and the prisoner received it from the postmaster, the offence was larceny, for the postmaster was the servant of the true owner, and the special property of the watchmaker, if any, ceased when he put the watch into the post. The possession was that of the owner.⁴ In one case the judges seem to have considered that the possession of the owner continued where the prisoner, *qua* servant, rescued some goods from a fire.⁵ Upon this occasion the prisoner had saved some muslin, in the presence of the prosecutor, and under his direction, but not by his desire. The owner afterwards applied to the prisoner, who denied having the property, but it was found artfully concealed in her house. The jury said, in their verdict, that they thought she had no original intention of stealing, but that the intention came upon her afterwards. The conviction was, of course, held wrong upon the latter ground.⁶ The mere custody of goods to show to a customer is not sufficient to divest the possession from the owner, although the person employed was not a servant of the owner.⁷ So it is in the case of taking bills or money fraudulently. The landlady of a house requested the prisoner, her lodger, to give her change for a bank note. He said he could not, but that he would go and get change; she delivered

¹ *R. v. Small*, 8 C. & P. 46. *R. v. Stewart*, 1 Cox, 174. The case of a valueless cheque. *R. v. Webb*, 5 Cox, 154. Where the prisoner gave the prosecutor an order for some boots. The servant took them with an order not to part with them without the money. The prisoner met the servant and said, that the goods were for him, and gave two counterfeit half-crowns for them. He was considered to have been rightly convicted of larceny, and his having previously pleaded guilty to the charge of uttering made no difference.

² *R. v. Norval and another*, 1 Cox, 95.

³ *R. v. Wilkins*, East, P. C. 673; Leach, 520. Whereas in *R. v. Parkes*, East, P. C. 674, *ante*, the servant was intrusted with the power of disposing of the goods.

⁴ *R. v. Kay*, 26 L. J. M. C. 119; Dears. & B. 231.

⁵ 2 Russ. C. M. 57. Note (d), in *R. v. Leigh*.

⁶ *R. v. Leigh*, East, P. C. 694; Leach, 411, n.

⁷ *R. v. Harvey*, 9 C. & P. 353. *R. v. Jones*, Car. & M. 611. *A fortiori*, if a servant. *R. v. Roberts and another*, 3 Cox, 74. This point has been repeatedly settled.

the note into his hands, and thus gave up the possession, but not the property, and therefore, as the prisoner did not return, he was guilty of a felony.¹ And in another case of exchange of bank notes for gold and silver, Wood, B., observed, that both the prosecutor and the prisoner must assent in order to effect a legal surrender of the property.² The prisoner went into a shop, and bought tobacco of the value of 1*½*d., and he tendered 2*s.* 6*d.* The shopman put down 2*s.* and whilst he was counting out the change, the prisoner took up the 2*s.* as if to throw them into the till, but threw in one only, and then asked for four sixpences, and received 1*s.* and two sixpences. This was not larceny.³ So, where the prisoner offered to discount a bill for 100*l.*, and contrived to get it into his hands upon the promise of going immediately for the money, upon which the clerk of the prosecutor was ordered to attend him, and not to lose sight of him till he, the clerk, had received the amount,—it was held, that a fraudulent evasion of the clerk by the prisoner gave the transaction the character of a felonious act, and that as the jury had found a preconcerted design to steal the bill, he had been legally convicted.⁴ If a person steal a bank note from A. and offer it to A. for change, it seems that it is larceny,⁵ for, although the possession might be gone, the ownership remains. A servant hid some fat belonging to his master, having taken it from its proper place. He then proposed to sell this fat to his master, but as the master had marked it, a discovery took place. It was argued for the prisoner that the entire possession of the fat was never intended to be taken, so as to deprive the owner of his property, but the judges affirmed the conviction.⁶ And the case differs entirely from that, where a workman took some skins from one part of a warehouse and placed them in another, with intent, not to sell them, but to bring them back as though he had himself dressed them, and thus to get paid for them as his own work. Here the skins were to be returned to the master without change of ownership. It was an attempt to commit a misdemeanor by a false pretence, but not larceny.⁷ So, in the case of the ore, where the miners took ore from the heaps of other miners, in order to increase their wages, which were paid according to the quantity produced. This was not larceny, for the ore was never taken out of the possession of the owner.⁸ *A fortiori*, where watches had been delivered to a watchmaker, who disposed of them, the jury not having found any *animus furandi* when they

¹ *R. v. Campbell*, Leach, 564.

² *R. v. Oliver*, 4 Taunt. 274, cited, Leach, 1072. See *R. v. Williams*, 6 C. & P. 390.

³ *R. v. Williams*, 7 Cox, 355; and *R. v. Oliver* was cited.

⁴ *R. v. Aichles*, Leach, 294.

⁵ See Den. 383, Alderson, B.

⁶ *R. v. Hall*, Den. 381; 18 L.J.

M. C. 62; 2 Car. & K. 947. *R. v.*

Manning and another, 22 L. J.

M. C. 21; Dears. 21; and *R. v.*

Hall was cited as in point.

⁷ *R. v. Holloway*, Den. 370; 2 Car. & K. 942.

⁸ *R. v. Webb and another*, 1 Moo. C. C. 431.

were received, the convictions were held wrong.¹ The prisoners broke open their master's store-room and took some finished gloves from it, and placed them on a table with other finished gloves. They were glove finishers, and pretended that these gloves were liable to payment according to the rule, which was, to pay for the number put upon the table. This was not larceny, and *Holloway's case* was deemed conclusive.² So, where the prisoner, not being a servant, was intrusted with a parcel of notes to take to a coach office, he was held to be guilty of felony for abstracting them.³ A landlord went to his tenant with a receipt written and signed. The tenant, who had removed his goods, asked to look at the receipt, giving the landlord at the same time 2*l.* He refused, however, to return the receipt, or to pay the remainder of the rent. He was then charged with stealing the receipt, and the landlord proved that when he gave up that paper he expected to receive the rent; that he would not have parted with it without payment, but that he did not expect to get back his receipt, because he looked for his rent. This was held to be larceny, and the payment of 2*l.* was considered to make no difference.⁴ Collins and Coker were charged with stealing two waistcoats. They had a gig, and had been bargaining with the prosecutor for some clothes, which were to be sent to N., but which address was fictitious. Coker then settled with the prosecutor to buy the waistcoats for 12*s.* Collins was in the gig. Coker took the waistcoats and *drove off*. The question was, whether the verdict of the jury, that the waistcoats were parted with conditionally, meant that the prosecutor should be paid for them at some time or other, for, if so, it was a debt. But the court held the conviction of Coker right. This was an express finding by the jury that the prosecutor only parted with the possession of the goods.⁵

Again, another case of artifice was where the prisoner got a load of "soft coal," and by a trick got it weighed as "slack," having covered the top of the cart with "slack." Here the property was not parted with, and the court held that he had committed larceny.⁶ Whereas, where a broker obtained delivery orders for some tallow, and tendered a crossed cheque upon the bank, *which was accepted*, but which produced no assets, and then got fresh warrants, he was acquitted, because by receiving the cheques the prosecutors parted with the property, as well as the possession of the delivery orders, by giving credit.⁷

¹ *R. v. Thistle*, 19 L. J. M. C. 66; Den. 502; 2 Car. & K. 842. *R. v. Levy*, 4 C. & P. 241.

² *R. v. Poole*, 27 L. J. M. C. 53; Dears. & B. 345. Whether they were indictable for a false pretence, qu.?

³ *R. v. Jenkins*, 9 C. & P. 38. *R. v. Smith*, 1 Car. & K. 428. Where the money was given to pay a coal bill, and the person employed brought back a forged re-

ceipt, this was a larceny of the money, although the prisoner was not legally a servant.

⁴ *R. v. Rodway*, 9 C. & P. 784.

⁵ *R. v. Cohen and another*, Den. & P. 249.

⁶ *R. v. Bramley*, 8 Cox, 468.

⁷ *R. v. North*, 8 Cox, 433. The jury, however, said that they gave this verdict under the direction of the judge.

Whether the subject be a horse, or goods, or any chattel, the contract endures till the engagement is satisfied or ended.¹ In some of these cases the possession is said to remain with the owner.² The prisoner was convicted of stealing a horse intrusted to him for agistment. There was no proof that the contract had been determined, so his conviction was held wrong, for the owner had parted with the possession.³ A person had the care of a horse, but, on being required, voluntarily gave it up. He then regained possession of it by a false pretence. Having sold it, according to his instructions under the original bailment, it was contended for him that the possession still remained constructively in him. But the judges held his conviction right. They said he was a trespasser upon his gaining possession by a false story, and, therefore, that he had committed larceny.⁴ Had the countermand been unaccompanied by a resumption of possession, there would have been no larceny.⁵ So, where the prisoner went to a pound-keeper and paid the dues for a horse, alleging that he had been sent by the owner, he was held guilty of larceny, and the possession of the horse was deemed to remain in the pound-keeper, being servant of the owner.⁶ A. pawns for B., A. then proposes to B. to redeem, which is agreed to, but A. takes away the property. This is larceny, for B. never gave up the ownership.⁷ A miller has corn to grind, he abstracts a part; by this act he violates the contract and commits felony.⁸ So, where a warehouseman received a bag of wheat to keep for the prosecutor, but took all the wheat with a felonious intention, he was guilty of larceny, and the judges said it mattered not whether he took the whole or a part.⁹ So, where a woman trusted the prisoner, a porter, with her bundle, and went with him, but he ran away with it, this act was felony in him. He determined the privity of contract, or perhaps the possession was never out of the woman, as she went with him; or perhaps he had an original felonious intention when he took the bundle.¹⁰

Carriers and bailees, 24 & 25 Vict. c. 96.] With reference to carriers and bailees, it was enacted by 24 & 25 Vict. c. 96, s. 3, whosoever, being a bailee of any chattel, money, or valuable security,¹¹ shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction.

There used to be a notable distinction in the case of carriers. Where such persons took the *whole* package committed to their

¹ Kel. 35, 82; Leach, 252, n.

² 1 Hawk. c. 33, s. 10.

³ *R. v. Smith*, 1 Moo. C. C. 473.

⁴ *R. v. Stears*, Den. 349; 18 L. J. M. C. 30.

⁵ Den. 355, Parke, B., in S. C.

⁶ *R. v. Simpson*, 2 Cox, 235.

⁷ *R. v. Sparrow*, 2 Cox, 287.

⁸ East, P. C. 698.

⁹ *R. v. Brazier*, Russ. & Ry.

337. *R. v. Howell*, 7 C. & P. 325.

¹⁰ *R. v. Jones*, East, P. C. 697; see Id. 698.

¹¹ See sect. 1.

charge, the act was not larceny, but otherwise, if the package were opened and a portion taken.¹ A carrier was convicted, however, under 20 & 21 Vict.c. 54, as a bailee, for misappropriating money with which he was intrusted to pay for goods.² However, as soon as the carrier has delivered his charge, the privity of contract is no more, so that if he should bring goods to the appointed place, and then take them away, he will be guilty of felony.³ So, if a quantity of goods were committed to the care of A., and he appropriated any article thereof, the bailment was determined, and the appropriation of the residue was larceny. If there were a separate bailment of each article it was not.⁴

From a review of these cases of larceny it appears,—1st, that a felonious intention must have existed in the mind of the taker *ab initio*; 2ndly, that in most instances the jury are the proper judges of the intention; 3rdly, that the property remains with the owner, although he may part with the possession, unless he does some act to make his assent to the taking evident; and 4thly, that in some cases, the possession continues with the owner as well as the property, although another person has the custody of it with a felonious intention. It has, moreover, been held, that where the owner combined with his servant for the detection of thieves, and permitted them to carry away part of his goods, he was not precluded from prosecuting them for the larceny, for he never intended that they should escape with the property. He gave them a greater facility to commit the offence, but he offered no original inducement to them, nor employed his servant to suggest the perpetration of the theft, which might have made a difference.⁵

It was, at one time, a common practice for servants to take corn clandestinely in order to feed their master's horses, and different opinions appear to have prevailed as to this conduct on their part.⁶ Where the prisoners opened the granary door by a false key, and took out beans, which the jury found they meant to give to the horses, eight judges held that they had committed larceny. Some of the judges thought, that as the man's labour had been lessened by giving the additional quantity of beans, the taking might be considered as being *lucri causâ*.⁷ This point has been once more

¹ Kel. 83. See the old cases, East, P. C. 696. But the reporter and text writer marvelled at this law. Leach, 33. *R. v. Madox*, Russ. & Ry. 92. Casks of butter. *R. v. Fletcher and another*, 4 C. & P. 545. *R. v. Pratley*, [a truss of hay,] 5 C. & P. 533. *R. v. Cornish*, Dears. C. C. 425, [cartloads of coal.] *R. v. Seward*, [canvas,] 5 Cox, 295.

² *R. v. Wells*, 1 Fost. & F. 109.

³ Kel. 83.

⁴ *R. v. Poyser*, 20 L. J. M. C. 191.

⁵ *R. v. Egginton and others*, Leach, 913; 2 Bos. & P. 508. He gave up the possession, not the property. See Fost. 129; Russ. & Ry. 310; also *R. v. Williams*, 1 Car. & K. 195.

⁶ Russ. & Ry. 307, 308.

⁷ *R. v. Morfit and another*, Russ. & Ry. 307. Diss. Graham and Wood; Barons, and Dallas, J. *R. v. Usborne or Osborne*, 5 Jur. 200, Parke, B. *R. v. Cole*, Id. n. Contra, Lord Abinger, C. B. *R. v. Smith*, 1 Cox, 10, Rolfe, B.

seriously considered, and the result has been that the convictions were sustained. The prisoners were tried before Erle, J., for stealing their master's oats. They were the carter and the carter's boy, and they took the oats for the horses, but they were *not answerable for the condition of the horses*. The jury found the fact of taking to give to the horses, but negatived any intention of private benefit. The majority of the judges held this act to be larceny, for the prisoners took the oats knowingly, and against the will of the owner, and without title or authority, with intent not to take temporary possession, and then abandon the oats (which would not be larceny), but to take the entire dominion over them, and it made no difference that this was not done *lucri causâ*, or even that the mode of applying the oats might be beneficial to the owner. And all the majority held themselves bound by the previous decisions, though several doubted whether, had the matter been *res integra*, they should have so decided. Erle, J., and Platt, B., thought that those judges, who had decided in favour of the conviction upon a former occasion, had proceeded on the ground that the prisoner would have gained, which was here negatived; and they also thought the taking not felonious, because the object was not to deprive the owner of his property, but to apply it for his benefit.¹ So it was where malt was given to horses.² So in the case of taking corn for the same purposes.³ So though a servant pawn his master's plate for the purpose of raising money upon it, this would not (in the opinion of Hullock, B.,) be larceny, yet if the intent were to steal it, it would be otherwise. The question is for the jury.⁴ Nevertheless, if a servant takes property, it is no defence that he has given it away.⁵

Gleaners.] The right to glean is not known to the law.⁶ Especially if the farmer swear a felony against the parties for stealing.⁷ The act is not simply a trespass, but a felony.⁸

Again, on the subject of *lucri causâ*. The prisoner opened a stable door, and having taken out the prosecutor's horse, backed it down a coalpit, whereby the horse was killed. This was done in

¹ *R. v. Privett and another*, Den. 193; 2 Car. & K. 114. Acc. Lord Denman, C. J.; Tindal, C. J.; Parke, B.; Patteson, J.; Williams, J.; Coltman, J.; Rolfe, B.; Wightman, J.; Cresswell, J.

² *R. v. Careswell*, 5 Jur. 251. And it does not seem necessary to show upon every occasion that the motive of the servant was to diminish his own labour.

³ *R. v. Handley*, Car. & M. 547. And the judge would not save the point.

⁴ *R. v. Wright*, Burn's Just. by Chitty, 640, Tit. "Larceny," citing Car. Cr. L. 278. See also *R. v.*

Guernsey. Taking papers from the Colonial Office. Verdict, Not guilty. 1 Fost. & F. 394.

⁵ *R. v. White*, 9 C. & P. 344.

⁶ 4 Burr. 1927, Hewitt, J. *Steel v. Houghton and another*, 1 Hen. Bl. 51.

⁷ They had been taking the corn before it had been carried, and even when some was standing. *R. v. Price, Esq.* 4 Burr. 1925. Rule for an information against a magistrate for committing them discharged with costs.

⁸ Woodf. Land. & Ten. ed. 1814, cited, 2 Russ. C. M. 11, O. B. cor. Rooke, J.

order to prevent the animal from being sworn to upon a trial for feloniously stealing it. Six judges held this act to be a felony. They said that the taking need not be *lucri causá*, that the object being to deprive the owner of his property, showed a felonious intention. Five judges were of a contrary opinion, and some of the six thought that the purpose in question might be deemed a benefit or *lucri causá*.¹ Although where the prisoner, out of revenge, threw some furniture into a river, having no intention of converting it to his own use, an acquittal was directed.² The prisoner had supplied to him a quantity of pig iron. He was to put this into a furnace to be melted, and was to be paid according to the weight of the metal which ran out of the furnace, and became bars. The prisoner put in the iron, and with it an iron axle belonging to his employers, of the value of 7s. This axle was not pig iron, and the prisoner gained 1*d.* by adding the axle, because the quantity of iron which ran from the furnace was increased. Upon this, it was held, that the prisoner was guilty of larceny, if he put the axle into the furnace with intent to convert it for his own benefit.³ A person was charged with larceny for opening and detaining a letter through curiosity, and an intent to injure was insinuated, but the judges directed an acquittal.⁴ However, where a servant got a letter from the post office addressed to B., and destroyed it for fear of its containing information unfavourable to her character, the judges, after argument, held that she had committed larceny, for here was a sufficient *lucrum*, even supposing that the principle of *lucri causá*, which they would not admit, should be recognized.⁵ So where a person was intrusted with a letter containing money for the purpose of putting it in the post. It was objected, that the prisoner was a bailee, but the court held that he had been guilty of larceny. The property was not parted with.⁶

Felonious taking, in what character.] Although we shall have occasion hereafter to point out more fully the principles which govern the more serious offences of larceny, provided for by the legislature against particular persons, as servants, clerks, &c., we will yet take the general principles of a felonious taking by particular persons in this place. and treat them as larcenies. As where the prisoner ran away with his master's cart.⁷ So where a clerk took a bill of exchange from a letter, which he had been ordered to put into the post.⁸ So where the clerk discounted a bill taken from his master's box, and absconded.⁹ So where the banker's

¹ *R. v. Cabbage*, Russ. & Ry. Coleridge, Maule, and Wightman, 92. See Den. 368. Parke, B., JJ., abs. in *R. v. Wynn*.

² *R. v. Blyton*, Dick. Q. S. 4th ed. p. 202, cited Den. 191.

³ *R. v. Richards*, 1 Car. & K. 532, Tindal, C. J.

⁴ *R. v. Godfrey*, 8 C. & P. 563.

⁵ *R. v. Eliz. Jones*, Den. 188; 2 Car. & K. 236. Platt, B., *dub.*;

⁶ *R. v. Jones*, 7 C. & P. 151.

⁷ *R. v. Robinson*, East, P. C. 565.

⁸ *R. v. Paradise*, Id.; Leach, 523, cited.

⁹ *R. v. Chipchase*, Leach, 699.

R. v. Metcalf, 1 Moo. C. C. 433.

R. v. Heath, 2 Moo. C. C. 33.

clerk pretended to a customer that he had paid money to the customer's account, and asking for a loan of it, got a cheque from him upon his master, with whom the customer kept cash, and then, in order to retard detection, made false entries in the books, he was held guilty of larceny. Every part of the definition of larceny was said to apply to the case.¹ So where a banker's clerk took money out of a strong room, where the cash was kept, having gone thither for a special purpose, he was held guilty of felony.² So it was, where the servant appropriated the goods with which his master had intrusted him for a customer.³ So where the master had given money to his servant, in order that he might carry it to another person.⁴ So where goods were delivered to the servant of the prosecutors' carman, having been weighed in the presence of their clerk, and the servant allowed other persons to steal the property, being himself a participator in the spoil, it was considered that this was not a breach of trust merely, but a larceny.⁵ A servant was intrusted with money to buy coals; he bought less than his orders, and had a balance, which of course belonged to the coal merchant, had he obeyed his master. His appropriation of this balance was larceny.⁶ So it was where the servant received monies specifically to pay tonnage dues. He only took the barge intrusted to his care sixteen miles, less than the prescribed distance, and appropriated a sovereign which should have covered the dues of the distance left untravelled. He was held to be guilty of larceny.⁷ The prisoner was intrusted with a parcel of clothes to sell; he was to bring back the money and the remainder of the unsold clothes, and he was to have 3s. in the pound for his trouble. But on one occasion he pawned some of the clothes for his own benefit, and appropriated the rest. This was held to be larceny. The court regarded the delivery of the parcel as one bailment of all the articles in it.⁸ A shopman sold clothes at a less price than that at which they were marked, and embezzled the proceeds; this act was not larceny but embezzlement.⁹

The prisoner was hired to drive sheep from Bristol to Bradford Fair, but he did not go to Bradford, and when taken he had sold ten of the sheep. The jury having found the original intention to steal, the judges held his conviction right.¹⁰ Upon another occasion, where a general drover, hired by the day, stole some sheep, and the jury found that the intention to steal did not arise until after the employment, it was held that he was guilty of larceny,

¹ *R. v. Hammon*, Leach, 1083;
4 Taunt. 304; Russ. & Ry. 221.

² *R. v. Murray*, Leach, 344.

³ *R. v. Bass*, East, P. C. 566;
Leach, 251, 524, cited. *R. v. Mead*,
3 Ch. Cr. L. 891.

⁴ *R. v. Lavender*, East, P. C.
566, overruling *R. v. Watson*, Id.
562. *R. v. Atkinson*, Leach, 302,
n. See *R. v. Butler*, 2 Car. & K.
340.

⁵ *R. v. Harding*, Russ. & Ry.
125. See *R. v. M'Carthy*, 2 Car.
& K. 379.

⁶ *R. v. Beaman*, Car. & M. 595.

⁷ *R. v. Goode*, Car. & M. 582.

⁸ *R. v. Poyser*, Den. & P. 233;
20 L. J. M. C. 191.

⁹ *R. v. Brackett*, 4 Cox, 274.

¹⁰ *R. v. Stock*, 1 Moo. C. C.
87.

for the possession remained.¹ But this case was clearly against principle, and it was eventually overruled in *R. v. Hey*, to which we shall come immediately. The hiring for a job makes no difference, for the possession of the driver is but that of a servant.² The prosecutors were pig jobbers at Newcastle, and they engaged the prisoner to drive some pigs to Leeds, and to bring back such monies as should be given him. He had no authority to sell, but only to deliver them, and should the person at Leeds refuse to accept them, no further instructions were given. The pigs were not accepted, and the prisoner sold the pigs, and absconded. The prisoner had never been employed by the prosecutor as a drover. Nothing was said about the right of the prisoner to drive cattle for any other person, but by the usage of the trade he might have done so. The question was, whether he was a servant, and the judges held that he was not. And it was not found that there was any original intention to steal the pigs when they were delivered to him. To be sure the prisoner was paid for his expenses, and it was found, that the customary mode of payment was by the day. On the other hand, he was a drover by trade, and seemed to have had the liberty of driving any other person's cattle. On the whole, therefore, the judges held that he was a bailee, and so his conviction was held wrong.³ A., the prisoner, left a pig on the road, under the pretence of its being tired, with B. He told his employer, who desired him to request B. to keep the pig, on condition of paying for the keep. Here the possession left the prisoner and reverted. The prisoner sold the pig to B., and kept the money. He was held not guilty of larceny, for he had no possession.⁴ The prisoner, a carrier, carried unsewed gloves to the sewers, and deducted his charges from the money received. He, however, instead of paying over the money, appropriated it, denying the receipt. He was held not to be the servant of the person defrauded, but only a bailee, and his conviction was deemed wrong.⁵ Thus, if there be no original intention to steal, and the person be not a servant, there cannot be a conviction for larceny. As where A. was a drover, and had only been employed once or twice by the prosecutor. He had eight oxen to drive to London, with leave to sell them on the road, otherwise he was to take them to a particular place in London. He sold two on the road, but appropriated the proceeds, and instead of delivering the remainder, according to his orders, sold them

¹ *R. v. M'Namee*, 1 Moo. C. C. 368. But see *R. v. Hey*, Den. 602.

² *R. v. Jackson*, 2 Moo. C. C. 32.

³ *R. v. Hey*, Den. C. C. 602; 2 Car. & K. 983. Now he would be guilty of larceny. See *Quarman v. Burnett*, 6 Mees. & W. 499. A carriage hired from a job-master, and

there was a particular servant and livery hired for the occasion. The job-master was not liable as master.

⁴ *R. v. Charles Jones*, 2 Russ. C. M. 158; Car. & M. 611.

⁵ *R. v. Gibbs*, Dears. 445; 24 L. J. M. C. 62. Now the Act 24 & 25 Vict. c. 96, would reach him.

likewise, and kept the money.¹ Again, a letter carrier was employed to carry letters from W. to C. A. sent two 5*l.* notes from C. to W., but the prisoner had received them at C., took out the notes before he arrived at W., and delivered the envelopes only. The verdict was guilty, but that there was no intention to steal the notes when they were delivered to the prisoner at C. The judges were unanimous that the conviction was wrong.² A surveyor got some gravel and stone by virtue of his office, and appropriated it. He was not guilty of larceny unless it could be proved that in the first instance he never intended to pay for it.³ But he is guilty of a misdemeanor at common law.⁴ Likewise, a servant was held guilty of stealing the money of B., although the indictment charged him with stealing the money of A. as A's servant, for the money was in the possession of A. as B.'s agent.⁵

Sheriffs' officers.] A sheriff's officer is guilty of a higher crime than a breach of trust when he takes goods wrongfully, by virtue of a writ. For his act does not alter the legal possession, and so it was held, the judges saying, that he had the bare custody of the property.⁶

Larceny by the owner himself.] Even the proprietor of goods may himself be convicted of stealing that which would seem to be his own. As, if he make a bailment to B., and then take away the things bailed in order to make B. answerable, for B. had a special property, which A. invaded, *invito domino*.⁷ So where goods were intrusted to M. & Co., who gave a bond conditioned for their exportation, and thus were special bailees. A., the owner, colluding with the prisoners, contrived to unpack the goods for home consumption, but without any intention to defraud M. & Co. It was held, that the prisoners were guilty of larceny, inasmuch as their object was to defraud the crown, and the jury having found the general property to be in A., the principle, that the owner might steal his own property from his own bailee, was recognized.⁸ The prisoner was in the habit of contributing

¹ *R. v. Goodbody*, 8 C. & P. 665.

² *R. v. Glass*, Den. 215; 2 Car. & K. 395.

³ *R. v. Richardson*, 1 Fost. & F. 488. Nor was it a false pretence.

⁴ *R. v. Anderson*, 3 Chit. Burn. 104. The act should be laid to be done by colour of his office, and in dereliction of his duty as surveyor.

⁵ *R. v. Jennings*, Dears. & B. 447.

⁶ *R. v. Eastall*, 2 Russ. C. M. 92, 153.

⁷ 1 Hale, P. C. 513. See East, P. C. 558; Leach, 871.

⁸ *R. v. Wilkinson and another*, Russ. & Ry. 470. Some of the judges thought likewise that if M. & Co. had *not* been open to an action on the bond, at the suit of the crown, and consequently, that the crown only could have been defrauded, the prisoners would still have been guilty.

to a benefit society, and on one night she took away the box where the funds were kept. No order for excluding her in consequence of her neglect to pay for four weeks had been made, but she was held to be guilty of larceny, for the landlord of the house where the box was kept was the special bailee, and was answerable for it to the society.¹

Joint tenant.] A joint tenant cannot be said to take property from his co-tenant feloniously, for, as Lord Hale observes, "Although he might so act *animo furandi*, yet being tenant in common he doth but what he may do."²

Baron and feme.] It is a general principle that the wife cannot commit larceny of her husband's goods.³ As where the wife broke open a box belonging to a friendly society, and which was kept locked by the stewards, but was under her husband's control.⁴ Not even though she deliver the goods over to another person than her husband; nor is that person guilty of receiving the goods by the wife's delivery.⁵ In such a case the court thought that the property had been taken with the consent and privity of the woman,⁶ and then the husband's consent would be presumed, because of the identity of property. But if the woman were living in adultery, the man as well as the woman would, probably, be punished for larceny, for then the identity would be rebutted, and there would be an original stealing.⁷ Where the finding was, that the wife and the prisoner stole the property jointly, living in adultery, the judges considered the taking to have been *invito domino*, and they affirmed the conviction against the prisoner, the adulterer.⁸ And it is no defence to allege the absence of adultery if the wife and the prisoner have evidently taken the goods with an intention to live together. Nor does it matter that the goods taken are the wife's clothing. Although if they turn out to be her necessary wearing apparel, the case is altered, and a conviction obtained under such circumstances was quashed.⁹ But if the jury be satisfied that the intention was not

¹ *R. v. Bramley*, Russ. & Ry. 478. In one count the property was laid in the landlord, in the other, in the stewardesses.

² 1 Hale, P. C. 513.

³ 1 Hawk. c. 33, s. 32.

⁴ *R. v. Willis*, 1 Moo. C. C. 375.

⁵ 1 Hale, P. C. 514.

⁶ *R. v. Harrison*, Leach, 47.

⁷ 1 Hale, P. C. 514, note (a).

⁸ *R. v. Tolfree*, 1 Moo. C. C. 243, overruling *R. v. Clarke*, Id. 376, n. (as it should seem.)

R. v. Tollett, Car. & M. 112. *R. v. Thompson*, Den. 549. *R. v. Featherstone*, 23 L. J. M. C. 127, where the wife delivered thirty-five sovereigns to the adulterer, he knowing that she had taken them. *R. v. Glassie and another*, 7 Cox, 1. The wife was acquitted, but the paramour was convicted, upon the husband's testimony, of stealing his goods, which were found in the trunk of the adulterer. ⁹ *R. v. Fitch*, 26 L. J. M. C. 169; *Dearsl. & B.* 187. The pri-

criminal, as if the prisoner's object was merely to get the wife away from her husband, with a friendly view, they ought to acquit.¹ A woman brought goods belonging to her husband to the lodgings of the adulterer, and placed them in a room where the adultery was committed. This was not sufficient evidence of the prisoner's possession. It was no more than the finding of the goods, as against him, in the same room.² The question is, whether when the prisoner and the wife leave the husband's house with the husband's goods, they have for their object that of adulterous intercourse, for if so, and the adultery be committed, the prisoner ought to be convicted.³ On the contrary, where there is no such intention, but a mere assistance by a stranger in carrying off the goods, the verdict of guilty will be set aside.⁴ Whether, in this case, the stranger had the *animus furandi* was not left to the jury. And Cockburn, C. J., said, that there were some old authorities which exonerated the taker even if he had the *animus*. But the court would not meddle with that point.⁵

Taking of chattels, personal or real.] Thirdly, the felonious taking must be of some property either personal, at common law or by statute, or of real chattels under the provisions of Acts of parliament. Therefore, at common law, it is a mere trespass to steal corn, or grass growing, or apples on a tree, or lead on a church or house.⁶ But the offender is punishable upon summary conviction. Neither are dogs, cats, bears, &c., chattels capable of being the subjects of theft at common law, being, as it were, of a base nature.⁷ But dogs are now protected by statute,⁸ although it is not felony to steal them. At common law, hares, conies, animals *feræ naturæ*, and fish were equally free to all,⁹ but if they are in a state of confinement, *i. e.* tame, or reclaimed, or if dead, and good for food, they are the subjects of larceny at common law.¹⁰ Neither did the common law extend its protection to writings which savoured of the realty, nor to records of a like nature, nor to choses in action, nor bills, bonds, &c.,¹¹ nor to an

soner and the wife left the husband's house, he first, and she followed. The husband was there likewise. The agreement between the prisoner and the wife was to live together. They were found on the road, the prisoner carrying a bandbox containing the wife's apparel. The charge was for stealing wearing apparel from the husband. The point was reserved by Erle, J. But by Cockburn, C. J., "We all agree that this conviction cannot be sustained."

¹ *R. v. Tollett*, Car. & M. 112.

² *R. v. Rosenberg*, 1 Car. & K. 233.

³ *R. v. Berry*, Bell, 95; 28 L. J. M. C. 70. Conviction affirmed.

⁴ *R. v. Avery*, 28 L. J. M. C. 185; Bell, 150.

⁵ S. C.

⁶ 1 Hawk. c. 33, s. 34.

⁷ Id. s. 36.

⁸ 24 & 25 Vict. c. 96, ss. 18, 19, 20.

⁹ 1 Hawk. c. 33, ss. 39, 40.

¹⁰ East, P. C. 607.

¹¹ 1 Hawk. c. 33, s. 35.

unstamped agreement.¹ But if the parchment writings were independent of the freehold, the case would be different. And the taking of domestic beasts, as horses, &c., ducks, hens, and such like, was always deemed felony.² And as soon as the apples, corn, or grass become severed from the freehold, it was larceny to take them at common law.³ As if a man should come in the daytime, and shake apples from a tree, and then return in the night and take them away, or if a tree be cut down, and then taken from the orchard at another time, it is the same.⁴ So if a man cut corn and lay it on one side, and fetch it away on the next day, it is felony, but not if the cutting and carrying away be one continuous act. So of a copper.⁵ It may likewise be added, that where it was felony at common law⁶ to steal the beasts themselves, it was likewise felony to steal the produce of them, as the milk of the cow,⁷ or the wool from the sheep's back.⁸ So the stealing of gas is larceny. There may easily be a sufficient severance to constitute an *asportavit*.⁹ The stealing of a pawnbroker's duplicate is likewise larceny. It is an assurance for the delivery of goods, and may be so called in an indictment. It may also be said to be a piece of paper, or a pawnbroker's ticket.¹⁰

Indictment for simple larceny.] The indictment for simple larceny states, that A., on, &c., feloniously did steal, take, and carry away [the property] of the goods and chattels of B., against the peace, &c. Indeed, before the stat. 14 & 15 Vict. c. 100, s. 16, the charges must have been single, and now by 24 & 25 Vict. c. 96, s. 5, it shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first

¹ *R. v. Watts*, Dears. 326. Parke, B., *diss.*, who thought that the indictment was good. The indictment was for stealing a piece of paper. Maule, J., said, that the piece of paper was an agreement, and was evidence of a right, and, as a right, could not be the subject of larceny, nor the paper which was evidence of it. And, consequently, it was enacted by 17 & 18 Vict. c. 83, s. 27, that every instrument liable to stamp duty shall be admitted in evidence in any criminal proceedings, although it may not have the stamp required by law impressed thereon, or affixed thereto.

² 1 Hawk. *ut supra*; East, P. C. 607.

³ 1 Hawk. c. 33, s. 34.

⁴ Say. Rep. 204, Ryder, C. J.

⁵ 1 Taunt. 791, Gibbs, C. J.

⁶ 1 Mod. 89, Hale, C. J.

⁷ East, P. C. 617. Case from the Oxford circuit.

⁸ *R. v. Martin*, Dal. 21; Leach, 171.

⁹ *R. v. White*, 22 L. J. M. C. 123; Dears. 203.

¹⁰ *R. v. Morrison*, 28 L. J. M. C. 210; Bell, 158. Cockburn, C. J., said, they could not hold this to be otherwise than a chattel without overruling *R. v. Boulton*, a decision binding upon them. Den. 508.

to the last of such acts, and to proceed thereon for all or any of them. By 14 & 15 Vict. c. 100, s. 18, in every indictment in which it shall be necessary to mention or make any averment as to any money or any note of the bank of England or any other bank, it shall be sufficient to describe such money or bank note simply as money, without specifying any particular coin or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note, shall not be proved, and in cases of embezzlement and obtaining money or bank notes by false pretences, by proof that the offender embezzled or obtained any piece of coin or any bank note, or any portion of the value thereof, although such piece of coin or bank note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly.¹

Here are, 1, the proper mention of the goods, and the description of the ownership. The goods should be so mentioned as to satisfy the legal definition of property, and disclose to the prisoner with sufficient accuracy the charge he is to meet. Thus, in the case of taking hares, it must be alleged that they were in a reclaimed state, tame, for otherwise they would be deemed to be *feræ naturæ*.² So, of other animals. So, in the case of a pheasant.³ So, if the animal be dead, it should be so stated, if there be any additional punishment by statute for stealing it. But as most of the cases of simple larceny do not bring any such additional punishment,⁴ it is in general sufficient to say one turkey, one fowl, &c. Although the rule was formerly to the contrary.⁵ The creature will be intended to be alive unless the contrary be shown.⁶ But "one ham" is a sufficient designation. The court will presume it to be the subject of larceny.⁷ In the case of receiving, it is immaterial whether the animal be dead or

¹ See *R. v. Fry and another*, Russ. & Ry. 482. *R. v. Radley*, Den. 450; 18 L. J. M. C. 184. *R. v. Bond*, Den. 517; 19 L. J. M. C. 138.

² *R. v. Tate*, 1 Lew. C. C. 234.

³ *R. v. Rough*, East, P. C. 607.

⁴ See 1 Moo. C. C. 242, where the judges said they could not reject the word "live" as surplusage; and *R. v. Edwards and another*, Russ. & Ry. 497, *post*.

⁵ *R. v. Holloway*, 1 Car. & P. 128, Hullock, B. *R. v. Harding and another*, Sarum Lent As. 1832, M. S. Park, J.

⁶ Archb. Crim. Pl. 355.

⁷ *R. v. Gallears*, 19 L. J. M. C. 13; Den. 501. And Pollock, C. B., intimated a doubt as to the correctness of the ruling in *R. v. Cox*, *infra*. But, notwithstanding variances, if an article improperly described as "ham" instead of "pork," be traced to the prisoner's house, the fact may be offered to the jury as evidence of the theft of something else. The taking of one article may be presumed from the possession of another, though there be no other evidence. *R. v. Purcell*, 1 Cox, 107, Alderson, B.

alive.¹ Where the charge was for stealing eggs, the indictment was held bad, because it did not describe the species of eggs. They might not have been the subject of larceny.² Again, the property must be correctly set forth. Not as "a great quantity of goods."³ Nor, "one parcel of the value of one shilling."⁴ Nor, "20 sheep and lambs."⁵ A charge of stealing 1 bushel of oats, 1 bushel of chaff, and 1 bushel of beans, was held insufficient by Bayley, J., who thought that the proper expression would have been "a certain mixture consisting of one bushel of," &c.⁶ But Alderson, B., doubted of this in subsequent cases, and alleged a distinction between mechanical and chemical mixtures. For, unlike a mechanical, a chemical mixture would make a distinction in each article.⁷ Where a set of handkerchiefs in a piece was described as so many handkerchiefs, and it appeared that the custom of the trade was to call the goods a piece of silk handkerchiefs, and, moreover, that the usual mode of drawing indictments at the Old Bailey was in a similar form, the judges affirmed the conviction, although Hullock, B., at the trial inclined towards the objection.⁸ Ingots of tin may be described as so many pounds weight of tin, and a bar of iron as so many pounds weight of iron.⁹ The indictment charged the stealing of ten pounds of copper, but the articles were copper nails, and Erle, J., inclined towards the objection.¹⁰ So, pieces of a brass furnace broken up will not satisfy the words "brass furnace,"¹¹ and a "spade" is not represented by the "flat or iron part of the spade," the handle being gone.¹²

As to the ownership. The goods of a married woman should be laid in the husband. A wife was sent to sell sheep by her father. She was plundered of 5*l.* before she paid the money to her father. The note taken was rightly laid in the husband.¹³ In the case of innkeeper and guest, the goods may be laid in either.¹⁴ But the goods of a lodger in ready-furnished lodgings must be laid in the lodger, for the owner is not entitled to the possession.¹⁵ So the linen delivered to a washerwoman may be laid in her.¹⁶ So, the cattle delivered to an agister may be laid in him, for he has the possession,

¹ *R. v. Puckering*, 1 Moo. C. C. 242.

² *R. v. Cox*, 1 Car. & K. 487, Tindal, C. J.

³ *R. v. Foster*, 1 Ld. Raym. 475.

⁴ *R. v. Bonner*, 7 Cox, 13. The indictment was quashed.

⁵ 2 Hale, P. C. 182.

⁶ *R. v. Kettle*, 3 Ch. Cr. L. 947.

⁷ Den. 521, in *R. v. Bond*.

⁸ *R. v. Nibbs and another*, 1 Moo. C. C. 25.

⁹ *R. v. Mansfield*, Car. & M. 140.

¹⁰ *R. v. Christance and another*, 1 Cox, 143.

¹¹ *R. v. Holloway*, 1 C. & P. 127.

¹² *R. v. Stiles*, 2 Russ. C. M. 109.

¹³ *R. v. Roberts*, 7 C. & P. 485, *R. v. Sallows and another*, 2 Cox, 63.

¹⁴ *R. v. Todd*, Leach, 357, n.

¹⁵ *R. v. Belstead*, Russ. & Ry. 411. *R. v. Brunswick*, 1 Moo. C. C. 26.

¹⁶ *R. v. Packer*, East, P. C. 653; Leach, 357, n.

and may maintain trespass.¹ And a parcel may be laid in the driver of a stage coach.² So may goods be laid in the carrier.³ And a coach glass may be laid in the coach-master, although the carriage should belong to another person.⁴ But the son's clothes should be laid as the property of the father, if they are supplied by the father to the son under indenture of apprenticeship, otherwise they should be laid in the son.⁵ Yet where the father bought and paid for cloth for trowsers for his son, *seventeen years of age*, the trowsers were considered to have been rightly laid in the father, although the better course would have been to have laid them in the son.⁶ Even if a child have a chattel, as a gold chain, it may be laid in him as well as in the father.⁷ A father left some boots at a stall in the charge of his son, a lad of fourteen, whom he supported. The prisoner stole them, and the indictment laid the property in the son. The court directed an acquittal, and the prisoner, upon a subsequent indictment, having pleaded in vain *autrefois acquit*, was convicted, and the court held that the son was not a bailee, and sustained the finding.⁸ Property may be laid in the owner, although he never had the possession of it, otherwise than through his agent, for the rule as to servants does not apply to takings by a third person.⁹ On the other hand, where the goods are in the owner's possession, an objection that they might have been described as the goods of another, will not avail. A. and B. were partners, and on B.'s death, without a will, his widow acted as partner with A. Upon an indictment the goods were laid in A. and the widow. It was held that the description was right, although it was objected that the children entitled under the statute of distributions should have been named in conjunction with the others, or that they should have been laid in the ordinary and the surviving partners.¹⁰ The dead body of A. lay in the road in the diocese of W. A knife was stolen from A.'s pocket. A.'s last abode was in the diocese of G. But his father deposed that, to his belief, A. had left that place of abode to come and live with him, but whether he had actually given up his old lodgings the father did not know. This was held sufficient evidence to warrant a count for larceny, laying the property in the bishop of the diocese of W.¹¹ In the case of the sheriff's officer, who was convicted of stealing goods taken under a *fi. fa.*,¹² it was held right to lay the property in J. S.

¹ *R. v. Woodward*, East, P. C. 653.

² *R. v. Deakin and another*, Id.

³ *R. v. Trollop*, Kel. 39.

⁴ *R. v. Taylor*, Leach, 356. *R. v. Statham*, Id. 357.

⁵ *R. v. Forsgate*, Leach, 463. The indictment was defective.

⁶ *R. v. Hughes*, Car. & M. 593.

⁷ Leach, 464, n.; East, P. C. 654.

⁸ *R. v. Green*, Dears. & B. 113; 26 L. J. M. C. 17.

⁹ *R. v. Remnant*, Russ. & Ry. 136. For the property should be laid in the servant where the master never had possession. *R. v. Rudick and others*, 8 C. & P. 237.

¹⁰ *R. v. Gaby*, Russ. & Ry. 178. See Id. 13.

¹¹ *R. v. Tippin*, Car. & M. 545.

¹² *R. v. Eastall*, ante.

whose goods were seized, for the loss would fall upon J. S. in the event of the non-application of the money arising from the sale towards the liquidation of his debt. It was urged that the goods should have been laid in the sheriff.¹ If A. should steal B.'s horse, and C. should steal it from A., the possession in law remaining with B., the property may be laid in him.² Lead fixed to a church is properly laid in the vicar,³ but it may be laid in the churchwardens.⁴ The property in iron found in a canal may be alleged to belong to a company of proprietors of the navigation, although had the owner been found, the iron would have been returned to him. The prisoner, however, was not their servant, but a stranger.⁵

In the case of a dissenting chapel, the property should be laid in the trustees, or in the minister. Where such property was alleged to be in a servant, who took care of the chapel, and had the only key belonging to it, except the minister's key, it was held that the conviction could not be supported.⁶ It was otherwise where A., in whom, with others, the property in a book stolen from the chapel was laid, stated himself to be a trustee.⁷ A shroud stolen from the corpse should be laid in the executor or other persons who buried the deceased.⁸ And leaden coffins may be laid in the executors,⁹ or in persons unknown, should the latter be the case.¹⁰ Although upon the charge of stealing from a person unknown, proof must be given of the loss of some property, in order that the taking might be presumed to have been *invito domino*. It would not be enough that the prisoner could not give an account of the property taken,¹¹ otherwise a man might be charged upon presumption. If the owner be known, there must be an acquittal on that count. But the leaden coffin must not be laid in the churchwardens. After sixty years, Buller, J., held, that such a coffin might be laid in a person unknown, although the same family remained on the spot, and no particular diligence had been used in making inquiries.¹² No larceny, however, can be committed of the corpse itself, although taking it from its grave is a misdemeanor.¹³ If the executor refuse to act, the property may be laid in the ordinary. An administrator had taken out his letters of administration since the offence, but before the indictment. The property being laid in him, the court directed an acquittal.¹⁴ If search be made for a will, and it be not found, it may be pre-

¹ S. C. 2 Russ. C. M. 153.

² 1 Hale, P. C. 507.

³ *R. v. Miles and another*, 1 Cox, 351.

⁴ *R. v. Garlick and others*, 1 Cox, 52.

⁵ *R. v. Rowe*, Bell, 93.

⁶ *R. v. Hutchinson and another*, Russ. & Ry. 412.

⁷ *R. v. Boulton*, 5 C. & P. 537.

⁸ *R. v. Haynes*, 12 Rep. 113; East, P. C. 652.

⁹ East, P. C. 652.

¹⁰ Id.

¹¹ East, P. C. 651, 657; 2 Hale, P. C. 290. Anon. 8 Mod. 248, Gilbert, C. B.

¹² East, P. C. 652.

¹³ East, P. C. 652; 2 T. R. 733.

¹⁴ *R. v. Smith and another*, 7 C. & P. 147.

sumed that there is not one. And the property stolen may be laid in the ordinary. And if *some* of the stolen property turn out to have been taken after the decease, it is sufficient, although some might have been taken before.¹ The goods of a felon may be described as the goods of the queen.² The property of a benefit society may be laid in the treasurer by his proper name, without further description. A trustee was held rightly convicted upon an indictment so framed. The argument for the prisoner that he was the person in whom the property vested was not entertained by the judges, for the treasurer was the officer substantially intended by the Act.³ *R. v. Cain* was cited in vain against a man who was a trustee of a friendly society, and in pursuance of a resolution at a lodge meeting, received and carried away 40*l.* belonging to the deceased R. C. The money in *R. v. Cain* was vested in the treasurer, but here in the trustees. The prisoner was a trustee, and specially appointed by the meeting to carry it to a bank. He was guilty of a breach of trust, but not of stealing the monies of R. C.⁴ We have seen, that in the case of partnership, the property may be laid as that of one partner, by name, and of others.⁵

Yet, if the indictment should mention A. and others, and there should be but one partner, the variance will be fatal,⁶ unless the judge should amend. One partner resided in Belgium, the other here. The home partner had the sole management. Notes and money stolen were held to have been rightly laid in him alone.⁷ In the case of the West Indian Dock Company, the indictment laid the property stolen as the goods and chattels of that company, and it was considered not necessary to add, that they had been taken feloniously, "from the said company."⁸ The property of counties, ridings, and divisions, has been already noticed.⁹

If the name of the person robbed should not be known,¹⁰ the question arises, whether the word "unknown" is to be taken generally, or limited to the "grand jury." "To the said grand jurors unknown." Certainly, where the principal felon appeared before the grand jury in support of an indictment against the accessory, a count, stating that a certain person, to the jurors unknown, stole, &c., was rejected, and an acquittal took place.¹¹ And, where the 1st count stated a name in particular, and the 3rd laid the property in persons unknown, it was clearly right to resort to the 2nd count, for the 1st had failed, and the 3rd was bad on the face of it.¹² But if the

¹ *R. v. Johnson*, 27 L. J. M. C. 52; Dears. & B. 340.

² *R. v. Whitehead*, 2 Moo. C. C. 181.

³ *R. v. Cain*, 2 Moo. C. C. 204; Car. & M. 309.

⁴ *R. v. Loose*, 29 L. J. M. C. 132.

⁵ *Ante*.

⁶ *R. v. Hampton*, 3 Ch. Burn. 428.

⁷ *R. v. Cole*, 4 Cox, 280.

⁸ *R. v. Stokes*, 8 C. & P. 151; *R. v. Wright*, 1 Lew. 268. *Post*, "Forgery."

⁹ *Ante*, p. 91; and see *R. v. Went*, Russ. & Ry. 359.

¹⁰ *Ante*.

¹¹ *R. v. Walker*, 3 Campb. 264. Anon. 2 Russ. C. M. 242, Dallas, J.

¹² *R. v. Deakin*, Leach, 862; *R. v. Robinson*, Holt, N. P. C. 595.

thief, or the owner of the property, were not known to the *grand jury*, but upon an indictment with these words, "to the jurors unknown," either charging an unknown thief, or mentioning an unknown owner, the name should appear at the trial, it might be said that the prisoner should be convicted. In *R. v. Cordy*, where it was argued that the prisoner should be acquitted under such circumstances,¹ Littledale, J., said he should doubt the correctness of such a holding, although such a decision had been arrived at, and the judge seemed disposed to limit the knowledge to the grand jury.² The issue does not appear.

It is usual to mention that the goods stolen were the chattels of A. or B. If these words were altogether omitted, and there should be nothing to connect the property stolen with A. or B., the indictment would probably be bad.³ It is common to state some value in the indictment, and if in evidence it should turn out that the thing stolen was worth the lowest English coin, a farthing, yet the charge will be sustained, being of *some value*.⁴

By 24 & 25 Vict. c. 96, s. 6, if upon the trial of any indictment for larceny it shall appear that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six months from the first to the last of such takings.

Trial.] By 24 & 25 Vict. c. 96, s. 2, every court whose power as to the trial of larceny was before that time limited to petty larceny shall have power to try every case of larceny, the punishment of which cannot exceed the punishment hereinafter mentioned for simple larceny, and also to try all accessories to such larceny.⁵ The prisoner should be tried in the county where the offence was committed, but the possession of the goods is held to be a continuing offence in every county where he is found with

¹ 2 Russ. C. M. 98, n.

² Id. Mr. Greaves thinks that in the case of total ignorance before the grand jury, the prisoner might, nevertheless, contradict the finding, by showing that the party was known, although not to the grand jury. If so, the question as to acquittal would be fairly raised, and the point might be decided. See Id., and *R. v. Thomas*, East, P. C.

781. *R. v. Woolford*, 1 Moo. & Rob. 384.

R. v. Long, Cro. El. 490; 2 Hawk. c. 25, s. 71.

⁴ *R. v. Morris*, 9 C. & P. 349. See further, concerning the indictment for larceny, East, P. C. 777.

⁵ The venue in proceedings against persons acting under the Act. Notice of action. General issue. 24 & 25 Vict. c. 96, s. 113.

them after the larceny.¹ And by 24 & 25 Vict. c. 96, s. 114, if any person shall have in his possession in any one part of the United Kingdom any chattel, money, valuable security, or other property whatsoever, which he shall have stolen or otherwise feloniously taken in any other part of the United Kingdom, he may be dealt with, &c. for larceny or theft in that part where he shall so have such property, as if he had actually stolen or taken it there, and if any person in any one part of the United Kingdom shall receive or have any chattel, &c. which shall have been stolen or otherwise feloniously taken in any other part, such person knowing such property to have been stolen or otherwise feloniously taken, he may be dealt with, &c., in that part of the United Kingdom where he shall so receive or have such property, in the same manner as if it had been originally stolen or taken in that part.²

In a joint prosecution against two, it is no defence that one of the prisoners took the goods into a second county, if it be proved that the other offender joined him, and concurred in the act which he had been before aiding and abetting in the first county.³ But where a felony was committed in Gloucestershire by four persons, who subsequently made a division of the stolen property, in the same county, Holroyd, J., ruled, that they could not be convicted of a joint larceny in Worcestershire, where the goods were found upon them, and he put the prosecutor to his election, who accordingly proceeded against one only.⁴ And although a person cannot be convicted of a compound larceny in another county than that in which the deed was done, it would not avail him upon an indictment for simple larceny, in a second county, where the plunder was found upon him, if it were to appear that he had committed a felonious act, connected with such goods elsewhere.⁵ It was once the subject of discussion whether the Island of Jersey could be considered as part of the United Kingdom within the old Act, and the judges held unanimously that a conviction in Dorsetshire of a larceny in Jersey was wrong.⁶ The fact of a long interval having elapsed between the theft in one county and the finding on the prisoners in another, makes no difference, either at common law or by statute.⁷ Again, where the character of the property changed in the second county, it was held that the trial could not be had there. As where live turkeys were stolen in Cambridgeshire, and they were found dead in the pri-

¹ *R. v. Bulwer*, 7 Rep. 1; East, P. C. 771.

² East, P. C. 772.

³ *R. v. County*, 2 Russ. C. M. 118. *R. v. M'Donagh and another*, Carr. Supp. 23.

⁴ *R. v. Barnett and others*, 2 Russ. C. M. 118. The prisoner was convicted, and the other three pleaded guilty to separate indict-

ments. See *R. v. Thomson*, Id. 116.

⁵ 2 Hale, P. C. 163.

⁶ *R. v. Prowes*, 1 Moo. C. C. 349. *R. v. Anderson and others*, (no longer applicable,) 2 East, P. C. 772, was cited.

⁷ *R. v. Parkin*, 1 Moo. C. C. 45.

soner's possession in Hertfordshire.¹ So where the prisoner was charged with stealing a brass furnace in Herefordshire, and it turned out that he had taken the furnace in Radnorshire, and had taken it to pieces before it had reached Herefordshire, or 500 yards from the boundary of that county, the same doctrine prevailed.²

Felonies committed upon persons or property in any carriages upon a journey, or on board of any vessel upon any navigable river, canal, or inland navigation, have been treated of elsewhere.³ Certain railway carmen driving a waggon from the station in Middlesex to a place in Kent, took some oats, which had been put into the horse-bags, and sold them in Kent, for their own use. It was objected, that the trial ought to have been in Kent, and not in Middlesex, for this could not be said to be a journey. But the court said, that the Act could not be restricted to the case of carriers, and the conviction was affirmed.⁴ An offence was committed in Holwell, Somerset, which is surrounded by the county of Dorset. A Dorsetshire grand jury found the bill. The venue was Dorset. Fitzherbert, referring to several statutes, contended, that the word "try" did not include the finding of a bill by the grand jury; but Rolfe, B., overruled the objection at once.⁵ Where an English ship lay in the Wampa, in China, twenty or thirty miles from the sea, it was, nevertheless, considered that a conviction at the Central Criminal Court, for a larceny committed by a sailor in that river, was proper, since it was a place where great ships went.⁶ We have already referred to the section by which every court whose power as to the trial of larceny was before that Act limited to petty larceny, shall have power to try every case of larceny, and all accessories thereto, provided that the punishment do not exceed that for simple larceny. This statute, however, does not warrant the trial in England of a person who is found here in possession of goods which he has stolen in France.⁷

Admiralty.] By 24 & 25 Vict. c. 96, s. 115, all indictable offences mentioned in this Act which shall be committed within the jurisdiction of the admiralty of England or Ireland shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England or Ireland, and may be dealt with, &c., in any county or place in which the offender shall be apprehended or be in custody;

¹ *R. v. Edwards and another*, 122. See Mr. Greaves's note on Russ. & Ry. 497. Talf. Dick. Q. S. 188. See 7 Geo. 4,

² *R. v. Holloway*, 1 C. & P. 127. c. 64, s. 12.

³ *Ante*.

⁴ *R. v. Sharpe and others*, 24 1 Moo. C. C. 494. L. J. M. C. 40; Dears. 415.

⁵ *R. v. Loader*, 2 Russ. C. M.

⁶ *R. v. Allan*, 7 C. & P. 664;

⁷ *R. v. Madge*, 9 C. & P. 29.

and in any indictment for any such offence, or for being an accessory to any such offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence itself shall be averred to have been committed "on the high seas;" provided, that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.

Judgment.] By 24 & 25 Vict. c. 96, s. 4, whosoever shall be convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall (except in the cases hereinafter otherwise provided for) be liable to penal servitude for three years, or imprisonment not exceeding two years, with or without hard labour, or solitary confinement, and, if a male under sixteen years, with or without whipping.

By sect. 7, whosoever shall commit simple larceny after a previous conviction for felony, whether such conviction shall have taken place upon an indictment, or under the provisions of the Act 18 & 19 Vict. c. 126, shall be liable to penal servitude not exceeding ten years and not less than three years, or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement, and, if a male under sixteen years, with or without whipping.

Then by sect. 8, whosoever shall commit simple larceny, or any offence hereby made punishable like simple larceny, after having been previously convicted of any indictable misdemeanor punishable under this Act, shall be liable to penal servitude not exceeding seven years nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement, and, if a male under sixteen years, with or without whipping.¹

And by sect. 117, whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, fine the offender, and require him to enter into his own recognizances and to find sureties, both or

¹ By sect. 9, whosoever shall commit simple larceny, or any offence hereby made punishable like simple larceny, after having been twice summarily convicted of any of the offences punishable upon summary conviction, under the Acts following, *i. e.*, 7 & 8 Geo. 4, cc. 29, 30; 9 Geo. 4, cc. 55, 56; 10 & 11 Vict. c. 82; 11 & 12 Vict. c. 59; 14 & 15 Vict. c. 92; 24 & 25 Vict. c. 96; 24 & 25 Vict. c. 97 (whether each of the convictions shall have been in respect of an offence of

the same description or not, and whether such convictions or either of them shall have been or shall be before or after the passing of this Act,) shall be guilty of felony, and liable to penal servitude not exceeding seven years and not less than three years, or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement, and, if a male under sixteen years, with or without whipping.

either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act the court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized: provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

By sect. 118, whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this Act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.

By sect. 119, whenever solitary confinement may be awarded for any indictable offence under this Act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year; and whenever whipping may be awarded for any indictable offence under this Act, the court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence.

By 18 & 19 Vict. c. 126, s. 1, larceny of property not exceeding 5s., and attempts to commit larceny from the person, or simple larceny, is punishable upon summary conviction, before two or more justices, with imprisonment not exceeding three calendar months, with or without hard labour. But an option is given to the prisoner to decline the jurisdiction, in which case he will be committed to the assizes or sessions. By sect. 3, where the property stolen exceeds 5s., or where the larceny is from the person, or the prisoner be a clerk or servant, and the prisoner pleads guilty, he may be imprisoned, with or without hard labour, for a term not exceeding six calendar months.

Costs in misdemeanors under 24 & 25 Vict. c. 96.] By 24 & 25 Vict. c. 96, s. 121, the court before which any indictable misdemeanor against this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

Restitution.] By 24 & 25 Vict. c. 96, s. 100, if any person guilty of any felony or misdemeanor provided for by the Act against larceny and similar offences, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted, in such case the property shall be restored to the owner or his representative; and in every case in this section the court

before whom any person shall be so tried shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner. Provided, that if it shall appear before any award or order made that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the court shall not award or order the restitution of such security. Provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods for any misdemeanor against this Act.

Formerly, the restitution was restricted to felonious takings, but the new Act extends to misdemeanor.¹ And it is worthy of remark, that the restitution works only after conviction, because if persons in possession of goods were compellable to deliver them up before conviction, the incitement of the prosecutor to convict the felon would be much abated, and this point is sometimes brought forward in actions of trover.² The defendant bought some cattle in market overt. They turned out to have been stolen. The defendant kept the cattle, and the thief was convicted. The court held, that upon conviction, the cattle became revested in the original owner, the plaintiff, and he, accordingly, recovered in trover. The words of the Act, "the property shall be restored," does not mean, that there must be a formal order of restitution by the court, but that the party may have back the thing stolen, or, at all events, *may have the right to it*.³ However, it is said, that the owner may, in cases where he is entitled to restitution, take his goods everywhere without a writ, provided he do not break the peace, and even should the goods have been sold to a purchaser in market overt.⁴ A. stole some money, and bought a horse with it, which he left in B.'s care. As he must have bought the animal with the stolen money, the court held that the horse might be delivered to the prosecutor.⁵ Certain property stolen from a railway company was ordered by the Central Criminal Court to be given up.⁶ And they went further, directing that all the property found on the prisoners should be yielded. This latter order was resisted, and although it was urged that all the property

¹ *R. v. De Veaux and others*, Leach, 585.

² *Horwood v. Smith*, Leach, 586, (n.); 2 T. R. 750.

³ *Scattergood v. Sylvester*, 19 L. J. Q. B. 447.

⁴ 1 Ch. Cr. L. 319.

⁵ *R. v. Powell*, 7 C. & P. 640. See *Scattergood v. Sylvester*, *supra*.

⁶ *R. v. Pierce*, 7 Cox, 206.

was mixed up, so that what belonged to the railway could hardly be separated, this decision was reversed by the Court of Queen's Bench.¹ But there are cases where the court has heard counsel, and ordered restitution in the ordinary way, or where they have made a special distribution.² A prisoner pleaded guilty, and the depositions disclosed a clear case of felony. Several pawn-brokers claimed the goods, and alleged that the prisoner was only an agent. But Alderson, B., ordered restitution, and he would not grant a *writ*, saying, that the only instance of a *writ* was in *Burgess v. Coney*, 1 Trem. P. C.³

There was a case of stealing plush. The property, after conviction, reverted in the owner, under 5 & 6 Vict. c. 39. The court ordered restitution, and, their order being disobeyed, granted an attachment.⁴

Bailees.] By 24 & 25 Vict. c. 96, s. 3, whosoever, being a bailee of any chattel, money, or valuable security,⁵ shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction.

The bailee is the temporary guardian of a specific article, whether it be a deed, or a bank note, or goods of any description. And this chattel or property he must return as soon as the owner determines the bailment. Therefore, if it should appear that the property and possession of a valuable thing are parted with, although, in justice and honesty, the representation of the bailment, as money, should be surrendered, yet the bailee is not bound to pay over specific coin.

The treasurer of a charity misapplied the funds committed to his charge, and he was indicted under 20 & 21 Vict. c. 54. But the objection was raised, that the statute applied where the same and not different property was to be returned, and it prevailed.⁶ Unless the money is to be specifically handed back, the person receiving it is not liable under the Act as bailee.⁷ Again, the monies belonging to a friendly society were vested in the trustees. It was resolved at a meeting that 40*l.* should be sent to a bank, and that the prisoner should take it. He misappropriated the sum and was indicted as bailee, and, upon the common count, for larceny. His conviction, however, was quashed. He could not be said to have stolen the money, for he was a part owner. Nor was he guilty of a breach of trust in respect of the

¹ Bell, 235; El. Bl. & El. 509.

² *R. v. Macklin*, 5 Cox, 216.

³ Id.

⁴ *R. v. Woller and Bliss, in re Hart*, 8 Cox, 337.

⁵ See sect. 1.

⁶ *R. v. Garratt*, 8 Cox, 368; 2 Fost. & F. 14.

⁷ *R. v. Hoare*, 1 Fost. & F. 647.

owner of the 40*l.*, because he was not to return the monies delivered to him.¹ In *R. v. Cain*,² the money of the society was laid in the indictment to belong to the *treasurer*, and the prisoner obtained 10*l.* from him upon a false pretence, and with an intention to steal.

Upon the false pretence of paying 135*l.* for a pair of carriage horses, the prisoner obtained that sum from the prosecutor. The indictment, however, did not contain that material averment, and the charge so far failed. But then it was said that the prisoner might be convicted of larceny, as bailee, not being entitled, according to the statute, to an acquittal, because the other charge was not sustained. But here it was plain that both property and possession had been surrendered, for the money was never to be returned, and the recorder directed a verdict of not guilty.³ Again, the treasurer of a club received small weekly payments from the members, and might lend the club money. There was a distribution in each year of the monies belonging to the club. The prisoner pretended that his house had been broken open, but he subsequently admitted his guilt. Upon a verdict of guilty, the same ruling prevailed as in the prior cases, and the conviction was quashed.⁴ "Unless a man is intrusted with a specific thing to be returned, how can he steal it?"⁵ "A bailment relates to something in the hands of the bailee, which is to be returned in specie."⁶

On the other hand, where the particular article must be restored, the rule alters. A man may even be a bailor, without, according to the opinion of Mr. Justice Crowder, taking any active step at all. As where the prosecutor lay, rather tipsy, and partly asleep, on the ground, and saw the prisoner take his watch out of his pocket, but did not offer any resistance. Here the judge looked upon him in the light of a bailor. For if the prisoner was acting from friendly motives, still, by converting the watch, he violated the bailment, for the specific property was to be restored.⁷ So in the case of the carrier, who received money to buy goods, and obtained and delivered them, but retained the money for his own use. This was a bailment specifically of the money which ought to have been handed to the seller, and under the direction of Erle, J., he was convicted upon the statute, 20 & 21 Vict. c. 4.⁸ And, besides, he was the servant of the buyer, in this instance, and the possession of the servant is that of the master, who never parted with it.

This is the converse of what was said, according to Willes, J., by Lord Wensleydale: "I have heard Lord Wensleydale say, more than once, that a servant was bound to hand over to his master the particular money he received on his account."⁹

¹ *R. v. Loose*, 29 L. J. 132.

² 2 Moo. C. C. 204.

³ *R. v. Hunt*, 8 Cox, 495.

⁴ *R. v. Hassall*, 8 Cox, 491; Leigh & Cave, 58; 30 L. J. M. C. 109. 175.

⁵ Willes, J., Id. 493.

⁶ Cockburn, C. J., Id. 494.

⁷ *R. v. Reeves*, 5 Jur. 716.

⁸ *R. v. Wells*, 1 Fost. & F.

⁹ 8 Cox, 493.

A husband and wife were indicted as bailees of clothing. Both went to the prosecutrix, and offered to take care of her clothes. The bailment was made, but when a demand was made for the return of the articles, some were found to have been pawned, and some sold by the female prisoner alone. By Martin, B., "the prisoners were husband and wife. A wife could not be a bailee, and the husband was not proved to have taken any part in the alleged conversion."¹

¹ *R. v. Denmour and wife*, 8 Cox, 440.

CHAPTER II.

OF TAKING AND ADVERTISING REWARDS FOR THE
RECOVERY OF STOLEN PROPERTY.

Taking a reward.] By 24 & 25 Vict. c. 96, s. 101, whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever which shall by any felony or misdemeanor have been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, as in this Act before mentioned, shall (unless he shall have used all due diligence to cause the offender to be brought to trial for the same) be guilty of felony, and liable to penal servitude not exceeding seven years and not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement, and, if a male under the age of eighteen years, with or without whipping.

In a case upon the old Act, 9 Geo. 1, c. 11, it was objected for the prisoner that he was entitled to his acquittal, first, because he had no acquaintance with the felon, and, secondly, because the goods were never recovered, and the prisoner had no power over them. And it further appeared at the trial that the prisoner had no power to apprehend the principal felon, nor had he any evidence to give against that person. But the judges held the conviction right.¹ Again, the finding of the jury was, that the prisoner knew the thieves, and assisted in endeavouring to purchase stolen property from them, not meaning to bring them to justice. The prosecutrix had been robbed of some cheeses, and the prisoner took 3*l.* from her in order to recover the property, with her sanction and at her request. The judges held that this finding established all the facts necessary to constitute the offence described in the statute.² If the principal felon should die, it seems that the case cannot be made out, because the act of God works no injury to any man, and by the death of the principal, the stipulated conditions became impossible to be performed without any default of the defendant.³

Indictment.] The indictment states, that on, &c., a certain person, to the jurors unknown, one gold watch of the value of 10*l.* of the goods and chattels of one B., feloniously did steal, &c., [describe

¹ *R. v. Leadbitter*, 1 Moo. C. C. 76.

² *R. v. Pascoe*, Den. 456; 18 L. J. M. C. 186.

³ East, P. C. 770.

the particular robbery,] and that A. afterwards, to wit, on, &c., notwithstanding he the said A. did not apprehend and cause, &c., the felon who stole the said watch as aforesaid, and cause the said felon to be brought to his trial for the same, and give evidence against him, under the pretence and upon account of helping the said B. to his said watch so feloniously stolen as aforesaid, did then wilfully, unlawfully, corruptly, and feloniously take of and from the said B. a certain sum of money, to wit, £— of lawful money of Great Britain, and did then deliver the same watch, so as aforesaid feloniously stolen, to him, the said B., against the form of the statute, &c. But the offence is complete although the goods be not recovered.¹ It is proper to aver in the indictment that the principal felon has not been apprehended, because that neglect is part of the description of the offence.² It was objected that the words "not *then* having caused the offenders, &c., to be apprehended," were insufficient for want of specifying the time where the apprehension ought to have taken place. But Erle, J., overruled this objection.³

Advertising a reward, &c.] By 24 & 25 Vict. c. 96, s. 102, whosoever shall publicly advertise a reward for the return of any property stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property, or shall promise or offer in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan upon any property stolen or lost the money so paid or advanced, or any other sum of money or reward for the return of such property, or shall print or publish any such advertisement, shall forfeit 50*l.* for every such offence to any person who will sue for the same by action of debt, to be recovered, with full costs of suit.

¹ *Ante.*

² East, P. C. 771. See *R. v. Drinkwater*, Leach, 15; East, P. C.

769; and see 7 & 8 Geo. 4, c. 29, s. 19, repealed.

³ *R. v. Hicks*, 1 Cox, 145.

CHAPTER III.

LARCENY OF CATTLE AND OTHER ANIMALS.

Larceny of cattle, &c.] By 24 & 25 Vict. c. 96, s. 10, whosoever shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, shall be guilty of felony, and liable to penal servitude not exceeding fourteen years and not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement.

By sect. 11, whosoever shall wilfully kill any animal, with intent to steal the carcass, skin, or any part of the animal so killed, shall be guilty of felony, and liable to the same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have amounted to felony.

Here, as in other cases, the felonious intention has been occasionally the subject of discussion. A man stole several articles, and then took a horse for the purpose of getting away. He was acquitted of stealing the horse, it being left to the jury to say what the intent really was. For, had he intended to include the horse in the theft, the jury would, of course, have pronounced him guilty.¹ But if a person were to take a stray horse from the highway, and a particular intent should appear, it is possible that the jury would return a verdict of guilty.² And where the prisoner went into an inn yard, and directed the ostler to bring out the prosecutor's horse, which but for the noise of some music he would have mounted, it was considered a sufficient asportation when the ostler had brought the horse, although the jury acquitted the man on the ground of a drunken frolic.³ So where four lambs were taken and their skins sold by the prisoner, and the carcasses were found on the premises where the lambs were kept, the conviction for sheep-stealing was held right, though there was no count for killing with intent to steal the carcasses, for the lambs had been removed from the fold.⁴ But this case of *Rawlins* is not law. A sheep was taken alive, and was removed to a distance for the purpose of killing it with intent to steal the whole or part of the carcass: here it became a question whether there was a sufficient asportation to support a count for sheep-stealing, and it was held

¹ *R. v. Crump*, 1 C. & P. 658.

² *R. v. Hutchinson*, 1 Lew. C. C. 195, Hullock, B.

³ *R. v. Pitman*, 2 C. & P. 423,

Gurney, B.

⁴ *R. v. Rawlins*, East, P. C. 617.

not, for the intention was to steal, not the sheep, but the carcass.¹ Unless the sheep were removed from the spot where it was, there clearly could not be such an asportation, as if a man should kill it there with a felonious intent, but should not remove it in a live state with a view to steal it alive.² It was also held in *R. v. Williams*, by nine judges, that upon a count for killing with intent to steal the whole of the carcass, the prisoner might be convicted upon proof of an intent to steal a part only.³ Again, where the prisoner cut off the leg of a live sheep, so that death must of necessity have ensued, it was held, that he might be convicted upon an indictment for killing with intent to steal a part of the carcass, for the death-wound was given before the theft.⁴ So where the prisoner wounded an ewe, and was interrupted by the prosecutor, the judges held that he had been rightly convicted of killing with intent to steal the carcass, the ewe dying two days afterwards, and the jury having expressly found the intent.⁵ Upon an indictment for stealing cattle, the mere fact of the carcass being found in the house of the prisoner is not sufficient to warrant his being called on for his defence, although if indicted for receiving, it might be different.⁶

Pigs are the subjects of larceny at common law.

Indictment.] The indictment for cattle-stealing states, that A., on, &c., feloniously did steal, take, and lead away one [describe the cattle], of the goods and chattels of B. The indictment for killing, with intent to steal the carcass, states, that A., on, &c., wilfully and feloniously did kill, [the cattle,] with intent then feloniously to steal, take, and carry away the carcass or part of the said [cattle] so killed as aforesaid.

An indictment for stealing a filly was not supported by proof of stealing an animal of the horse kind more than three years old, because it had then become a mare.⁷ Whatever might have been the rule *formerly*,⁸ it is now held, that an indictment which describes a thing by its generic term is supported by proof of a species clearly comprehended within its description.⁹ The prisoner was charged with killing a sheep with intent to steal the carcass. The evidence, although it proved a felony of an animal of that species, failed to describe the sex. It was then said for the prosecutor, that sheep would include

¹ *R. v. Williams*, 1 Moo. C. C. 107.

² *Id.* 107, 111.

³ 1 Moo. C. C. 107, S. P. on the authority of *R. v. Williams*. *R. v. Marley*, 2 Russ. C. M. 137.

⁴ *R. v. Clay*, Russ. & Ry. 387.

⁵ *R. v. Sutton*, 2 Moo. C. C. 29; 8 C. & P. 291.

⁶ *R. v. Arundel and another*, 1 Lew. C. C. 115.

⁷ *R. v. Jones*, 2 Russ. C. M. 140.

⁸ Cow in indictment, heifer in

proof. *R. v. Cook*, East, P. C. 616; Leach, 105. Sheep in indictment, lambs in proof. *R. v. Loom and others*, 1 Moo. C. C. 160. Sheep in indictment, ewes in proof. *R. v. Puddifoot*, 1 Moo. C. C. 247. A teg under a year old. *R. v. Birket*, 4 C. & P. 216. *R. v. Puddifoot* was cited. Ewe in indictment, ewe teg in proof. *R. v. Jewett*, 2 Cox, 227. See *R. v. Gillbrass*, 7 C. & P. 444.

⁹ Den. C. C. 83, (n.)

either sex, ewe or ram, and it was sought to throw the onus on the prisoner of proving this for his defence. But Patteson, J., would not entertain this, but left the question to the jury, who found that the distinctive appellation is used at any time after weaning. They convicted the prisoner, and the judges held, that the word "sheep," included ram, ewe, and wether, and that the two former words might be rejected. So the conviction was affirmed.¹ The next case went still further. The indictment described the animal stolen as a sheep. The evidence, however, rendered it doubtful whether it was a lamb or sheep, it being between nine and twelve months old. The jury thought it would be called a lamb. The prisoner being convicted, six judges held the indictment good, and five were of the contrary opinion. The conviction was, therefore, affirmed.² Again, upon a charge of stealing a horse, it turned out that the animal was half cut, or a *ridgit*, and this was held sufficient.³ The prisoner was charged with stealing a lamb. It turned out that the lamb had been killed before the prisoner had it. Upon this, it occurred to Littledale, J., that where the larceny of an animal was a capital offence (as in the case before him), there might be a difference, so that an animal mentioned in capital indictments might be said to mean a live animal only. But the judges held the conviction right, the offence and the punishment for it being the same, whether the lamb stolen were alive or dead at the time of the felonious receipt.⁴ Still, with reference to *R. v. Cook*,⁵ it may be remarked, that if the indictment should speak of a cow, and the evidence, instead of a female heifer, prove that a male heifer has been stolen, the charge will, probably, be deemed insufficient.

Indictment. Sheep.] The indictment usually states, that A., on, &c., feloniously did steal, take, and lead away one sheep, of the goods and chattels of B., &c. Or wilfully and feloniously did kill one ewe, of the goods and chattels of B., with intent then feloniously to steal, take, and carry away the carcass of the said ewe so killed as aforesaid, &c. The mode of laying the property is similar to the cases of simple larceny. A father and son were in partnership as farmers, and, after the death of the son, intestate, the father continued the business for the joint benefit of himself and the next of kin. At this time some of the sheep belonging to the concern were stolen, and the indictment laid the sheep to be the joint property of the father and the grandchildren, the son's

¹ *R. v. M'Culley*, 2 Moo. C. C. 34. *Diss.*: Parke, B.; Vaughan, J.; Coleridge, J. Absent: Gurney, B. See Mr. Greaves's note, 2 Russ. C. M. 139. C. B.; Patteson, J.; Williams, J.; Wightman, J.; Cresswell, J. Absent: Parke, B.; Maule, J.; Coleridge, J.; Platt, B.

² *R. v. Spicer*, Den. C. C. 82. *Acc.*: Lord Denman, C. J.; Tindal, C. J.; Alderson, B.; Coltman, J.; Rolfe, B.; Erle, J. *Diss.*: Pollock, ³ *R. v. Aldridge*, 4 Cox, 143. *R. v. Spicer* was cited. ⁴ *R. v. Puckering*, 1 Moo. C. C. 243. ⁵ *Ante*.

widow having died shortly after her husband's death. No division of the stock had been made, but the grandfather kept a regular account, as one moiety, in his books. And the judges held, that the property had been rightly laid, being of opinion, that the strict legal property need not appear upon such an occasion.¹ Since the abolition of the distinction between grand and petty larceny, the value of the theft is immaterial.²

Trial.] The trial, as in ordinary cases of larceny, may be either where the cattle are found upon the prisoner, or where the theft has taken place. And a possession of the stolen animal three days after the robbery in one county will justify a charge of stealing in the county where the loss happened. As, where the prisoner was found at Kirkcudbright with a horse which had been stolen in Cumberland, it was held, that the stealing in Cumberland had been made out.³ So again, where the horse had been stolen in Durham, and was seen in the possession of the prisoner in Cumberland, and was found with him in Scotland, a continuing possession for the purpose of larceny was recognized.⁴ But it should seem, that as soon as the prisoner is apprehended, the continuance of the felony is at an end, so that where the thief was taken in Surrey, with two horses, and then having made an excuse to go into Kent with the constable, contrived to escape, it was held, that no evidence of stealing in Kent could have been properly presented to the jury. The prisoner was, therefore, sent back to Surrey, and no judgment was given upon the conviction.⁵ A sheep was feloniously killed in the county of A. The carcass was taken into the county of B. The indictment was held good for stealing, taking, and driving the sheep into B. But there was no killing with intent to steal the carcass in B.⁶

¹ *R. v. Scott*, Russ. & Ry. 13; East, P. C. 655.

⁴ *R. v. Moses*, 1 Lew. C. C. 196.

⁵ *R. v. Simmonds*, 1 Moo. C. C.

² See *R. v. Peel*, Russ. & Ry. 408.

407. *R. v. Pearles*, East, P. C. 741.

⁶ *R. v. Newland*, 2 Cox, 283.

³ *R. v. Clement*, 1 Lew. C. C. 113.

R. v. Miller was cited, *ante*.

CHAPTER IV.

OF DEER AND FISH; CREATURES FERÆ NATURÆ; AND OF
DOG-STEALING.

Deer.] By 24 & 25 Vict. c. 96, s. 12, whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, shall, on conviction before a justice,¹ forfeit a sum not exceeding 50*l.*; and whosoever having been previously convicted of any offence relating to deer, for which a pecuniary penalty shall have been imposed by this or by any former Act, shall afterwards commit any of the above offences, whether such second offence be of the same description as the first or not, shall be guilty of felony, and liable to imprisonment not exceeding two years, with or without hard labour, or solitary confinement, and, if a male under sixteen years, with or without whipping.

By sect. 13, if the offences in sect. 12 be committed in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept, the offender shall be guilty of felony, and liable to the punishments awarded by the 12th section.

Then by sect. 14, if any deer, or the head, skin, or other part thereof, or any snare or engine for the taking of deer, shall be found in the possession of any person or on the premises of any person with his knowledge, and such person being taken or summoned before a justice, shall not satisfy the justice that he came lawfully by such deer, or the head, &c., or had a lawful occasion for such snare or engine, and that he did not keep the same for any unlawful purpose, he shall forfeit a sum not exceeding 20*l.*; and if any such person shall not under the said provisions be liable to conviction, then, for the discovery of the party who actually killed or stole such deer, the justice, as the evidence given and the circumstances of the case shall require,

¹ By 24 & 25 Vict. c. 96, s. 120, summary proceedings in England are to be regulated by 11 & 12 Vict. c. 43, and in Ireland by 14 & 15 Vict. c. 93. Mode of compelling appearance, 24 & 25 Vict. c. 96, s. 105; application of forfeitures and penalties, sect. 106; commitment for nonpayment, sect. 107; discharge, first offence, sect. 108; summary conviction;

upon payment, or remission, or after punishment, to be a bar to future proceedings, sect. 109. The appeal is given by sect. 110. By sect. 111 the *certiorari* is taken away, and an invalid warrant is cured if there be a good conviction. By sect. 112 the convictions are to be returned to the quarter sessions.

may summon before him every person through whose hands such deer, or the head, &c., shall appear to have passed; and if the person from whom the same shall have been first received, or who shall have had possession thereof, shall not satisfy the justice that he came lawfully by the same, he shall be liable to the payment of such sum of money as is hereinbefore last mentioned.

And by sect. 15, whosoever shall unlawfully and wilfully set or use any snare or engine whatsoever, for the purpose of taking or killing deer, in any part of any forest, chase, or purlieu, whether such part be inclosed or not, or in any fence or bank dividing the same from any land adjoining, or in any inclosed land where deer shall be usually kept, or shall unlawfully and wilfully destroy any part of the fence of any land where any deer shall be then kept, shall, on conviction thereof before a justice, forfeit and pay a sum not exceeding 20*l*.

And also by sect. 16, if any person shall enter into any forest, chase, or purlieu, whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, every person intrusted with the care of such deer, and any of his assistants, whether in his presence or not, may demand from every such offender any gun, fire-arms, snare, or engine in his possession, and any dog there brought for hunting, coursing, or killing deer, and in case such offender shall not immediately deliver up the same, may seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer; and if any such offender shall unlawfully beat or wound any person intrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this Act, every such offender shall be guilty of felony, and liable to imprisonment not exceeding two years, with or without hard labour, or solitary confinement, and, if a male under sixteen years, with or without whipping.

Upon an indictment for a second offence under the above circumstances, it is competent to raise objections to the first conviction. And, therefore, where it appeared that the conviction before the justice had taken place at Edmonton, for an offence committed in Essex, the judges held the conviction for the second offence wrong.¹ It was also submitted that the indictment was wrong in stating the conviction to have been of W. A., instead of W. A. and others jointly, (which was the fact,) and also because it omitted to allege that W. A. had been duly convicted; but the reporter conceives that the objection as to the county was that which weighed with the judges.² But this objection is cured by this statute. It is, however, no objection to say that the conviction, when put in, appears to have taken place before *two* justices, nor that it failed to

¹ *R. v. Allen*, Russ. & Ry. 513.
R. v. Warren, *Id.* 514, *n*.

² *R. v. Allen*, *ut supra*.

mention the place where the offence was committed, for the omission was supplied, if not by the marginal venue, yet, at all events, by that part of the document which adjudicated the penalty, the award of the penalty being "to the overseers of D. in the said county where the said offence was committed."¹ Proof of taking a fawn will support a count for stealing deer.² Deer pass to executors as personal property.³

Indictments.] The indictment under sect. 13 states that A., on, &c., in certain inclosed land of B., situate, &c., wherein deer had been and then were usually kept, unlawfully, wilfully, and feloniously did course, kill, take, and carry away one fallow deer, the property of the said B. in the said inclosed land then kept and being, against the form, &c.

In the case of a second offence, the prior conviction should be set out, and then the felonious coursing, &c., in the *uninclosed* place.

Hares and conies.] By 24 & 25 Vict. c. 96, s. 17, whosoever shall unlawfully and wilfully, between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, take or kill any hare or rabbit in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be inclosed or not, shall be guilty of a misdemeanor; provided that nothing in this section contained shall affect any person taking or killing in the daytime any rabbits on any sea bank or river bank in the county of Lincoln, so far as the tide shall extend, or within one furlong of such bank.⁴

The wildness of the animal is so important that where rabbits were kept in a rick-yard, and were at liberty to run about, the charge failed.⁵ A rabbit was caught in a net; the prisoner, who had set the wire, was surprised by the warrener as he was taking up the wire; the rabbit was not dead. The question was whether this was a "taking," and the judges were in favour of the affirmative.⁶ It need not be shown for the prosecution that the prisoner had no leave to be on the land. The jury may infer that from the circumstances.⁷

¹ *R. v. Weale*, 5 C. & P. 135.

² *R. v. Strange*, 1 Cox, 58. With reference to summary convictions for the offences mentioned here, see 24 & 25 Vict. c. 96, s. 64, *et seq.* As to appeal, see *R. v. JJ. of Oxfordshire*, 4 Q. B. 177; 3 Gale & D. 348.

³ *Morgan v. Earl of Aberga-venny*, 8 C. B. 768.

⁴ Between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, there may be a summary

conviction before a justice, with a forfeiture not exceeding 5*l.* See sect. 107, as to the proceeding in case of nonpayment.

⁵ *R. v. Garratt*, 6 C. & P. 369.

⁶ *R. v. Glover*, Russ. & Ry. 269. Le Blanc. J., thought that there must be an *asportavit*, as in larceny.

⁷ *R. v. Wood*, 25 L. J. M. C. 96, notwithstanding a decision of Martin, B., in *R. v. Edge*, then cited, Dears. & B. 1.

Indictment.] The indictment states, that A., on, &c. *in the night-time*, to wit, about the hour of eleven of the night of the same day, in a certain warren and ground of B., situate, &c., then lawfully used for the breeding and keeping of hares and rabbits, unlawfully and wilfully did take and kill hares, against the form, &c.

*Other animals feræ naturæ.*¹] If an animal be reclaimed or confined, so as to be fit for food,² and so reduced, as it were, into possession, it was always the subject of larceny. As, for example, fish in a trunk or net, pheasants or partridges in a mew, swans marked and pinioned, peacocks, and other such naturally wild creatures.³ And pigeons which come home every night, to roost in wooden boxes hung on the outside of the house, are the subjects of larceny.⁴ So, the stealing of a stock of bees is felony.⁵ But ferrets are enumerated amongst animals of a base nature, and, although valuable, they are unfit for food, and larceny cannot be committed of them.⁶ And, it is said, on the authority of East, P. C. 614, that ferrets, however tame and saleable, are not the subjects of this offence.⁷ And it is observable, that in an indictment the reclaimed animals must be stated to have been dead, tame, or confined, and that it is not sufficient to mention them as goods and chattels.⁸ The qualification to kill or keep game was held upon one occasion to have no reference to the question of stealing reclaimed pheasants, and it is reasonable to say, that the present revenue provisions (the old qualification being abolished) have no greater force in that respect. The prisoner was charged with stealing five pheasants, and upon proof that the prosecutor was not a qualified person, it was objected that he had not a possession sufficiently legal to support the indictment, but the court thought otherwise, and a conviction took place.⁹

By 24 & 25 Vict. c. 96, s. 21, whosoever shall steal any bird,

¹ It has been thought fit to withdraw the game clauses which in several bills stood next to "Hares and Conies." We have, therefore, placed "game," under a separate head. The taking of game can hardly be called stealing, much less larceny, therefore there may be a ground on the part of the legislature for leaving it to the operation of other Acts.

² 1 Hale, P. C. 512, as to hawks. As to rooks, *Hannam v. Mockett*, 2 B. & C. 934.

³ As to pheasants, 1 Hale, 510, 511; East, P. C. 607. *R. v. Head*, 1 Fost. & F. 350.

⁴ *R. v. Brooks*, 4 C. & P. 131. *R. v. Cheafor*, Den. & P. 361; 21 L. J. M. C. 43. *R. v. Howell*,

Den. & P. 363, cited. *R. v. Luke*, 2 Russ. C. M. 83, citing *Rosc. Crim. Ev.* 577, Parke, B. And if the case of killing, wounding, or taking any house dove or pigeon does not amount to larceny at common law, a penalty of 2*l.*, over and above the value of the bird, attaches. 24 & 25 Vict. c. 96, s. 23.

⁵ Tho. Raym. 33.

⁶ 1 Hale, P. C. 512.

⁷ *R. v. Searing*, Russ. & Ry. 350. Nevertheless the taking of these and other such wild animals is punishable upon summary conviction.

⁸ *R. v. Rough*, East, P. C. 607.

⁹ *R. v. Jones*, 2 Russ. C. M. 85.

beast, or other animal ordinarily kept in a state of confinement or for any domestic purpose, not being the subject of larceny at common law, or shall wilfully kill any such bird, &c., with intent to steal the same, or any part thereof, shall, on conviction before a justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour not exceeding six months, or else shall forfeit over and above the value of the bird, &c., a sum not exceeding 20*l.*; and whosoever, having been convicted of any such offence, either against this or any former Act, shall afterwards commit any offence in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve months as the convicting justice shall think fit.

By sect. 22, if any such bird, or any of the plumage thereof, or any dog, or any such beast, or the skin thereof, or any such animal, or any part thereof, shall be found in the possession or on the premises of any person, any justice may restore the same respectively to the owner; and any person in whose possession or on whose premises such bird, &c. shall be so found, (such person knowing that the bird, beast, or animal has been stolen, or that the plumage is the plumage of a stolen bird, or that the skin is the skin of a stolen beast, or that the part is a part of a stolen animal,) shall on conviction before a justice, be liable for the first offence to such forfeiture, and for every subsequent offence to such punishment, as any person convicted of stealing any beast or bird is made liable to by the last preceding section.

Fish.] We have above intimated¹ that fish kept in a trunk, net, or stew are the subjects of larceny at common law, and it may be added, that the better opinion is, that if the fish are in a pond,² the law will be the same, although at one time there was considerable doubt as to the pond.³ And the more especially if the pond be private inclosed property, the fish being restrained from their natural liberty so as to be taken at any time, at the pleasure of the owner.⁴ It seems that, in an indictment, the sort of pond should be described, that it may appear upon the face of the indictment that the taking of fish out of such a pond would be felony.

By 24 & 25 Vict. c. 96, s. 24, whosoever shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling house of any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanor; and whosoever shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as hereinbefore

¹ *Ante*, p. 414.

² 3 Inst. 110; East, P. C. 610. *R. v. Hanson and another*, cited.

³ See *Greye v. Batholomew*, Ow. 20; Gouldsb. 127.

⁴ *R. v. Hunsdon*, East, P. C.

611. See *Id.* 610; 1 Hawk. c. 33, s. 41. *R. v. Walford*, 5 Esp.

62.

mentioned, but which shall be private property, or in which there shall be any private right of fishery, shall, on conviction before a justice, forfeit and pay, over and above the value of the fish taken or destroyed (if any), a sum not exceeding 5*l*. Provided, that nothing hereinbefore contained shall extend to any person angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset; but whosoever shall by angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, shall, on conviction before a justice, forfeit a sum not exceeding 5*l*., and if in any such water as last mentioned, he shall, on the like conviction, forfeit and pay a sum not exceeding 2*l*.; and if the boundary of any parish, township, or vill shall happen to be in or by the side of any such water as is in this section before mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or vill named in the indictment or information, or in any parish, township, or vill adjoining thereto.

By sect. 25, if any person shall at any time be found fishing against the provisions of this Act, the owner of the ground, water, or fishery where such offender shall be so found, his servant, or any person authorized by him, may demand from such offender any rod, line, hook, net, or other implement for taking or destroying fish which shall then be in his possession, and in case such offender shall not immediately deliver up the same, may seize and take the same from him for the use of such owner. Provided, that any person angling against the provisions of this Act, between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, from whom any implement used by anglers shall be taken or by whom the same shall be so delivered up, shall by the taking or delivering thereof be exempted from the payment of any damages or penalty for such angling.

Indictment]. The indictment states that A. on, &c., unlawfully and wilfully did take [destroy] ten fish called —, in certain water running through certain land in the parish of —, in the county of —, adjoining to the dwelling of B., there situate, of which water the said B. was then and still is the owner [or had a right of fishery], against the form, &c.

In a case under 5 Geo. 3, c. 14 [repealed], where the prisoner was indicted for unlawfully entering a garden and stealing fish “of the goods and chattels of the said J. T.,” it was held, that these words were mere surplusage, and that the introduction of them would not vitiate the count.¹ In this case, it was admitted,

¹ *R. v. Hunsdon*, East, P. C. But the court would not quash the indictment upon motion. 611. *R. v. Steer*, (*contra*), 6 Mod. 183; 3 Salk. 189. See 3 Mod. 97.

that the defendant might be indicted for felony at common law, or for a misdemeanor upon the statute, at the election of the prosecutor.¹ The mode adopted by the defendant in order to take the fish, need not be stated. It was so held, where the old statute had the words "steal, take, &c., by any way, means, or device whatsoever."² *A fortiori*, this allegation needs not to be introduced under a clause which omits all mention of the method.

Oysters.] By 24 & 25 Vict. c. 96, s. 26, whosoever shall steal any oysters or oyster brood from any oyster bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny; and whosoever shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any oyster bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, for the purpose of taking oysters or oyster brood, although none shall be actually taken, or shall unlawfully and wilfully with any net, instrument, or engine, drag upon the ground or soil of any such fishery, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three months, with or without hard labour, and with or without solitary confinement; and it shall be sufficient in any indictment to describe either by name or otherwise the bed, laying, or fishery in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill: Provided, that nothing in this section contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery, with any net, instrument, or engine adapted for taking floating fish only.

Indictment]. The indictment states that A. on, &c., feloniously did steal [100 oysters] from a certain oyster bed, the property of B., sufficiently known and marked out as the property of B., against the form, &c.

Dogs.] By 24 & 25 Vict. c. 96, s. 18, whosoever shall steal any dog shall, on conviction before two justices, either be committed to the common gaol or house of correction, with imprisonment, or imprisonment and hard labour, not exceeding six months, or shall forfeit and pay, over and above the value of the said dog, a sum not exceeding 20*l.*, and whosoever, having been convicted of the same, either against this or any former Act, shall afterwards steal any dog, shall be guilty of a misdemeanor, and be liable to be imprisoned for any term not exceeding eighteen months, with or without hard labour.

¹ *R. v. Hunsdon*, ut sup.

² *R. v. Carradice*, Russ. & Ry. 205.

By sect. 19, whosoever shall unlawfully have in his possession or on his premises any stolen dog, or the skin of any stolen dog, knowing such dog to have been stolen or such skin to be the skin of a stolen dog, shall, on conviction before two justices, be liable to pay a sum not exceeding 20*l.*; and whosoever, having been convicted of any such offence, either against this or any former Act, shall afterwards be guilty of any such offence as in this section before mentioned, shall be guilty of a misdemeanor, and shall be liable to imprisonment not exceeding eighteen months, with or without hard labour.

And by sect. 20, whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of aiding any person to recover any dog which shall have been stolen, or which shall be in the possession of any person not being the owner thereof, shall be guilty of a misdemeanor, and liable to imprisonment not exceeding eighteen months, with or without hard labour.

Indictments]. The first indictment states the former conviction whenever it happened, and that A. on, &c., unlawfully did steal a certain dog, the property of B. It does not seem necessary to mention the kind of dog. The second indictment also alleges the former conviction, and goes on to say that A. on, &c., had unlawfully a certain dog in his possession, the property of B., or the skin of a stolen dog belonging to B., or, that by virtue of a certain search warrant the dog or skin was found on the premises of A., the said B. well knowing that the dog (or skin) had been stolen. The third indictment alleges that A., under pretence of aiding B. in recovering a dog belonging to B., then before stolen, or in the possession of C., C. not being the owner thereof, unlawfully and corruptly did take a certain sum of money, that is to say, the sum of £—, upon the pretence (or upon account of) and for the purpose aforesaid.

CHAPTER V.

LARCENY OF VALUABLE SECURITIES.

By 24 & 25 Vict. c. 96, s. 1, the term "valuable security" shall include any order, exchequer acquittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, whether within the United Kingdom or in any foreign state or country, or to any deposit in any bank, and shall also include any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, and any document of title to lands or goods as defined in this Act.

Bonds, bills, notes, &c.] By 24 & 25 Vict. c. 96, s. 27, whosoever shall steal, or shall for any fraudulent purpose destroy, cancel, or obliterate, the whole or any part of any valuable security, other than a document of title to lands, shall be guilty of felony, of the same nature and in the same degree punishable in the same manner as if he had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned, or referred to in or by the security. In other words, he would be guilty of larceny, and punishable under 24 & 25 Vict. c. 96, s. 4.

In considering this clause, it is evident that the instrument in question must be valuable. So that where a note was obtained by duress, and withdrawn from the prosecutor as soon as he had signed, it was held, that this act was not a felony under 2 Geo. 2, c. 25, s. 2.¹ So it was where exchequer bills were signed without legal authority.² But upon another indictment they were held to be securities and effects within 15 Geo. 2, c. 13.³ So in the case of bankers' notes completely executed, but not put into circulation, no felony was committed, for there was no money due upon them.⁴ But they might, probably, be deemed valuable

¹ Now repealed. *R. v. Phipoe*, Leach, 673. See also *Russ. & Ry.* 219, 488.

² *R. v. Aslett*, Leach, 954.

³ *R. v. Aslett*, Id. 958; *Russ. & Ry.* 67; 1 New Rep. 1.

⁴ Anon. Leach, 1061, citing 4 Com. by Christian, 234.

property, and the subjects of larceny at common law.¹ So in the case of a cheque written on unstamped paper, and not made payable to bearer.² But an indictment for stealing a piece of paper is good at common law. A person was charged with stealing a cheque, and it became doubtful whether the document was not void for want of being stamped conformably to 55 Geo. 3, c. 184. There was, however, a count for stealing a piece of paper, value one penny, and upon this fact being ascertained by the court, the conviction was held right.³ It was held to be no good objection that the prosecutor had not indorsed a promissory note delivered to him.⁴ Nor, on the other hand, that a name appeared on the note when it was produced in evidence, in addition to the names of the indorsers, who had been mentioned without the third, in the indictment.⁵ And a cheque in the hands of drawers was held to be the subject of larceny in a case where the clerk appropriated it to his own use.⁶ And although the drawers were not stated to be bankers, it was held, that this made no difference.⁷ So, in accordance with the opinion of Russell, Serjt., where notes reissuable, but not reissued, had been stolen in the interval between the payment and fresh circulation of them, a conviction for stealing the paper and stamp was held right.⁸ So again, such notes, although not valuable securities, might yet be described as goods and chattels.⁹ And, notwithstanding the doubts in *Vyse's case*, the prisoner was held guilty of larceny for stealing notes, not in circulation, yet for value, and which had been paid in at one branch of a bank for transmission to another branch, whence, they might, or not, have been reissued.¹⁰ So the halves of notes sent in a letter have been deemed goods and chattels, and the subjects of larceny and embezzlement.¹¹ The prisoner offered to produce 5,000*l.* for the prosecutor, and took from his pocket book ten stamps of 6*s.*, across each of which the prosecutor wrote "accepted, payable at P. & Co., London." The prisoner took up the stamps and nothing more was said about them. Bills for 500*l.* were subsequently drawn upon these stamps, and negotiated by the prisoner, upon which he was indicted for larceny. But it was held, that these

¹ *R. v. Ranson*, Russ. & Ry. 232. *R. v. West*, 26 L. J. M. C. 6; Dears. & B. 109.

² *R. v. Yates*, 1 Moo. C. C. 170, decided on 7 & 8 Geo. 4, c. 29, s. 5.

³ *R. v. Perry*, Den. 69; 1 Car. & K. 725.

⁴ East, P. C. 598.

⁵ *R. v. Austin and another*, Id. 602.

⁶ *R. v. Metcalf*, 1 Moo. C. C. 433. Littledale, J., *dub.* *R. v. Heath*, 2 Moo. C. C. 33, by the judges unanimously.

⁷ S. C.

⁸ *R. v. Clarke*, Russ. & Ry. 181; Leach, 1036.

⁹ *R. v. Vyse*, 1 Moo. C. C. 218, so held on 7 & 8 Geo. 4, c. 29, s. 5. In this case, the prisoner's counsel endeavoured, in vain, to make a distinction between this case and *R. v. Clarke*, on the ground, that in the latter case, the notes were called property, but in the present, goods and chattels. Id. 222.

¹⁰ *R. v. West*, ante, 7 Cox, 183.

¹¹ *R. v. Mead*, 4 C. & P. 535.

stamped acceptances were not "bills of exchange," nor "orders for the payment of money," nor "securities for money," and that, in this case, no larceny of the stamps nor of the paper could be charged.¹ So in the case of a receipt produced and taken away by the prisoner, Parke, B., referred to *Hart's case* as an authority against a conviction.² The following were held to be valuable securities. In the first count, three deeds, being a security for money, to wit, 20*l*. In the second, three deeds, being a security for payment of money. In the third, a lease and release from A. to B. and a mortgage by a demise of the real estate. The same from B. and C., and held by the prosecutor as executor of C.³ The scrip certificates of a foreign railway are within the Act, although the words "or of any foreign states" are omitted.⁴

Indictment.] The indictment for stealing these securities is in the ordinary form for larceny, but by 14 & 15 Vict. c. 100, s. 18, coin and bank notes may be described "simply as money."⁵ In the case of bills, &c. it should be stated that the instrument was due and unsatisfied. Still, as good a correspondence as possible between the security in question and the statute should be maintained. Under the old law, where a stolen note was described as a note, commonly called a bank note, the count was held ill.⁶ But on charging the theft of a promissory note, it was deemed sufficient to call it "a promissory note for the payment of one guinea," without setting forth the note.⁷ And in *Craven's case*,⁸ where the indictment stated that the note had been signed by A. H. for the governor and company, &c., the judges held, that some proof of A. H.'s signature was necessary.⁹

¹ *R. v. Hart*, 6 C. & P. 106.

² *R. v. Smith*, 21 L. J. M. C. 111; Den. & P. 449.

³ *R. v. Williams*, 6 Cox, 49.

⁴ *R. v. Smith*, 25 L. J. M. C. 31. Parke, B., Crompton, J., *dub.*; Wightman, J., Willes, J., *acc.*

⁵ The old cases, therefore, are obsolete, as *R. v. Fry*, Russ. &

Ry. 482. *R. v. Wenman*, 2 Russ. C. M. 110.

⁶ *R. v. Craven*, East, P. C. 601; Russ. & Ry. 14. See also *R. v. Chard*, Russ. & Ry. 488. But the objection will not apply now.

⁷ *R. v. Milne*, East, P. C. 602.

⁸ *Supra*.

⁹ Russ. & Ry. 16.

CHAPTER VI.

LARCENY OF DEEDS RELATING TO REAL ESTATE; WILLS;
AND RECORDS, &c.

Deeds relating to real estate.] By 24 & 25 Vict. c. 96, s. 28, whosoever shall steal, or shall for any fraudulent purpose destroy, cancel, obliterate, or conceal, the whole or any part of any document of title to lands, shall be guilty of felony, and shall be liable to penal servitude for three years, or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement; and in any indictment for any such offence relating to any document of title to land, it shall be sufficient to allege such document to be or to contain evidence of the title or of part of the title of the person or of some one of the persons having an interest, whether vested or contingent, legal or equitable, in the real estate to which the same relates, and to mention such real estate or some part thereof.

Indictment.] The form is, that A., on, &c., feloniously did steal, take, and carry away a certain deed of [grant], the property of B., the said deed being then evidence of [part of] the title of the said B. to a certain real estate called —, in which real estate the said C. D. then had, and still hath, a present interest, against the form, &c.¹

Wills, codicils, &c.] By 24 & 25 Vict. c. 96, s. 29, whosoever shall, either during the life of the testator or after his death, steal, or for any fraudulent purpose destroy, cancel, obliterate, or conceal, the whole or any part of any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement; and it shall not in any indictment for such offence be necessary to allege that such will, &c., is the property of any person. Provided, that nothing in this or the last preceding section mentioned, nor any proceeding, conviction, or judgment to be had or taken thereupon, shall prevent, lessen, or impeach any present or future remedy at law or in equity, but no conviction of any such offender shall be received in evidence against him; and no person shall be liable to be convicted of any of the felonies in this and the last preceding section

¹ Or did fraudulently and feloniously destroy [cancel], &c.

mentioned, by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency.

The defendant concealed a will, and paid money to the husband of the next of kin, which, under the will, should have gone to A. and B. The husband was a creditor of the defendant. This was held to be a fraudulent purpose.¹

Indictment]. The indictment states that A. on, &c., in the lifetime of one B. [or after the death of one B.], feloniously did steal, take, and carry away a certain will of the said B., or fraudulently and feloniously did destroy, or conceal, &c.

It would be unwise to draw an indictment for destroying or concealing.² The purpose which prompted the concealment ought to be stated.³ It is made a question, however, whether the objection is available otherwise than upon demurrer.⁴

Records, &c.] By 24 & 25 Vict. c. 96, s. 30, whosoever shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously cancel, obliterate, injure, or destroy the whole or any part of any record, writ, return, pannel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or of any original document whatsoever of or belonging to any court of record, or relating to any matter, civil or criminal, begun, depending, or terminated in any such court, or of any bill, petition, answer, interrogatory, deposition, affidavit, order, or decree, or of any original document whatsoever of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such court, or of any original document in anywise relating to the business of any office or employment under Her Majesty, and being or remaining in any office appertaining to any court of justice, or in any of Her Majesty's castles, palaces, or houses, or in any government or public office, shall be guilty of felony, and liable to penal servitude for three years, or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement; and it shall not in any indictment for such offence be necessary to allege that the article in respect of which the offence is committed is the property of any person.

¹ *R. v. Morris*, 9 C. & P. 89.

² *R. v. Spencer*, Willmore, 418.

³ *R. v. Morris*, 9 C. & P. 89.

⁴ 9 C. & P. 90. See as to the old law, *R. v. Westbeer*, Leach, 12, note (a).

It is to be observed, that the stealing of records is now felony.¹

Indictment.] The indictment sets forth that A. on, &c., feloniously did steal, take, and carry away a certain record [state it], [or for a fraudulent purpose feloniously and fraudulently did take from its place of deposit] a certain record, &c., against the form, &c.

If the article be a record, it should not be described as parchment, being a record, but if it should have lost that character, it may then be called parchment.²

In the case of cancelling, injuring, &c., unlawfully, maliciously, and feloniously did cancel, [injure,] &c., a certain record, &c.³

¹ *R. v. John*, 7 C. & P. 324, Patteson, J., no longer applies. As to the venue, see sect. 114.

² *R. v. Walker*, 1 Moo. C. C. 155.

³ See *ante*, *R. v. Spencer*; *R. v. Morris*.

CHAPTER VII.

OF LARCENY OF THINGS ATTACHED TO, OR GROWING ON
LAND.¹

Metal, glass, wood, &c., fixed to house or land.] By 24 & 25 Vict. c. 96, s. 31, whosoever shall steal, or shall rip, cut, sever, or break with intent to steal, any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material or of both, respectively fixed in or to any building whatsoever, or anything made of metal fixed in any land being private property, or for a fence to any dwelling house, garden, or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial ground, shall be guilty of felony, and shall be punished as in the case of simple larceny;² and in the case of any such thing fixed in any such square, street, or place as aforesaid, it shall not be necessary to allege the same to be the property of any person.

If the indictment be properly framed, a casement will be within the words of the statute.³ And it is presumed, that glazed sashes, although only fastened in by laths nailed across the frames to prevent their falling out, are likewise within it.⁴ It has likewise been held upon a similar section, that an unfurnished building, intended for a cart-shed, with a door and lock, and having the frame of a roof with loose gorse thrown over it, because of its not being yet thatched, was within the same provisions.⁵ A plank was used as a seat. There were a wall and pillars at the end of it. The plank was laid in mortar at the top of the wall and pillars, and there was no roof. Park, J., held, that this was not a building within the Act.⁶ Brass fixed to tombstones in a churchyard, is also within the protection of the Act.⁷ So it is in the case of a copper sun-dial attached by screws to the top of a wooden post fixed in a churchyard.⁸ So stealing lead fixed to a wharf was held to be within such a statute, for the wharf was a building. But as there was no other evidence of stealing the lead than that which went to show the lead to have been a fixture, the convic-

¹ The 21 Geo. 3, c. 68, as to the punishment of stealers of copper, brass, &c., is repealed by 24 & 25 Vict. c. 101.

² Sect. 4 of this Act. And see sects. 5, 6.

³ 2 Russ. C. M. 64. See *R. v. Senior*, Leach, 496.

⁴ *R. v. Hedges*, Leach, 201.

⁵ *R. v. Worrall*, 7 C. & P. 516.

⁶ *R. v. Reece*, 2 Russ. C. M. 65.

⁷ *R. v. Blick*, 4 C. & P. 377, Bosanquet, J.

⁸ *R. v. Jones and Jones*, 27 L. J. M. C. 171; Dears. & B. 555.

tion on the second count for simple larceny could not be sustained.¹ So, likewise, where the prisoner was indicted for stealing lead affixed to a building, and the jury found that he had stolen the lead when lying severed, thus negating the stealing it fixed, Tindal, C. J., directed a verdict of not guilty to be entered.² A room was attached to a shire hall, and used as a ball and concert room. There was a chandelier there which had been used as a fixture, but was not then used for any other purpose. The hall-keeper was charged with stealing this chandelier, and it was held, that he might be deemed guilty of larceny within 7 & 8 Geo. 4, c. 64, s. 15. He was not the bailee nor the servant of the inhabitants. The statute makes the inhabitants a *quasi* corporation.³

Indictment.] The indictment states that A. on, &c., feloniously did steal, &c., — pounds of lead, &c., the property of B., and then fixed to a certain dwelling house of the said B., situate, &c. Or, on, &c., feloniously did rip and break — pounds of lead, &c., with intent feloniously to steal, take, and carry away the same.

The indictment must state carefully the ownership of the dwelling house, and lay the chattel or fixture correctly. The prisoner was charged with stealing a copper pipe fixed to the dwelling house of E. D. and S. H. But it turned out, that these two persons were separate tenants in the same house, and, for this reason, the judges held the conviction wrong.⁴ If lead be stolen from a church, it may be better to follow the rule laid down by the judges in an old case, and to state that the lead or other metal had been fixed to a certain building called the parish church.⁵ The receipt of rents is *prima facie* evidence of a seisin in fee.⁶ Therefore, the ownership of a house being laid in W., who resided at Patras, the evidence was, that B. managed the property for him, let his house and received the rent. This proof was held to disclose sufficient ownership in W.⁷

Venue.] Lead was stolen from the roof of a church in Bucks. The prisoner was traced with it into Middlesex, and an indictment was preferred against him at the Central Criminal Court as for simple larceny. But the court held that he could not be convicted there for want of jurisdiction, inasmuch as the original taking was, although a statutable felony, yet no taking at common law, and the subsequent possession did not make the offence such a larceny.⁸

¹ *R. v. Rice and others*, 28 L. J. M. C. 64.

² *R. v. Good and another*, 8 C. & P. 293. *R. v. Millar*, 7 C. & P. 665. See *Lyde v. Russell*, post, 1 B. & Adol. 394.

³ *R. v. Winbow*, 5 Cox, 346.

⁴ *R. v. Finch*, 1 Moo. C. C. 418.

⁵ *R. v. Hickman and another*,

Leach, 318. See *R. v. Isley*, Id. 320, n.

⁶ *R. v. Brummitt*, 8 Cox, 413.

⁷ *R. v. Brummitt*, Leigh & Cave, 9. A case of stealing lead fixed. The court of criminal appeal will not send back a case upon an objection not incident to the merits.

⁸ *R. v. Millar*, 7 C. & P. 665.

Trees in pleasure grounds.] By 24 & 25 Vict. c. 96, s. 32, whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling house, shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of 1*l.*.) be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny;² and whosoever shall steal, &c. the whole or any part of any tree, &c., or any underwood, respectively growing elsewhere than in any of the situations in this section before mentioned, shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of 5*l.*.) be guilty of felony, and shall be punished as in the case of simple larceny.³

By sect. 33, whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood *where-soever* the same may be respectively growing, the stealing of such article or articles, or the injury done, being to the amount of 1*s.* at the least, shall, on conviction thereof before a justice, forfeit over and above the value of the article or articles stolen, or the amount of the injury done, a sum not exceeding 5*l.*; and whosoever having been convicted of any such offence, either against this or any former Act of parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall, for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve months as the convicting justice shall think fit; and whosoever, having been twice convicted of any such offence (whether both or either of such convictions shall have taken place before or after the passing of this Act), shall afterwards commit any of the offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be punished in the same manner as in the case of simple larceny.⁴

Fences ; gates.] By sect. 34, whosoever shall steal, or shall cut, break, or throw down with intent to steal, any part of any live or dead fence, or any wooden post, pale, wire, or rail set up or used as a fence, or any stile or gate, or any part thereof respectively, shall, on conviction thereof before a justice, forfeit, over and above the value of the article or articles so stolen, or the amount of the injury done, a sum not exceeding 5*l.*; and whosoever, having been

¹ The author is aware that these offences concerning trees, &c., are punishable, as in the case of simple larceny, and, therefore, are not larcenies; but he has not thought it worth while to disturb the title for the sake of a mere technicality.

² Sect. 4 of this Act. See sects. 5, 6.

³ Id.

⁴ Sect. 4 of this Act. See sects. 5, 6.

convicted of any such offence, either against this or any former Act of parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour, for such term not exceeding twelve months as the convicting justice shall think fit.

Unlawful possession.] Again, by sect. 35, if the whole or any part of any tree, sapling, or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, wire, rail, stile, or gate, or any part thereof, being of the value of 1s. at the least, shall be found in the possession of any person, or on the premises of any person, with his knowledge, and such person, being taken or summoned before a justice, shall not satisfy the justice that he came lawfully by the same, he shall on conviction by the justice forfeit and pay, over and above the value of the article or articles so found, any sum not exceeding 2*l*.

Fruits, vegetable productions, &c.] By sect. 36, whosoever shall steal, or shall destroy or damage with intent to steal, any plant, root, fruit, or vegetable production growing in any garden, orchard, pleasure ground, nursery ground, hothouse, greenhouse, or conservatory, shall, on conviction thereof before a justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit over and above the value of the article or articles so stolen, or the amount of the injury done, a sum not exceeding 20*l*.; and whosoever, having been convicted of any such offence, either against this or any former Act of parliament, shall afterwards commit any of the offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny.¹

Vegetables in fields.] By sect. 37, whosoever shall steal, or shall destroy or damage with intent to steal, any cultivated root or plant, used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard, pleasure ground, or nursery ground, shall, on conviction thereof before a justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding one month, or else shall forfeit, over and above the value of the article or articles so stolen, or the amount of the injury done, a sum not exceeding 20*s*., as to the justice shall seem meet, and in default of payment thereof, together with the costs (if ordered), shall be committed as

¹ Sect. 4 of this Act. See sects. 5, 6.

aforesaid for any term not exceeding one month, unless payment be sooner made; and whosoever, having been convicted of any such offence either against this or any former Act of parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour, for such term not exceeding six months as the convicting justice shall think fit.

Under sect. 36, whether the ground mentioned in the indictment be a garden or a nursery, is a question for the jury.¹ Ground separated from the house by a narrow walk and paling cannot be said to be ground adjoining or belonging to the dwelling house.²

Indictments.] The indictments upon these sections state, that A., on, &c., in a certain park, &c., of B., situate, &c., feloniously did cut and root up, &c., &c., one tree, the property of the said D., in the said park then growing, with intent the said tree then feloniously to steal, &c., the said tree being then and there above the value of 1*l*. Or did steal, take, and carry away one tree, &c., thereby doing injury to the said B. to an amount exceeding the sum of 1*l*. If it be thought fit, there may be two counts. And in the last case the prisoner's conviction should be set out, and afterwards, the subsequent offence. The word "plant" cannot be said to denote a young fruit tree.³ Under the old Act clover was considered to be a plant for the food of beasts, so as to warrant the apprehension of an offender under it by a constable, the owner, or his servant.⁴

The indictment in this case sets forth prisoner's conviction, and goes on to mention the felonious act done by him, whether by stealing, destroying, or damaging, with intent to steal, with a local venue.

¹ *R. v. Hodges*, Moo. & Malk. 341.

² *Id.*

³ *R. v. Hodges*, Moo. & Malk. 341.

⁴ *R. v. Brumby*, 3 Car. & K. 315. The clauses relating to summary conviction are ss. 105, *et seq.*

CHAPTER VIII.

OF LARCENY FROM MINES.

Larceny in mines.] By 24 & 25 Vict. c. 96, s. 38, whosoever shall steal, or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal, from any mine, bed, or vein thereof respectively, shall be guilty of felony, and liable to imprisonment not exceeding two years, with or without hard labour, or solitary confinement.¹

And by sect. 39, whosoever, being employed in or about any mine, shall take, remove, or conceal any ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud any proprietor of or any adventurer in such mine, or any workman or miner employed therein, shall be guilty of felony, and liable to the punishments of the 38th section.

The prisoner took heaps of ore from one pit, and put them upon another, in order to get more wages from adventurers. This act was not larceny, because, although the adventurers might be cheated, yet both pits would ultimately come into their hands, and so there could not be a stealing of the ore.²

Indictment.] The indictment states, that A., on, &c., in a certain coal mine of B., in the parish of —, in the county of —, feloniously did sever one ton-weight of coal, the property of the said B., in the said mine there being, with intent the said coal feloniously to steal, take, and carry away. In a second count, that A., on, &c., in a certain coal mine of B., in the parish of —, and in the county of —, feloniously did steal, &c., from the said mine one ton of ore, the property of the said B.³ It was alleged in an indictment that the prisoner being employed in a mine at the parish of —, in the county of Cornwall, on, &c., at, &c., did steal certain ore, the property, &c., *then and there being found*. This statement was considered insufficient to show that the ore was in the mine when stolen.⁴

¹ The stat. 56 Geo. 3, c. 73, Moo. C. C. 431. And see *R. v. [Stealing from mines,]* repealed by *Holloway*, Den. 370.

24 & 25 Vict. c. 101.

³ See Archb. Cr. Pl. 415.

² *R. v. Webb and another*, 1

⁴ *R. v. Trevenner*, 2 Moo. & Rob. 476.

CHAPTER IX.

OF SIMPLE ROBBERY.

STEALING FROM THE PERSON. ASSAULT WITH INTENT TO ROB.

By 24 & 25 Vict. c. 96, s. 40, whosoever shall rob any person, or steal any chattel, money, or valuable security¹ from the person of another, shall be guilty of felony, and liable to penal servitude not exceeding fourteen years and not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement.

By sect. 41, if upon the trial of any person upon any indictment for robbery, it shall appear to the jury that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not be acquitted thereupon, but the jury may return as their verdict that the defendant is guilty of an assault with intent to rob; and such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob;² and no person so tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried.

And by sect. 42, whosoever shall assault any person with intent to rob shall be guilty of felony, and being convicted thereof shall (save and except in the cases where a greater punishment is provided by this Act) be liable to penal servitude for three years, or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement.

Robbery.] The distinction between robbery and stealing from the person is this. When the attack is such as to create an impression of fear, or to incapacitate the individual by reason of surprise from any reflection, it may be without actual personal violence, the theft taking place contemporaneously, the offence will amount to simple robbery. But the force or fear must not come after the taking. A asked B. to open a gap for him; whilst B. was engaged in doing so, A. took a purse from B.'s pocket; B. turning round, saw his purse in the hand of A. and demanded it, upon which A. used violent threats and went away with the purse. This was a taking by stealth, because the menace was used after the theft.³ Thieves

¹ See sect. 1.

² Under sect. 42.

³ *R. v. Harman*, 2 Ro. Rep.

154. *R. v. Smith and another*,
1 Lew. C. C. 301.

struck money out of a man's hand, and then drove the owner away by threats : this was not robbery, for the menace took place afterwards.¹ So where the prosecutor's watch chain was jerked out of his pocket with considerable force, and a scuffle ensued, Garrow, B., held that the force occurred after the robbery.² The value of the thing taken is immaterial. A slip of paper containing a memorandum is sufficient, for the prosecutor by keeping it in his pocket showed that it was of some value to him.³

There must be an asportation. The robber had the purse in his hand, but could not entirely detach it from the owner's pocket, by reason of some keys, with which it was entangled : this was no robbery, for the purse had not quitted the pocket.⁴ So where the prosecutor had laid down a feather bed through fear, and the prisoner was apprehended before he had removed it.⁵ Had the purse fallen to the ground, or had the prisoner picked up the bed, the case would have been robbery.⁶ The thief detached a lady's earring, but lost it in the curls of her hair : this was an asportation, for there was a momentary possession.⁷ It is no defence to say that the prosecutor threw away his property, if the thief afterwards picked it up.⁸ Nor that the robber should return the purse, requesting the delivery of the money within it.⁹ Again, this offence must be committed in the presence of the injured party. As where thieves struck money out of the owner's hands and drove him away with threats ; they took it up, but the special verdict was silent as to the presence of the prosecutor at the time of the taking up. The court would not intend that he was present.¹⁰ Again, the property must be taken from the prosecutor. One of two prisoners snatched up a bundle belonging to the prosecutor, which B., who was carrying it, had thrown down upon being assaulted by the prisoner. The bundle was not taken from the prosecutor, and the prisoners were guilty of simple larceny only.¹¹ A. being disappointed by not finding B.'s money, threw B.'s bridle into the road : this was not robbery.¹² However, it has been said that if a man-servant be robbed, in sight of his master, of his master's goods, the robbery is a robbery of the master,¹³ because of the possession, that of the servant being that of the master. Further, the attack and

¹ *R. v. Francis and others*, 2 Str. 1015. *R. v. Grey and others*, East, P. C. 708.

² *R. v. Gnosil*, 1 Car. & P. 304.

³ *R. v. Bingley and another*, 5 C. & P. 602, Gurney, B.

⁴ *R. v. Wilkinson*, 1 Hale, P. C. 508 ; Leach, 321, n. So in stealing from the person. *R. v. Thompson*, 1 Moo. C. C. 78.

⁵ 1 Hale, P. C. 533.

⁶ *Id.* *R. v. Farrell*, Leach, 322, n.

⁷ *R. v. Lapier*, Leach, 320.

Rather, there had been an asportation from its original place.

⁸ *R. v. Wright*, Str. 156 ; Leach, 726, cited.

⁹ *R. v. Peat*, Leach, 228.

¹⁰ *R. v. Francis and others*, 2 Str. 1015 ; Com. Rep. 478 ; Ca. Temp. Hardw. 113, ante. *R. v. Grey and others*, East, P. C. 708. And see *Id.* 707.

¹¹ *R. v. Fallows and another*, 5 C. & P. 508.

¹² Anon. East, P. C. 662. No felonious intent was found.

¹³ *R. v. Wright*, Sty. 156.

loss must be *invito domino*. It was concerted amongst certain bad characters that an attack should be made upon one of themselves, by one of the gang, who was to find two strangers to assist, in order that they might apprehend the strangers, and get the reward for apprehending robbers: it was held upon a special verdict, that the indictment against the strangers for aiding and abetting could not be supported. The person supposed to be robbed had parted with his property willingly.¹ But where a man hearing that one of the early stages was robbed frequently near London, put some money into his pocket, and threw himself in the way of the highwayman, and having succeeded in meeting that person, gave him, upon demand, the money, and then, with help, apprehended him, it was held that a case of robbery had been made out,² inasmuch as there was actual violence on the part of the highwayman.³ For, says Foster, J., it was quite uncertain whether the thief would come, and equally so whether he would be alone, neither was there any concert between the prosecutor and the robber.⁴

If the original intent be rape, the prisoner cannot set up that intent to excuse a robbery. The woman offered some money to redeem her chastity. The prisoner put it into his pocket, but continued to persevere in his violence until he was interrupted. He was held guilty of robbery. He had derived the advantage of plunder by his felonious conduct.⁵ A poacher demanded his wires with threats from the gamekeeper who had seized them. The jury negatived any felonious intention, and it was held that no robbery had been committed.⁶

There must be some personal violence, sufficient at least to create alarm in a mind of ordinary firmness, or to distinguish the case from stealing from the person. An actual touch is not necessary if the external circumstances are of such a nature as to warrant fear.⁷ A violent push, or running up against a person in order to divert his attention, would be evidence of the offence.⁸ Surrounding a person with intent to prevent his escaping or resisting would, *by reason of the company*, be sufficient to constitute the offence.⁹ A person tried to retain his sword, upon which the prisoner had laid hold, but was unsuccessful in his attempt to keep it: this was robbery.¹⁰ So was the snatching of the ear-ring,¹¹ and of a dia-

¹ *R. v. M^cDaniel and others*, Fost. 121.

² *R. v. Norden*, Fost. 129.

³ Leach, 619.

⁴ Fost. 129.

⁵ *R. v. Blackham*, East, P. C. 711.

⁶ *R. v. Hall*, 3 C. & P. 409. Simple robbery is the taking of money or goods, *of any value*, from the person of another or in his presence, *against his will*, and by putting him in fear. See East, P. C. 702. *R. v. Horner*, Id.

703. And as to accessories, East, P. C. 700. But accessories are now punishable as principals.

⁷ The old law required actual violence. *R. v. Macauley*, Leach, 287. *R. v. Baker*, Id. 290. *R. v. Steward*, East, P. C. 702.

⁸ Anon. 1 Lew. C. C. 300.

⁹ *R. v. Hughes and another*, Id. 301. See *R. v. Gnosil*, 1 C. & P. 304.

¹⁰ *R. v. Davies*, East, P. C. 709.

¹¹ *R. v. Lapier*, ante.

mond pin, so forcibly as to tear away the hair.¹ So where a pulling and two or three jerks were used in order to detach the watch from the fob.² Snatching is different from continued force, as where the prosecutor was telling the hour at the prisoner's request, and the latter snatched the watch, Patteson, J., held it to be a stealing from the person, not robbery.³ Indeed, force supplies the place of fear, as where a person was knocked down and rendered senseless, and whilst thus injured, was stripped by the prisoner: this was robbery.⁴ And *R. v. Lapier* illustrates the same doctrine.⁵

Again, there may be a continuing violence, as when thieves compelled A. to bring them a sum of money at a particular time by menacing him with death. He brought the money, and the act was held to be robbery, because the fear of the menace still continued upon him when he delivered the money.⁶

Again, fraud will constitute robbery. Gascoigne, under pretence of conveying a woman to gaol for an offence, kicked her into a coach, and then took money from her. This was held to be robbery.⁷ Another case is, where money has been obtained during riots; and the fear under the statute extends not only to loss of life, or personal injury, but also to the loss of property. Taplin, the captain of a mob in 1780, accompanied the mob on horseback. The prosecutor, on being appealed to, gave the prisoner half a crown, upon demand, instead of a shilling which he had intended to give. This act was held to be robbery.⁸ Upon another occasion, evidence of other demands by the same mob, the prisoners being present, were held admissible as to the character of the transaction.⁹ Again, during these riots of 1780, the prosecutor was told that, if he desired to keep his blood within his mouth, he must give the shilling demanded: the same law prevailed.¹⁰ The same rule applies if a mob succeed in possessing themselves of provisions at a lower rate than their value, although they pay the reduced price.¹¹ In this last case the fear of death was held out; but, in another case, followed by execution, the threat was that the mob would take away the property, if it were not delivered up, upon which the prosecutor complied.¹² So where the threat was to tear down a mow of corn and level the house.¹³ So where the threat was to bring a mob from Birmingham and burn the house, if the prosecutor did not give money. He

¹ *R. v. Moore*, Leach, 335.

² *R. v. Mason*, Russ. & Ry. 419.

³ *R. v. Walls and another*, 2 Car. & K. 214. There was not sufficient force to put in fear, or create extraordinary surprise. The punishments are now the same.

⁴ East, P. C. 711.

⁵ *Ante*.

⁶ 1 Hale, P. C. 532; East, P. C. 714. See 1 Hawk. c. 34, s. 1.

⁷ *R. v. Gascoigne*, Leach, 280; East, P. C. 709.

⁸ *R. v. Taplin*, East, P. C. 712.

⁹ *R. v. Winkworth and others*, 4 C. & P. 444.

¹⁰ *R. v. Brown*, East, P. C. 731.

¹¹ *R. v. Simons*, Id. 712.

¹² *R. v. Spencer*, East, P. C. 712.

¹³ *R. v. Simons*, Id. 731.

did not apprehend danger to his life or person, but feared that his house would be pulled down. The jury having found these facts, the crime was held to be robbery.¹ So where rioters seized a cart of cheeses, under pretence of the want of a permit, and frightened the owner into an agreement to go before a magistrate; but, as soon as the owner was gone, they carried off the cheeses.² The judges seem to have made a difference between the case of rioters using urgency and violence, and that of an ordinary demand. As where a woman was inveigled into a mock auction room, and was afterwards threatened that if she did not pay a shilling, she should be taken before a magistrate for not paying the price of a lot pretended to have been bought by her, the judges held, that the payment thus enforced was not robbery. The woman had a choice of difficulties; she chose to pay the shilling rather than go before the magistrate.³ It must be confessed, that the distinction is rather nice. Lastly, it may be remarked, that a *successful* threatening letter for the extortion of money or goods, will amount to robbery. If, indeed, the mandate be not complied with, the offence becomes the subject of another enactment;⁴ but if the threat be yielded to by the person intimidated, it is simple robbery.

Indictment.] The indictment for simple robbery states that A., on, &c., in and upon one B. feloniously did make an assault, and did then put the said B. *in danger and fear* [of his life], and then did feloniously and violently steal, take, and carry away from the person, and against the will of the said B., certain money, &c., that is to say, belonging to the said B., against the form, &c. Nevertheless, the putting in bodily fear is no necessary part of the indictment, however usual, for the felonious assault and robbery are the principal characters of the offence;⁵ and the assault needs not to be alleged to have been done violently.⁶ No parish need to be mentioned.⁷

Verdict.] The right of a jury to convict of an assault with intent to rob, upon an indictment for robbery, has already been mentioned.⁸

Stealing from the person.] In the case of stealing from the person, proof of an asportation is necessary, that is to say, a complete removal of the property. Thus where the prosecutor's

¹ *R. v. Astley*, Id. 729.

² *Merriman v. Hundred of Chippenham*, Id. 709.

³ *R. v. Knewland and another*, Leach, 721; East, P. C. 732. *R. v. Newton*, Car. Cr. L. 285.

⁴ See *R. v. Pelfryman and another*, Leach, 563.

⁵ See *R. v. Donally*, East, P. C.

⁶ *R. v. Smith*, Id.

⁷ See East, P. C. 784-786, as to the old law.

⁸ *Ante*.

pocket-book was drawn partly from his pocket, but not totally from his person, it was held by six judges against four, that although there was an asportation sufficient to warrant a judgment for simple larceny, the count for the compound larceny was wrong, and a pardon upon condition of transportation for seven years was recommended.¹ This case may be compared with one more recent. A watch was drawn out of the prosecutor's pocket; the chain and key were drawn from the button hole forcibly, but the point of the key caught upon a button, and the prisoner's hand being seized, the watch remained suspended. This was held to be a severance.² Jervis, C. J., said, he considered the minority of the judges in *Thompson's case* to have been right. Alderson, B., said, that there must be a removal of the property from the person; a hair's breadth would do.³ *Thompson's case* seems to be untouched, notwithstanding the remark of Jervis, C. J., for there was not a complete severance; and *Lapier's case* was relied on in *Simpson's case*, for the ear-ring fell amongst the curls, and thus there was, at all events, a momentary severance. It has been decided that the existence of force and fear is no answer to the charge of stealing from the person, or, in other words, that evidence of the greater offence would not, in this instance, warrant an acquittal for the less; therefore, if proof of a highway robbery be given, the prisoner may be yet convicted of stealing from the person.⁴ And Wood, B., was doubtful, whether, if he directed an acquittal, the prisoners might not have pleaded *aut. acq.* to the robbery.⁵ A man went to bed with a prostitute, and left his watch in a hat on the table. She stole it while he was asleep. This was a larceny in the dwelling house, not from the person.⁶ But where the prosecutor was assaulted in his house by A., whilst B. went to the cupboard and stole the cash-box, it was left to the jury to say whether the cash-box was under the protection of the prosecutor's person, and they found a verdict of guilty.⁷

Indictment.] The indictment states that A., on, &c. [state the property] of the goods and chattels of B., from the person of the said B. feloniously did steal, take, and carry away, against the form, &c.

Assault with intent to rob.] An actual blow does not seem necessary in order to constitute an assault with intent to rob. The words "stand and deliver," with a club uplifted,⁸ would, unquestionably, amount to such an assault. Should the force come short of an assault, it is still punishable under another section.⁹

¹ *R. v. Thompson*, 1 Moo. C. C. 78.

² *R. v. Simpson*, Dears. 424; 24 L. J. M. C. 7.

³ Dears. C. C. 424.

⁴ *R. v. Robinson and another*, Russ. & Ry. 321. *R. v. Pearce*, Id. 174; Leach, 1046.

⁵ *R. v. Robinson*, supra.

⁶ *R. v. Hamilton*, 8 C. & P. 49.

⁷ *R. v. Selway and another*, 8 Cox, 235; and 1 Hale, P. C. 533, was cited.

⁸ *R. v. Pegge*, East, P. C. 420.

⁹ 24 & 25 Vict. c. 96, s. 45.

So if a pistol be presented, it is an assault with intent to rob.¹ *A fortiori*, if the prosecutor was ordered to stop.² So it is if the prisoner, with a companion, should lay hands upon the prosecutor, saying, "Not a word, or I will blow your brains out."³ So an assault upon, and threatening to accuse the prosecutor of an infamous crime, is an assault with intent to rob.⁴ And, in that case, the judges thought, that *Henry's case* was not rightly decided. There one Taunton was convicted of being the principal in the second degree in a robbery, accompanied by threats of an abominable nature. Taunton committed no violence, but was present. Henry used actual force, and there was no question as to him, but, as to Taunton, the judges held the conviction wrong.⁵ The assault must be with intent to rob the prosecutor of something valuable. So that where a person was compelled to sign a note of hand under the fear of death, a knife having been placed at his throat, it was held, that felony had not been committed, because the note was of no value in the prosecutor's hands, and he was not, therefore, dispossessed of anything valuable.⁶ So where a person was decoyed into a house, and was induced under duress, being chained down, to write an order for the payment of money, and for the delivery of some deeds, and an indictment was preferred for an assault with intent to rob, the same law prevailed.⁷ But an assault was committed in both cases, and Mrs. Phipoe was convicted upon another indictment for the misdemeanor. Nor were the cases within the section respecting the demand of chattels, money, or valuable securities, with menaces, because admitting that the mere piece of paper belonged to the prosecutor, yet the demand would not be of that small chattel, but of the order to be written on it. But the 48th section of the statute 24 & 25 Vict. c. 96, has provided sufficiently for the offence by inflicting a very severe punishment.⁸ *A fortiori*, if there be a semblance of right, there is no assault *with intent to rob*. The prisoner, finding that several sovereigns given to the prosecutor for the purpose of buying a horse, were fraudulently retained by him, on the next day seeing him receive some sovereigns, knocked him down, and tried to take the money. This was not a felonious assault.⁹ And in a case where an assault took place after an alleged assault to rob had ceased, a separate indictment should have been preferred, *Wightman, J.*, being of opinion that he could not connect the two assaults, so as to warrant a conviction for a common assault under 1 Vict. c. 85, s. 11.¹⁰

¹ East, P. C. 417.

² *R. v. Trusty and another*, Id. 418, overruling *R. v. Parfait*, Leach, 19.

³ *R. v. Jacobs and another*, Leach, 267. However, if a companion be present, the robbery is more serious.

⁴ *R. v. Stringer and others*, 2 Moo. C. C. 261; 1 Car. & K. 188.

⁵ *R. v. Henry and Taunton*, 2 Moo. C. C. 118.

⁶ *R. v. Phipoe*, Leach, 673.

⁷ *R. v. Edwards*, 6 C. & P. 515.

⁸ *Post*.

⁹ *R. v. Boden*, 1 Car. & K. 305.

¹⁰ Now repealed. *R. v. Sandys and another*, 1 Cox, 8.

Indictment.] The indictment states, that A., on, &c., in and upon B., feloniously did make an assault with intent then to rob the said B., and feloniously and violently to steal, take, and carry away the money, &c., of the said B., against the will of the said B. The indictment should state, with accuracy, the party intended to be robbed. A. stopped a postboy, and presented a pistol, making use of some violent oaths; but seeing that he was pursued, immediately rode away. B. was in the carriage which the postboy was driving, and the prisoner was charged with an assault with intent to rob B.; but the court directed an acquittal, for the prisoner did not assault B., but the postboy. The prisoner was then tried for assaulting the postboy with intent to rob him, but the court said, that the indictment could not be sustained, for the prisoner had no intention of robbing the postboy, since he had made no demand in that direction.¹ The intent to *rob* must likewise appear in the indictment. It will not suffice to charge the intent to have been feloniously to *steal*, take, and carry away.² But where the elements of robbery appear in the indictment, the word "rob" is not indispensable, although it is not wise to omit it. The indictment charged that A., in and upon B., feloniously did make an assault, with intent, the monies, goods, and chattels of the said B., from the person and against the will of the said B., then and there feloniously and violently to steal, take, and carry away, &c. This count was held good.³

¹ *R. v. Thomas*, East, P. C. 417. Hawk. c. 55, s. 6. *R. v. Monteith*,

² *R. v. Remnant*, 5 T. R. 169. Leach, 702.

Semb. overruling *R. v. Rook*, 2 ³ *R. v. Huxley*, Car. & M. 596.

CHAPTER X.

OF AGGRAVATED ROBBERIES.

Robbery, or assault with intent to rob, being armed with any offensive weapon.] By 24 & 25 Vict. c. 96, s. 43, whosoever shall, being armed with any offensive weapon or instrument, rob, or assault with intent to rob, any person, or shall, together with one or more other person or persons, rob, or assault with intent to rob, any person, or shall rob any person, and at the time of or immediately before or immediately after such robbery shall wound, beat, strike, or use any other personal violence to any person, shall be guilty of felony, and liable to penal servitude for life, or not less than three years, or imprisonment not exceeding two years, with or without hard labour, or solitary confinement. The punishment of death therefore under 1 Vict. c. 87, s. 2, exists no longer.

The decisions as to an offensive weapon under the Act of 7 Geo. 2, c. 21, seem to be worthy of attention. Thus a staff was held to be an offensive weapon, for it would produce blows and bruises, and would satisfy an indictment for murder.¹ So a stick although of no great thickness, but about a yard long, and like a common walking stick, was held to be within the statute 7 Geo. 2.² So a crutch used by a lame person was considered to be within 9 Geo. 4, c. 69, s. 2, although it was left to the jury to say with what intent the weapon was used.³ So under this Act of 9 Geo. 4, large stones were deemed offensive weapons.⁴ And it seems that "offensive" has a greater latitude than "dangerous," a term used in some of the statutes against smuggling.⁵ A bludgeon was considered to be offensive.⁶ But a common horse-whip was negatived as such a weapon.⁷

A question arose under a Smuggling Act whether one who seized a hatchet during an affray should be deemed guilty of *using* such a weapon, and the court thought not.⁸ But that Act spoke of an *assembling* with offensive weapons, whereas if it were shown that a robber took up a stick in order to complete the robbery, there is little doubt but that he would come within this clause.

Indictment.] After stating the robbery,⁹ add, and that the said A., at the time he so committed the said robbery, was armed with

¹ *R. v. Sharwin*, East, P. C. 421.

² *R. v. Johnson*, Russ. & Ry. 492. The words "other offensive weapon whatsoever," are alluded to.

³ *R. v. Palmer*, 1 Moo. & Rob. 70.

⁴ *R. v. Grice*, 7 C. & P. 803.

⁵ See *R. v. Ince*, Leach, 342, n. *R. v. Cosans*, Id.

⁶ Id.

⁷ *R. v. Fletcher*, Leach, 23.

⁸ *R. v. Rose*, Id. 343, n.

⁹ *Ante*, p. 435.

a certain offensive weapon, to wit, —— [or at the time he so committed the said assault *with intent* to rob B.], was armed, &c., against the form, &c.¹ If, having mentioned the weapon in the indictment, the evidence were to show a different instrument, there will be no variance, at all events, if the instrument be likely to produce the same kind of injury. As a club instead of a stick, a stone instead of a staff, &c., for blows and bruises would be the result in both cases. And it was so held by the judges in *Sharwin's case*.²

Together with one or more person or persons.] If a robber should casually meet with help from a confederate, after he has completed the asportation, and abstain from violence, the offence cannot be said to have been committed with another person. But persons within reach, and so in a condition to aid and abet the robber, would be persons in company within the clause. As if A. and B. were to set upon C., and after a short time A. were, in B.'s absence, or out of his sight, to rob C. Here B. would not be the less a principal robber.³ Whilst, on the other hand, where poachers beat a gamekeeper till he became senseless, and then one returned and took his money, it was held that he only who went back was guilty of robbery.⁴

Indictment.] The indictment is of course the same in form as in simple robbery, with this exception, that two persons at least must be charged with the crime. It needs not to be averred that they were in company. But if one be indicted alone, who committed the act with others, it is proper that it should be so averred.⁵ As that, A., together with one ——, or with one other person to the jurors unknown, on, &c.

Violence immediately before or after the robbery.] The indictments for violent robberies state, that A., on, &c., in and upon B. did make an assault, and him the said B. did then feloniously put in fear and danger of his life, and did then feloniously and violently steal from the person and against the will of the said B., certain [money] of the said B. And that the said A. at the time immediately [before, or immediately after,] he so committed the robbery as aforesaid, feloniously did [beat and strike,] [stab, cut, and wound] the said B. This must not be an accidental wound, it must be intentional and during the robbery.⁶ The words, "at the time," were considered not to have been sustained by evidence of wounding immediately before. Although Alderson, B., thought,

¹ See *R. v. Jackson and another*, Leach, 267.

² East, P. C. 421.

³ 1 And. 116.

⁴ *R. v. Hawkins and others*, 3 C. & P. 392.

⁵ *R. v. Raffaty*, 2 Lew. C. C.

271, Patteson, J., and *R. v. Ramsden and another*, 1 Cox, 37, where Maule, J., hesitated concerning the dictum of Patteson, J., in *R. v. Raffaty*.

⁶ *R. v. Edwards*, 1 Cox, 32.

that but for the express words of the legislature, the words, "at the time," should have included the whole time, before and after.¹

Trial.] Robbery being compound larceny, must be tried in the county where it happened. Although a conviction for simple larceny may take place in a second county upon an indictment for robbery. This point, at one time, was not settled.² But the rule is now established, although Eyre, C. J., once held it to be discretionary in the judge to look into the facts, where the trial took place in the county where the simple larceny only was proved, in order that he might oust the prisoner of his clergy or not as he should see fit.³ This opinion, however, was not approved, and where a prisoner was tried in Middlesex for robbing the mail in Wilts or Berks, the judges held, that he could not be capitally convicted out of the county where the mail was robbed.⁴

Verdict.] The words in sect. 41 are, "*any* indictment for robbery." Therefore if the jury find an aggravated assault with intent to rob upon an indictment for robbery, the offender may be punished with penal servitude, if of a simple assault, with the like intent, with imprisonment. The verdict was that three prisoners had together committed the felonious assault, and the court held, that the assault followed the nature of the robbery, and that the sentence of transportation was right. And this, notwithstanding other sections where imprisonment only is awarded for assaults with intent to rob.⁵

For some time a prisoner might have been convicted of an assault under 1 Vict. c. 85, s. 11. Robbery and assaults against the person were included. But this clause was repealed, many complicated questions of law having arisen upon it.⁶

¹ *R. v. Hammond*, 1 Cox, 123. Where two persons together were robbed at the same time of different kinds of property, with violence, Littledale, J., allowed evidence to be given of the finding of a watch upon one of the prisoners, although there were two indictments for robbing these persons respectively, and the watch belonged to the second case. But the learned judge would not permit a proof of *violence* in the second case to be offered in support of the first. See *R. v. Rooney*, 7 C. & P. 517. See *R. v. Giddins*, Car. & M. 634.

² See, the cases collected, East, P. C. 776.

³ *R. v. Butler*, Id. 776, 777.

⁴ *R. v. Thomson*, 2 Russ. C. M. 116. *R. v. Evans*, East, P. C. 776.

⁵ *R. v. Mitchell and others*, Den. & P. 468; 3 Car. & K. 181.

⁶ See, on this subject, *R. v. Ellis*, 8 C. & P. 654. *R. v. Boden*, 1 Car. & K. 395. *R. v. Birch and another*, Den. 185; 2 Car. & K. 193. *R. v. Greenwood*, 2 Car. & K. 339. *R. v. Barnet*, Car. & K. 594.

CHAPTER XI.

OF DEMANDS WITH MENACES.

Demands with menaces.] By 24 & 25 Vict. c. 96, s. 44, whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony, and liable to penal servitude for life, or for any term not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement, and, if a male under sixteen years, with or without whipping.

By sect. 45, whosoever shall with menaces or by force demand any property, chattel, money, valuable security, or other valuable thing of any person, with intent to steal the same, shall be guilty of felony, and liable to penal servitude for three years, or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement.

By sect. 46, whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death or penal servitude for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent in any of such cases to extort or gain by means of such letter or writing any property, chattel, money, valuable security, or other valuable thing, from any person, shall be guilty of felony, and liable to penal servitude for life, or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement, and, if a male under sixteen years, with or without whipping; and the abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the said abominable crime, and every solicitation, persuasion, promise, or threat offered or made to any person whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this Act.¹

¹ The stat. 6 Geo. 4, c. 19, on this subject, was repealed by 24 & 25 Vict. c. 101.

By sect. 47, whosoever shall accuse or threaten to accuse, either the person to whom such accusation or threat shall be made, *or any other person*, of any of the infamous or other crimes lastly hereinbefore mentioned, with the view or intent, in any of the cases last aforesaid, to extort or gain from such person so accused or threatened to be accused, or from any other person, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony, and liable to the punishments of the 46th section.

By sect. 48, whosoever, with intent to defraud or injure any other person, shall, by any unlawful violence to or restraint of, or threat of violence to or restraint of, the person of another, or by accusing or threatening to accuse any person of any treason, felony, or infamous crime as hereinbefore defined, compel or induce any person to execute, make, accept, indorse, alter, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or co-partnership, or the seal of any body corporate, company, or society, upon or to any paper or parchment, in order that the same may be afterwards made or converted into, or used or dealt with as, a valuable security, shall be guilty of felony, and liable to penal servitude for life, or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement.

And by sect. 49, it shall be immaterial whether the menaces or threats be of violence, injury, or accusation to be caused or made by the offender or by any other person.

A demand of 1s., and on refusal, a threat to burn up the prosecutor, who had declined to give the prisoner work, was within 1 Vict. c. 87, s. 7.¹

Indictment.] The indictment for sending a threatening letter of the character above mentioned, states that A., on, &c., knowingly and feloniously did send to B. a certain letter directed to the said B., by the name and description of —, demanding [the chattel, &c.] of and from the said B. with menaces, and without any reasonable and probable cause, and which letter is as follows, that is to say, [set it out,] against the form, &c.

With reference to the demand with menaces, it does not seem to be necessary that the same force which is requisite to constitute robbery need be employed. But the chattel demanded must be something of value, not a mere order for payment, which was was never valuable in the hands of the prosecutor.² And if the money be actually obtained under circumstances amounting to robbery, the count cannot be sustained,³ but there may be a new indictment.

¹ *R. v. Taylor*, 1 Fost. & F. 513.

² *R. v. Edwards*, ante.

³ *R. v. Norton*, 8 C. & P. 671. But judgment was pronounced upon another count free from objection.

The indictment for demanding with menaces states that A., on, &c., with menaces, did feloniously demand of one B., [the chattel, &c.,] the property of the said B., with intent then to steal, take, and carry away the same.

The next sections relate to letters threatening to kill or murder, or to burn property, and to accusations, or threats, with intent to extort.

First, as to threatening letters. It is of no moment whether the writer conceals his name or not.¹ Or whether he puts his initials, or a full name.² It has been held, that dropping a letter near the prosecutor, with intent that it might reach him, was a sending of the letter.³ So, fixing a letter on a gate is an act fit to be left to the jury, with reference to the prisoner's intent that the letter should reach the prosecutor.⁴

A. wrote a threatening letter to B., containing a menace that he would burn the house of one of B.'s tenants. A. left the letter at a gate near B.'s house. It was found, and was taken to B.'s steward, who read it, and gave it to a constable. The constable showed it to B., and to the tenant afterwards. It was held, that if the prisoner meant, when he left the letter, that it should reach the tenant as well as B., it was a sending of the letter.⁵ So, where a letter was put in a place where it was likely to be seen and read, and where it was found, the act was held to be an uttering within 10 & 11 Vict. c. 66. The prisoner had put it under a table-cloth, so that his fellow servant, whom he threatened, could not fail to see it.⁶ The guilty knowledge of the contents must be left to the jury. A wife may write a letter and send it by her husband, and yet the husband may be ignorant of it.⁷ Had the husband sent the letter by the wife, it might be presumed that the wife had acted under his direction, but the converse will not hold. However, the bare delivery of a letter, though sealed, is evidence for the jury to say whether the party delivering it knew its contents.⁸ The jury are the judges of the intent. A count charged that the threat was to put A. to death. Another, that it was to burn two houses, &c. The jury negatived the first, but affirmed the second count. The conviction was held good after verdict.⁹ The prosecutor may be asked whether he understood the words conveyed to him to mean what the record imputed, *i. e.*, a threat to burn

¹ At one time this circumstance made a difference. *R. v. Heming*, Leach, 445, *n.* East, P. C. 1116. *R. v. Wagstaff*, Russ. & Ry. 398.

² *R. v. Robinson*, Leach, 749; East, P. C. 1010.

³ *R. v. Wagstaff*, Russ. & Ry. 398. *R. v. Lloyd*, East, P. C. 1122.

⁴ *R. v. Williams*, 1 Cox, 16. See *R. v. Grimwade*, Id. 85. *R. v. Braynell*, 4 Cox, 402.

⁵ *R. v. Grimwade*, Den. 30;

1 Car. & K. 592. See also *R. v. Jepson and another*, East, P. C. 1115.

⁶ *R. v. Jones*, 5 Cox, 226.

⁷ *R. v. Hammond and ux.*, Leach, 444. The wife was acquitted because there was no proof of her having sent it, although the husband delivered it.

⁸ *R. v. Girdwood*, Leach, 142.

⁹ *R. v. Tyler and another*, 1 Moo. C. C. 428. *R. v. Carruthers*, 1 Cox, 138.

his houses. The letter was as follows,—“Sir, this is to inform you that you had better not let your farm to any of your family; if you do, you will suffer as before. You know how you felt the other day.” “A caution friend.”¹ The words “chattel, money, or valuable security,” probably include every species of personal property, so that all the old objections are at an end.² Formerly, likewise, the prosecutor ought to have been in possession of the property threatened. As, where A. had parted with his mill three years before the threat to burn it, this threat was held insufficient, and the threat to do all the public injury they could to his farms, did not imply a threat to burn, so that the conviction was held wrong.³ So the threat to burn the house of an owner occupied by a tenant was held not to be within the statute.⁴ The words “without any reasonable or probable cause,” apply, not to the accusation, but, to the money demanded,⁵ although the reasonableness or probability is a question for the jury.⁶ The following was considered to be a threatening letter—the prisoner was desirous of obtaining 250 sovereigns, and he proposed that they should be left in a particular spot, upon which he declared he would avert a calamity by fire, from the house. The letter went on to say, “Let the money be lodged tomorrow by half-past eleven, but not a minute sooner, and all shall be well with you, but if I am at all deceived in any way, it must fall upon yourselves.” This was a demand.⁷ And the judges expressly recognized *Pickford's case* as law. There the anonymous letter stated that if the prosecutor would leave thirty sovereigns in a particular spot, the writer would give information of an injury by fire intended to be done. *In that case there was no demand.*⁸

Formerly, if a letter was sent from B. to C., in order that C. might deliver it to A., the crime was not complete until C. delivered it to A.⁹ But this fault is now remedied.¹⁰

With reference to infamous crimes, it was formerly no offence by statute to accuse a person of a solicitation to commit them.¹¹ And,

¹ *R. v. Hendy*, 4 Cox, 243.

² See *R. v. Robinson*, Leach, 749. *R. v. Major*, Id. 772; East, P. C. 1118.

³ *R. v. Jepson and another*, East, P. C. 1115.

⁴ *R. v. Burridge*, 2 Moo. & Rob. 296. See also *R. v. Jones*, Den. 218.

⁵ *R. v. Hamilton*, 1 Car. & K. 212.

⁶ *R. v. Miard*, 1 Cox, 22.

⁷ *R. v. Smith*, Den. 510; 19 L. J. M. C. 80; 2 Car. & K. 882.

⁸ 4 C. & P. 227. The words, “agricultural produce” include

standing corn. *R. v. Hill*, 5 Cox, 233.

⁹ See *R. v. Williams*, 1 Cox, 16. *R. v. Grimwade*, Den. 30; 1 Car. & K. 592. *R. v. Braynell*, 4 Cox, 402. *R. v. Paddle*, Russ. & Ry. 484. *R. v. Jones*, Den. 218; 2 Car. & K. 398. *R. v. Jepson and another*, East, P. C. 1115.

¹⁰ 24 & 25 Vict. c. 96, s. 44, “utter to any other person.” 10 & 11 Vict. c. 66, s. 1, “utter, or directly or indirectly cause to be received.”

¹¹ *R. v. Hickman*, 1 Moo. C. C. 34.

even now, a threat to procure witnesses to appear in support of a charge already made is not within the statutes.¹ But it was a misdemeanor at common law. It might overcome a firm and prudent mind.²

At one time the opinion was strongly maintained, that an accusation of sodomy was sufficient to constitute robbery, without any personal violence.³ But after the statute 1 Vict. c. 87, s. 4, which made the bare accusation felony, without any actual extortion, the judges thought, that that Act superseded the 7 & 8 Geo. 4, c. 29, s. 7, which affirmed the old law, and they held a conviction wrong, where no violence was committed by one prisoner at the time of the accusation, and where he was not privy to the robbery by the other, and might not even have seen it, although he made the charge in company with the other.⁴ Although it was afterwards said that if money were obtained by threats, independently of those mentioned in the statute of Victoria, the offence might, without personal violence, amount to robbery.⁵ Nevertheless, the law, in *R. v. Henry and Taunton* was doubted as to *Taunton*, who, being absent, committed no actual violence. The prisoners were charged with assaulting and threatening to charge the prosecutor with an infamous crime, but no money was taken, and the judges held that they were rightly convicted of an assault with intent to rob.⁶ However, it seems, that some FEAR must be present in order to create the crime of robbery. It was not robbery where the prosecutor parted with his money with the view of bringing the offender to justice.⁷ Still, if the fear exists contemporaneously with the idea of prosecuting, the case is different. As, where sometime elapsed between the charge and the payment, so as to give the prosecutor the opportunity of consulting a friend, and yet the prosecutor was evidently scared when he gave his money.⁸

Again, there was a verdict of not guilty on the special count, but on the counts for robbery and demanding money with menaces,

¹ *R. v. Gill*, 1 Lew. C. C. 305.

² *R. v. Woodward*, 11 Mod. 137; 6 East, 140.

³ *R. v. Donally*, Leach, 193; East, P. C. 715. No violence used. *R. v. Brown*. *R. v. Jones*. *R. v. Harrold*. Leach, 199, cited. Some violence used, but the judges said that the circumstance made no material distinction. *R. v. Elmstead*, 2 Russ. C. M. 894. *R. v. Hickman*, Leach, 278. *R. v. Cannon*, Russ. & Ry. 146. Five judges thought some force essential. Five were of the contrary opinion. But all agreed that calling a coach, and compelling the prosecutor to get

into it, under the threat of taking him before a magistrate, was a sufficient force. *R. v. Egerton*, 6 Russ. & Ry. 375.

⁴ *R. v. Henry and Taunton*, 2 Moo. C. C. 118.

⁵ *R. v. Norton*, 8 C. & P. 871, 874, n.

⁶ *R. v. Stringer and another*, 2 Moo. C. C. 261; 1 Car. & K. 188.

⁷ *R. v. Reane*, East, P. C. 734, 735; Leach, 616. *R. v. Fuller*, Russ. & Ry. 408.

⁸ *R. v. Jackson and another*, East, P. C. Add. xxi. See 8 C. & P. 675.

guilty. Judgment of transportation was entered on the count for robbery. And the threat need not be to accuse before a judicial tribunal; before a third person will suffice.¹ It has been held not to be robbery to extort money from a wife under pretence of accusing the husband of an infamous crime.²

It is no defence to show a commitment, or an attempt at commitment of the crime.³

The jury need not confine themselves to the expressions used when the money was given; if the expressions are equivocal, the jury may connect them with any observations made by the prisoner when taken into custody.⁴ Although it must not be asked whether the accusation had not been made two years before, where the extortionate intent in the actual case admits of no doubt.⁵ But it was permitted to show that the prisoner had said he had got money before from a gentleman upon a similar charge. The jury are to consider the words used with reference to their meaning.⁶ The defendant, with another, was charged with a conspiracy to extort money upon false pretences. The false pretences were not proved, and so much of the count as related to them was rejected as surplusage. They were also charged with unlawfully offering to prevent the publishing of a libel against the prosecutor, and with threatening to publish it against him. The evidence was that an information would be laid against the prosecutor for an offence against the posthorse duties, and that they, the defendants, could prevent it, and would do so upon payment of so much money. This proof was held insufficient to warrant a conviction.⁷

Indictment.] The indictment for sending a threatening letter sets forth, that A., on, &c., knowingly, unlawfully, and feloniously did send a certain letter [or writing], signed —, that is to say, with the name of —, directed to B. —, by the name and description of —, threatening to accuse him, the said B., of a certain crime, punishable by law with penal servitude, to wit —, with the view and intent then, by means of the said threatening letter, to extort and gain from the said B. [money], and which letter is as follows [set it out], against the form, &c. The indictment must, in any case, set out the letter. For want of this, a conviction at Hereford, many years since, was holden improper.⁸ And, upon application by the prisoner, the court will order the letter to be deposited with the officer, in order that the prisoner's witnesses may inspect it.⁹ Although it must appear

¹ *R. v. Robinson*, 2 Moo. & Rob. 14.

² *R. v. Edwards*, 1 Moo. & Rob. 257; 5 C. & P. 518.

³ *R. v. Gardner*, 1 C. & P. 479.

⁴ *R. v. Kain*, 8 C. & P. 187.

⁵ *R. v. M'Donnell*, 5 Cox, 153.

⁶ *R. v. Cooper*, 3 Cox, 547. "Guilty."

⁷ *R. v. Yates and another*, 6 Cox, 441.

⁸ *R. v. Lloyd*, East, P. C. 1122.

⁹ *R. v. Harrie*, 6 C. & P. 105.

that the prisoner sent the letter to the prosecutor, yet if there be an allegation that the prisoner sent a certain letter to B., and it should turn out that the letter was sent to A. in order that he should deliver it to B., this is a sending to B.¹ And, moreover, the indictment need not set out the particular crime charged, nor explain the threat otherwise than by setting out the letter. Thus, a letter said, "That the party should not live the week out, if he had his deserts," and ended, "Don't make light of this, or I'll make light of you and yours; I am your cut-throat." This was held to be a letter threatening to kill and murder without any inuendo.² Comparison of hands cannot be admitted. However, unconnected with the charge, and however unquestionable the authenticity of the document tendered, as being in the handwriting of the prisoner, the jury cannot, on any consideration, be let into the comparison of hands.³ Nor can a scientific inspector be called for that purpose.⁴

The indictment needs not to specify the crime, inasmuch as the charge might have been kept intentionally in the dark; but, in such a case, the judges were of opinion, that parole evidence was properly received for the purpose of explaining parts of the letter, although the prisoner himself had furnished the information. The conviction was held right upon a general indictment, with a view to extort money;⁵ yet, although the prisoner may be the author of evidence against himself, it is not every word that he says which will establish his guilt. Thus, where the sole evidence was his own declaration, that he should never have written the letter but for a certain person, naming him, it was held insufficient.⁶ It needs not to be averred in the indictment to whom the valuable thing belonged, for instance, an I.O.U.⁷

But the indictment must disclose the person threatened; therefore, where the prisoner was convicted upon a count which stated that A. and others did threaten to accuse B., and so on, it was held ill for want of saying that A. and others did threaten B. to accuse him, &c.⁸ An indictment, under the old Act, 4 Geo. 4, c. 54, stated, that the prisoners charged and accused J. N., and did feloniously threaten and menace to prosecute him for the offence. Garrow, B., held the count insufficient, for the indictment wandered from the terms of the statute. Had it been proved that the prisoners threatened to prosecute under an indict-

¹ *R. v. Paddle*, Russ. & Ry. 484. *R. v. Lloyd*, ut supra. The letter was delivered, and under 10 & 11 Vict. c. 66, this would make no difference.

² *R. v. Boucher*, 4 C. & P. 562.

³ *R. v. Morgan*, 1 Moo. & Rob. 134. *R. v. Shepherd*, 1 Cox, 237.

⁴ S. C.

⁵ *R. v. Tucker*, 1 Moo. C. C. 134. But see *R. v. Middleditch*, Den. 92; 2 Cox, 313.

⁶ *R. v. Howe*, 7 C. & P. 268.

⁷ *R. v. Tiddeman and others*, 4 Cox, 387.

⁸ *R. v. Dunkley and others*, 1 Moo. C. C. 90.

ment properly framed, it might have been left to the jury to say whether that was not a threatening to accuse.¹

Indictment for accusing.] The indictment for accusing states that A., on, &c., feloniously did threaten B. to accuse him of a certain crime, punishable with penal servitude, to wit, with—, with the view and intent then and thereby to extort and gain money from B.

Trial.] It is usual to indict in the county where the threatening letter has been received. It has, indeed, been argued, that the offence ought to be inquired of in the county, where the sending originated, but this objection has been overruled.² And it has also been intimated, that if the sending be the gravamen, the trial would properly be had in any county through which the letter might pass;³ but the ordinary course is to adopt the county where the receipt has taken place.⁴ Indeed, in point of law, the sending is reckoned to have taken place in the county where the letter is directed; so that where the letter was dated from Maidstone and directed into Middlesex, Lord Mansfield said, that this was a sending in Middlesex, for the whole was to be considered as the act of the defendant up to the time of delivery in that county.⁵

¹ *R. v. Abgood and others*, 2 C. & P. 436.

² *R. v. Esser*, East, P. C. 1125.

³ *Id.*

⁴ *R. v. Girdwood*, Leach, 142. *R. v. Hickman*, 1 Moo. C. C. 34.

⁵ *R. v. Esser*, East, P. C. 1125.

CHAPTER XII.

OF BURGLARY.

Burglary.] By 24 & 25 Vict. c. 96, s. 50, whosoever shall break and enter any church, chapel, meeting house, or other place of divine worship, and commit any felony therein, or being in any church, chapel, meeting house, or other place of divine worship shall commit any felony therein and break out of the same, shall be guilty of felony, and liable to penal servitude for life, or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 51, whosoever shall enter the dwelling house of another with intent to commit any felony therein, or being in such dwelling house shall commit any felony therein, and shall in either case break out of the said dwelling house in the night, shall be deemed guilty of burglary.

By sect. 52, whosoever shall be convicted of the crime of burglary shall be liable to penal servitude for life, or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.¹

By sect. 53, no building, although within the same curtilage with any dwelling house, and occupied therewith, shall be deemed to be part of such dwelling house for any of the purposes of this Act, unless there shall be a communication between such building and dwelling house, either immediate, or by means of a covered and inclosed passage leading from the one to the other.

The following section (54) does not embrace the crime of burglary, but as it related to an offence nearly connected with that crime, and is besides a new enactment, we have thought it expedient to include it in this chapter.

By sect. 54, whosoever shall enter any dwelling house in the night, with intent to commit any felony therein, shall be guilty of felony, and liable to penal servitude not exceeding seven years and not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

Burglary, like some species of treasons, may be constructive as well as positive; so that if a door be opened through intimidation or artifice, it is no defence to affirm that there was no actual breaking, since the felonious entry evidently took place against the will of the owner of the house. But the most frequent instances of the crime are accompanied by a forcible breach of the

¹ It is obvious that the punishment of death for assaulting with intent to murder, or stabbing, cutting, or wounding, beating or striking, during a burglary, has not

been renewed. The statute 1 Vict. c. 86, s. 2, which contained that severe penalty, was not acted upon, and is now repealed by 24 & 25 Vict. c. 95.

dwelling, and a taking of property. A burglar is said to be one who breaks and enters a mansion house in the night with intent to kill, or to commit some felony, whether his intention be executed or not.¹

Sacrilege.] The term "sacrilege" is barely acknowledged at present. The act of breaking into a place of worship belonging to the Church of England and stealing therein, or committing any felony there, whether by day or night, is felony. And the term "sacrilegiously" has long been disused in indictments. Still the preamble of the section concerning sacrilege is, "As to sacrilege," &c.

A dissenting chapel is not within the clause,² although it is protected by the statutes against arson. Fixtures are not mentioned in the clause; but where it was averred that certain fixtures, naming them, were stolen, the prisoner was liable to be convicted of stealing them under 7 & 8 Geo. 4, c. 29, s. 44.³ And the violation of the sanctity of the place being the chief thing to be guarded against, things not used for divine service are within the Act. It was so held under the old law.⁴

With respect to the place itself, all such parts, at all events, as have an internal communication with the body of the building, are within the statute; as where it appeared that certain canonical vestments had been stolen from a box kept in the church tower. The tower was higher than the church, and had a separate roof, but there was no outer door, the only way of reaching the tower being through the body of the church, from which the tower was not separated by any partition. Park, J., held this tower to be parcel of the church.⁵ A vestry had been formed out of what had originally been the church porch. It had a door opening into the churchyard, which could only be unlocked from the outside. It was held part of the church for the purpose of a conviction for this offence.⁶

Indictment.] The indictment states that A., on, &c., feloniously and burglariously did break and enter the church of —, situate, &c., and then in the said church feloniously did steal, &c. [the property] of the chattels of B. and C., churchwardens of the said parish, against the form, &c. The 2nd count may allege a breaking out. The word "sacrilegiously" is no longer necessary.⁷ The bells, books, &c., may however be laid to be the goods of the parishioners, and the goods of a chapel in those persons who have the custody of them.⁸ A box, with the inscription

¹ 1 Hale, P. C. 549; East, P. C. 485.

² *R. v. Warren*, 6 C. & P. 335. *R. v. Richardson*, Id. *R. v. Nixon and another*, 7 C. & P. 442.

³ *R. v. Baker*, 3 Cox, 581. See post, *R. v. Wortley*. Now the Act 24 & 25 Vict. c. 96, s. 31.

⁴ *R. v. Rourke*, Russ. & Ry. 386.

⁵ *R. v. Wheeler and others*, 3 C. & P. 585.

⁶ *R. v. Evans*, Car. & M. 298.

⁷ *R. v. Hickman and another*, Leach, 318.

⁸ East, P. C. 651; 2 Stark. Cr. Pl. 472.

"Remember the poor," was fixed by screws to the outside of a pew in the centre aisle of the church. The pew belonged to an hospital. The prisoners were found guilty of stealing only, and it was objected that the box was not the property of the parish; but Tindal, C. J., observed, that the box was in the aisle, and that the aisle was parish property. It was said that the 1st count should have laid the property in the churchwardens, and not in C. T., and another. And as there was no count laying it in the rector, whose freehold the place was, the indictment was impugned on that point likewise. But the 2nd count laid the property in T. N. (who was the vicar) and others, and the judges were unanimous for a conviction on this count.¹

Night, with reference to burglary, commencing at 9 P. M. and concluding at 6 A. M., the old difficulties of "*inter crepuscula*," and the sufficiency of light to see a man's countenance, are done away with.²

The breaking and entry must combine, but, in the case of breaking out, the entry precedes the breaking. Nevertheless, both need not to happen in the same night. The prisoner broke the glass of a side door on Friday night, and entered on Sunday night through the aperture. The jury found the breaking and entry felonious, and by night, and the judges held the conviction right.³ But it has been said that such a breaking in the daytime, with an intent to enter on the same or a subsequent night, would not be burglary.⁴ But, says Sir Edward East, "The resolution there only was, that if thieves enter in by night at a hole in the wall which was there before, it is not burglary; but it does not appear who made the hole, much less that it was made by the thieves themselves, with intent to enter more securely at night."⁵ At the present day, however, the opinion of Lord Hale would probably prevail, that both breaking and entry must be in the night, without any constructive offence.

It is clear that the entry may be lawful and yet the breaking out burglary. Though both must unite both need not be felonious. As in the case of the lodger, who, having committed a larceny, unbolted the back door and went away.⁶ But the constructive ruling obtains when the question of accessory comes into view. Two assisted a third in breaking and entering. They did not enter, but they helped to screen the housebreaker. They were convicted, although not near when the entry was effected.⁷ The object of the burglary must be felonious, as

¹ *R. v. Wortley*, Den. 162; 2 Car. & K. 283; Canon 84; Burn's Eccl. Law, tit. "Church."

² East, P. C. 508.

³ *R. v. Smith*, Russ. & Ry. 417. Lord Hale says of such a case, "It shall be supposed that they broke and entered in the night when they entered, for the breaking makes

not the burglary till the entry." Hale, 551, 555; East, P. C. 508.

⁴ Hale, *ut supra*, citing from Crompton, 8 Ed. 2; East, 509.

⁵ East, 509.

⁶ *R. v. Wheeldon*, 8 C. & P. 747.

⁷ *R. v. Jordan and others*, 7 C. & P. 432.

rape.¹ And the circumstance of another criminal transaction being attempted at the same time makes no difference. A servant sold goods for his master, received 160 guineas, and either being discharged from the service, or decamping suddenly,² took all, excepting ten, which he had in his bedroom. He then broke open the house, and took away the ten guineas. This was not burglary, because though this was *in right* the master's money, it was the servant's in possession, and the first original act was no felony, the taking of the 160 guineas.³ The prisoner broke open a house for the purpose of recovering some tea which had been seized by an excise officer, and the jury found the intent to have been to deliver the tea to the supposed owner: this was held to be no breaking in order to steal. Had the indictment laid the intent to have been to rescue uncustomed goods, and evidence brought to show the contraband dealing, the case might have been different.⁴ The prisoner entered a stable and killed a horse, in order to prevent its running. This was not burglary, because the *intent* was to commit a trespass, although the prisoner had committed a substantive felony by killing the horse. He was afterwards *convicted* of the latter offence.⁵ Two poachers went to the house of a gamekeeper in quest of their dog. They broke open his doors, believing him absent. This was held not to be burglary.⁶ Nevertheless, if the intent be doubtful, the commission of a felony is the strongest proof of the intent to do that act, and the prisoner's assertion that he entered with a view not felonious, will be of little avail.⁷ The onus of proof lies on the prisoner if he asserts an innocent intent.⁸ Whether the felony be one at common law or by statute is immaterial (although this was once doubted), since whenever a statute makes an offence felony, it incidentally gives it all the properties of a felony at common law.⁹

Breaking and entry.] We now come to the breaking and entry. The former of these acts created the larger share of discussion. There may, as we have observed, be a constructive as well as an actual breach. As where the maid servant being thrown off her guard by a false pretence, opened the door to thieves; this was burglary on the part of the thieves.¹⁰ So, where an entrance was effected under the cloak of religious union.¹¹ So, under the shield

¹ *R. v. Locost and another*, Kel. 30. *R. v. Gray*, Str. 481.

² *R. v. Meeres*, 1 Show. 53. Nothing said of the *discharges*. Leach, 840, both mentioned. The decamping is the more probable.

³ 1 Show. 53, cited; East, P. C. 510. (East. Sessions, 1687.) *R. v. Dingley*, Leach, 840, cited. Now, however, he would have been guilty of felony.

⁴ *R. v. Knight and another*, East, P. C. 510. See also *R. v.*

Dobbs, Id. 513. *R. v. Dannelly and another*, Russ. & Ry. 319. *R. v. Jones*, Car. & M. 218.

⁵ *R. v. Dobbs*, East, P. C. 513.

⁶ Anon. Matth. Cr. Dig. 48.

⁷ 1 East, P. C. 509. The intent may thus be inferred.

⁸ Anon. 1 Lew. C. C. 37.

⁹ East, P. C. 511.

¹⁰ *R. v. Le Mott*, Kel. 42.

¹¹ *R. v. Cassy and another*, Id. 62.

of a pretended legal authority.¹ It is not necessary to advance every instance of fraud in proof of this position.² But it was settled, after some doubt and a special finding, that the connivance of a servant by opening the door is a constructive breaking and entry by both, although the servant does not leave the house with the thief. And the servant was executed.³ Again, it seems that if a noise be made adjoining to a dwelling, upon which the door is opened and the thief rushes in, it is likewise a burglarious act.⁴

So, where breaking of windows and firing of guns induced the family to open the door, the jury were directed to convict if they thought that the entrance had been effected by intimidation.⁵ Should the inmate, when alarmed, as above mentioned, advance upon the robbers without, for the purpose of repelling their attack, it will be burglary in them to enter.⁶ The stealing, however, must be in the dwelling house, so that if the owner fling his goods or purse into the street, or elsewhere, to the thieves, they may, indeed, be guilty of robbery, but not of burglary.⁷ Thus much of a constructive breaking, although the descent by a chimney into the house is viewed much in the same light. The prisoner was found concealed in the chimney, just above the mantel-piece. Here the getting in was deemed to be a breaking, and the lowering of the body in the chimney an entry, and the conviction was held right.⁸ For the chimney is said to be inclosed as much as the nature of the thing will admit of.⁹ Hence, it follows, that opening a window,¹⁰ unlocking or forcing open a door or window,¹¹ whether there be outside shutters or not,¹² or whether they be put to or not,¹³ pushing in broken or cut glass,¹⁴ breaking

¹ *R. v. Farre*, Id. 43; 1 Hale, P. C. 552; Leach, 284; *per cur.*

² See *R. v. Hawkins*, East, P. C. 485. *R. v. Branton*, Id.

³ *R. v. Cornwall*, Str. 881.

⁴ 1 Hawk. c. 38, s. 7.

⁵ *R. v. Swallow and others*, 2 Russ. C. M. 793 (executed).

⁶ 1 Hale, P. C. 553.

⁷ 1 Hawk. c. 38, s. 3.

⁸ *R. v. Brice*, Russ. & Ry. 450. By ten judges.] Holroyd and Burrough, JJ., would have held the same had the prisoner descended *below* the chimney-piece *before* he was taken.

⁹ 1 Hale, P. C. 552, by Manwood, C. B.; East, P. C. 485. Hale, C. J., doubted of this law, but it is now settled.

¹⁰ *R. v. Haines and another*, Russ. & Ry. 451, the upper sash

was pulled down. *R. v. Hyams*, 7 C. & P. 441, where there was a hasp which might have been fastened had the inmates been careful. *R. v. Robinson and Bacon*, 1 Moo. C. C. 327, where the prisoners broke out a pane already broken in part, and unfastened a sash. *R. v. Foster*, 1 Lew. C. C. 33.

¹¹ *R. v. Hall*, Russ. & Ry. 355. Where the window was fastened by two nails which acted as wedges, but the nails would open by pushing, see *R. v. Brown*, East, P. C. 487.

¹² *R. v. Roberts*, East, P. C. 487; see Russ. & Ry. 341.

¹³ *R. v. Haines and another*, ut supra. See *R. v. Russell*, post.

¹⁴ *R. v. Bird*, 9 C. & P. 44.

a hole in the wall, using a false key, lifting up the latch of a door, where there is no other fastening,¹ or unloosing any fastening, will be burglaries if an entry be gained.² The prisoner got into a house by raising up the flap door of a cellar usually kept down by its own weight, and sometimes nailed, and he was held to be guilty of burglary, although the jury found that on the particular night the door was not nailed.³ But in a case where the fastenings had not been put on, it was held that burglary had not been committed by merely lifting up a trap door, although opening a hall door and running away were considered in the same case to be a breaking out.⁴ And where there were interior fastenings to a cellar, the trap door of which shut down by its own weight, six judges held that the prisoner had not been guilty of burglary by breaking out through the cellar trap. Six were in favour of a conviction,⁵ but this case has been shaken, if not overturned, by *R. v. Russell*.⁶ A shutter box, close to a house, but unconnected with it internally, is not the subject of burglary.⁷

The commission of burglary is not limited to the outer door of the house. Certainly, if the outer door be open, and the thief enter, he has not as yet committed the offence, but as soon as he unlatches an inner door, or turns the key of a door which is locked, the crime is complete.⁸ And so it is if having entered at an open door, the prisoner unbolts the street door on the inside, in order to go out.⁹ A servant drew the latch of a door at the foot of the stairs, in order to gain his master's apartment, for the purpose of murder, and the act was ruled to be burglary.¹⁰ So it is if a guest at an inn open the door of another guest with a felonious intent.¹¹ But Lord Hale has doubted whether it would be burglary for a guest at an inn to open *his own* chamber door with a like intent, because of the special interest which the guest might have in the chamber.¹²

It is admitted, that the breaking of a chest or box by one who had gained an entrance through an open window is not burglary.¹³ And, in 1690, the judges were equally divided on the

¹ *R. v. Owen*, 1 Lew. C. C. 35.
R. v. Wheeldon, 8 C. & P. 747.
[a breaking out].

² 1 Hawk. c. 38, s. 6.

³ *R. v. Russell*, 1 Moo. C. C. 377, overruling *R. v. Callan*, ut
semble, Russ. & Ry. 157.

⁴ *R. v. Lawrence and another*,
4 C. & P. 231.

⁵ *R. v. Callan*, Russ. & Ry. 157.
It did not appear that the flap had
been bolted on the night in ques-
tion.

⁶ *Supra*.

⁷ *R. v. Paine and another*, 7
C. & P. 135.

⁸ 1 Hale, P. C. 524, 553. *R. v.*
Johnson and others, Kel. 58.

⁹ *R. v. Johnson*, East, P. C.
488.

¹⁰ *R. v. Edwards*, Hutt. 20.
R. v. Gray, Str. 481, where the
attempt was to commit a rape. See
also *R. v. Binglose*, cited, East,
P. C. 488.

¹¹ 1 Hale, P. C. 554.

¹² 1 Hale, P. C. 554; East, P. C.
488.

¹³ 1 Hale, P. C. 524.

point whether the breaking open of a cupboard, let into the wall and fixed to the freehold, was such an offence.¹ If the accused should have come into the house by an open window, without more, it is certain that he must be acquitted of burglary.² And if the prisoner steal goods by putting his hand through an aperture, it is the same, for there is no breaking.³ Nor is it burglary if the prisoner finding a sash partly open, push it higher so as to admit him.⁴ And where a hole had been left in a house at the top, in order to admit the light, the same rule prevailed, notwithstanding the case of the chimney.⁵

Entry.] Secondly, there must be an entry. The least intrusion of hand or foot will suffice.⁶ The fore part of the finger was put on the shop side of a pane of glass just broken by the prisoner. This was an entry.⁷ So is cutting a hole through the window-shutters, and abstracting watches from the shop.⁸ So, if the hand be introduced through a broken pane, although there be inside shutters fastened, and the thief be taken before he has done more than cut a hole in the shutter with his centre-bit.⁹ So, breaking a pane, and inserting a knife to push back the shutter, is burglary.¹⁰ At one time it was no answer to say, that the instrument, as a pistol, or knife, might have been within the house, but not the hand which held it, although the purpose must have been that of taking property or committing some other felony.¹¹ It is now, however, ruled, that if the hand, or some part of it, be not *actually* within the house, burglary has not been committed. A hole was bored through a door with a centre-bit. Some pieces of the broken pannel were found within the door on the threshold, but no other entry was made. It was contended, that no case had gone the length of determining that the introduction of an instrument in the act of breaking would satisfy both the essentials of burglary, and the court being of that opinion, the prisoners were acquitted.¹² So where the window was thrown up, and a crowbar introduced to force the shutters, but it did not, nor could it appear whether any part of the hand had been within the window, although the aperture was large enough to admit the hand, it was held not to be burglary.¹³ But, of course,

¹ Fost. 108. And see the observations of Foster, J., *Id.* 108, 109.

² 1 Hale, P. C. 551, overruling the opinion of Sir Nicholas Hyde.

³ *Id.* 551, 552.

⁴ *R. v. Smith*, 1 Moo. C. C. 178.

⁵ *R. v. Spriggs*, 1 Moo. & Rob. 57. *R. v. W. and J. Lewis*, 2 C. & P. 628.

⁶ East, P. C. 490.

⁷ *R. v. Davis*, Russ. & Ry. 499.

R. v. Perkes, 1 C. & P. 300. See 1 Moo. C. C. 183, *infra*.

⁸ *R. v. Gibbons*, Fost. 107.

⁹ *R. v. Bailey and another*, Russ. & Ry. 341.

¹⁰ *R. v. Tucker*, 1 Cox, 73.

¹¹ East, P. C. 490.

¹² *R. v. Hughes and others*, Leach, 406. *R. v. O'Brien*, 4 Cox, 398.

¹³ *R. v. Rust and another*, 1 Moo. C. C. 183.

there may be a conviction for the attempt.¹ A lodger opened a shutter, and handed out some bacon to a confederate outside. The lodger, probably, did not go *out* of the house, and the confederate did not come in. This was held not to be burglary.²

The prisoner made a pass with his sword at some persons in the entry, and in so doing intruded his hand over the threshold: this was a burglarious entry. The owner of the house had opened the door to drive away the thieves.³ And it would once have been so if the sword alone, without the hand, had passed the threshold.⁴ It is even said that to discharge a loaded gun into a house would be an act of entry,⁵ and if the case were, that the owner being alarmed, opened his door, there can be no doubt; but it is far more difficult to conceive that both a breaking and entry could be effected by such a discharge. Lord Hale would not sanction such a doctrine.⁶ Yet if a hole be made in a house in order to shoot or fire, it will be burglary.⁷ Nevertheless, Lord Ellenborough ruled on the circuit once, that a man, who from the outside of a field discharged a gun into it, so that the shot must have struck the soil, was guilty of breaking and entering it.⁸ But this was in trespass.

Place.] Thirdly, we come to the consideration of the place where burglary may be committed. It is called a mansion house, *i. e.* a dwelling house, where there is a continuance of residence. Therefore, where A. leaves his house, and there is no evidence of the *animus revertendi*, burglary cannot be committed there. As where the owner of a house disfurnished it, and rather inclined against any idea of returning.⁹ So, where a person abandoned his house for six months.¹⁰ Nevertheless, the placing of furniture in a house is not conclusive evidence of an intent to inhabit, whatever opinions might at one time have obtained.¹¹ It was considered by the judges that a house in that condition must be considered as quite uninhabited.¹² *A fortiori*, where there is a determination not to inhabit.¹³ Nor does it make any difference that workmen sleep in the house,¹⁴ for until possession be actually

¹ *R. v. Davis*, 6 Cox, 369.

² *R. v. Burr*, 3 Burn's J. by D'Oyly & W. 93.

³ 1 Hale, P. C. 553.

⁴ *Supra*.

⁵ 1 Hawk. c. 38, s. 11.

⁶ 1 Hale, 555, although he adds a query. 1 And. 115; Sav. 59, where an act of that nature was held not to be burglary.

⁷ 1 And. 115; Sav. 59.

⁸ 4 Camp. 220.

⁹ *R. v. Nutbrown*, Fost. 76. *R. v. Mott and another*, Crown C. C.

by Ryland, 103; and see Russ. & Ry. 187.

¹⁰ *R. v. Hamilton*, 1 Lew. C. C. 77.

¹¹ 1 Hawk. c. 38, s. 18.

¹² *R. v. Lyons*, Leach, 185. *R. v. Holland*, East, P. C. 498. *R. v. Thompson*, Id. *R. v. Davis*, Id. 499, and *post*.

¹³ *R. v. Davis*, Leach, 876; East, P. C. 499.

¹⁴ *R. v. Fuller*, Leach, 186, n. *R. v. Harris*, East, P. C. 498. *R. v. Barton*, Crown C. C. by Ryland, 103.

taken by the master, or his domestic servants, there is no *mansion* to be broken.¹ On the other hand, no sooner do they arrive than the case is altered, and, of course, a temporary absence works no change. As where one went into Cornwall and returned in two months with his family, having left the house empty, and the key with a friend in order that he might look after it, but with a full intention to return.² Again, A. died: his executors put servants into the house at board wages, but never lodged there; it was made a question whether burglary could have been committed, but the evidence as to the breaking failed.³

The inhabitancy must include sleeping, *i. e.*, not during a temporary absence, but in general. A. had a house where he entertained his friends, and where he intended to have lived, but he slept two doors off at his mother's: here burglary could not be committed.⁴ The following case was one of constructive inhabitancy: A. placed a servant in a shop, part of his house, in order to prevent the house from being robbed, and he let out the house to lodgers; but he had quitted the house with his family with a determination not to return. The judges held, that a conviction for burglary was proper. The house had been inhabited by the prosecutor.⁵ Whereas, where a servant is put into an inhabited house to watch thieves, or to look after goods, the case is the reverse for want of inhabitancy.⁶ Formerly the protection of the dwelling house was extended to the outhouses, if they were parcel of the messuage, though not under the same roof. This doctrine gave rise to several difficult questions, as to the nature of the fence which ought to have inclosed the buildings.⁷ But the modern statutes concerning the curtilage have settled these questions,⁸ although the judges have still disagreed as to a *room* in a dwelling house having no internal communication. The prosecutor had such a room which he used as a wash-house. The door of this wash-house opened into a back-yard, but there was no access to the other part of the house. The prisoner was in the act of breaking the partition when he was detected. Seven judges

¹ *R. v. Murry and another*, East, P. C. 496. *R. v. Kirkham*, 2 Stark. Ev. 279. See Poph. 42, 152.

² *R. v. Murry and another*, *supra*.

³ *R. v. Jones and another*, East, P. C. 499. The court were inclined to hold it burglary because the servants lived there.

⁴ *R. v. Martin and another*, Russ. & Ry. 108.

⁵ *R. v. Gibbons and another*, Russ. & Ry. 442.

⁶ *R. v. Brown*, East, P. C. 497. *R. v. Smith*, Id. 497.

⁷ See *R. v. Castle*, 1 Hale,

P. C. 558; Hutt. 33. *R. v. Garland*, East, P. C. 493. *R. v. Brown*, Id. *R. v. Egginton and others*, Id. 494; Leach, 913; 2 B. & P. 508. *R. v. Gibson and another*, Leach, 357. *R. v. Hancock and others*, Id. 170. *R. v. Bennett and others*, Russ. & Ry. 289. *R. v. Davis and another*, Id. 322. *R. v. Chalking and another*, Id. 343. *R. v. Lithgo*, Id. 357. *R. v. Clayburn and another*, Id. 360. *R. v. Walters and others*, 1 Moo. C. C. 13.

⁸ 7 & 8 Geo. 4, c. 29, s. 13. Rep. 24 & 25 Vict. c. 96, s. 53.

held, that the wash-house was parcel of the dwelling house, and the conviction for burglary was affirmed.¹ Five judges were of a contrary opinion, probably being unable to overcome the impression which the strong words of the statute respecting the necessity of an internal communication had created in their minds. But where there was a kiln, one end of which was supported by the end wall of the dwelling house, and there was a dairy adjoining the kiln, one end of the dairy being supported by the end wall of the kiln, and there was no internal communication between the dwelling house and the dairy, it was held, that the dairy was not the subject of burglary. The roofs of the dwelling house, kiln, and dairy were also of different heights.² In another case there was a pantry behind the dwelling house. In order to reach the pantry, the kitchen must be passed through into a passage; at the end of the passage there was a door, and outside the door, on the left hand, was the door of the pantry. When the passage door was shut, the pantry was excluded, and was open to the yard; but the roof or covering of the passage projected beyond the door of the passage, and reached as far as the pantry door. There was no door communicating directly between the pantry and the house, and the two were not under the same roof. The roof of the pantry was "tea-fall," and leant against the wall of an inner pantry, in which there was a latchet window, common to both, and which opened betwixt them, but there was no door of communication between them: the inside pantry was under the same roof as the dwelling house. The prisoners entered the outer pantry by a window which looked towards the yard, having first cut away the hair cloth which was nailed to the window frame. Taunton, J., said, that the pantry was not a part of the dwelling house, not being under the same roof, nor included within the passage by which it was approached, and that no burglary had been committed.³ It is evident, that the judges either considered these buildings as outhouses, and so not parcel of the dwelling house, or that they were affected by the opinions of the minority of five in the case of the wash-house. The seven judges viewed the room as any place but an *outhouse*. It was the definition of "outhouse" which caused the statutory regulation as to the curtilage.

A building may be so constructed as to form a separate mansion. A room was separated from a dwelling house by a public road. There was a connection with the house by an awning which reached across; but a servant boy slept in this room,

¹ *R. v. Burrowes*, 1 Moo. C. C. 274. The house consisted of two long rooms, of another room used as a cellar and wash-house on the ground floor; and of three bedrooms upstairs; one of them over the wash-house. The bedroom over the house place communicated with the bedroom over the wash-house;

but there was no other internal communication between the wash-house or any of the other rooms. The whole building was under the same roof.

² *R. v. Higgs*, 2 Car. & K. 322.

³ *R. v. Somerville*, 2 Lew. C. C. 113.

whereupon the judges deemed it to be a distinct mansion, and it having been laid as the mansion house of the prosecutor, the conviction was affirmed.¹ This case, therefore, still applies. So lofts, where the coachmen sleep, are distinct domiciles, although not immediately connected with the messuage.² A booth at Weyhill Fair, where a man and his wife slept, was broken into: the man rented it during the fair week. Park, J., after consulting with Littledale, J., held it to be a sufficient dwelling house for the purpose of burglary.³ Here the dwelling house and the inhabitancy were united.

Fourthly, the ownership of the house must be properly set out in the indictment. It must not be called the house of the landlord, when it should be charged as that of the tenant, nor *vice versa*, nor the abode of the inmate when the owner's name ought to appear. The house may be laid in general in the occupier, or his servant, or in a lodger, if neither the owner nor his servant inhabit; or, each apartment may, in that case, be laid as the dwelling of the lodgers respectively.⁴ So it is if the lodgers enter by separate outer doors, although the owner himself may abide in the house.⁵ It made no difference in that case that the rooms were let from year to year under a rent.⁶ Nor does the case vary if the owner reserve any part of the premises, unless he himself dwell, or his servant. So that where the owner kept back a cellar, but let C. a shop and parlour, where the burglary happened, it was held, that the premises were properly laid in C.⁷ So chambers, in the inns of court, where, in term time, at all events, there is a residence, are the mansions of the several occupiers.⁸ Hence, unless there be a separate occupation, the owner cannot commit burglary by breaking open the doors of his lodgers.⁹ In the case of a public company, if the house be assigned to the servant of such a company, the judges, probably, will not object to an indictment laying this offence to have been committed in the dwelling house of either master or servant,¹⁰ for the salary might be abated in consideration of freedom from rent; and thus for the purpose of burglary, a constructive tenancy might be presumed. But, in such a case, it is more common to use the name of the agent or servant.¹¹ It follows, that when the dwelling house is considered in the ordinary light of a holding by service, the possession being in the master, the building must be laid in the company.¹² Again, the wages of a workman were less on ac-

¹ *R. v. Westwood*, Russ. & Ry. 495. *Diss.*, Graham, B., who thought that the room was parcel of the dwelling house across the road. *Diss.*, generally, Park, J.

² *R. v. Turner*, Leach, 305; East, P. C. 492.

³ *R. v. Smith*, 1 Moo. & Rob. 256.

⁴ East, P. C. 505.

⁵ *Id.* See Kel. 84.

⁶ East, P. C. 505.

⁷ *R. v. Rogers*, Leach, 89.

⁸ *R. v. Evans and another*, 1 Hale, P. C. 588; Cro. Car. 473.

⁹ East, P. C. 506.

¹⁰ See 1 Moo. C. C. 250.

¹¹ *R. v. Margetts and another*, Leach, 930; and see *Id.* 931, *n.*, citing another case to the same effect.

¹² *R. v. Picket*, East, P. C. 501.

count of his excused rent. A burglary having been committed in his dwelling house, the indictment laid the house in one count, as the property of the master, and in another as that of the workman. The judges held, that here was no more than a licence to the workman to lodge in the cottage, and not a letting of it to him. The count therefore, which laid the cottage in the master, was correct.¹ In another case there appeared to have been no abatement of wages, but an agreement that the prosecutor should live in a cottage free of rent and taxes. Some of the workmen had this privilege, some not. It was objected, upon the authority of the cases above, that the indictment should have laid the cottage in the master. But Holroyd, J., said, that although the occupation of the cottage was by reason of G. being, as workman, the servant of Mr. B., and co-extensive only with the hiring, yet that the inhabitancy was not, as in the cases cited, merely as servant, nor was it either as to the whole or any part of the dwelling as Mr. B.'s occupation, or for his use, or business, or that of the colliery, but wholly for the use of G. and his family, in like manner as if he had paid rent and taxes for it either out of higher wages or otherwise. The judges upheld this opinion, and the conviction was held right.² Several judges in *Brown's case* inclined to think, that had there been a *demise* of the cottage to the servant, the barn, which was part of it, and where the burglary happened, would still have remained exclusively in the master;³ but this latter dictum seems to be shaken by the case before Mr. J. Holroyd. A person, although only permitted to dwell in a cottage for a season, may be considered as a tenant at will, and thus entitled to have the dwelling house laid in him.⁴ So is the case of the gardener who had the entire control of his house and kept the key.⁵ So, where a person kept a house till it was let, *but not as a servant*.⁶ So in the case of the toll collector, who occupied a house, rent-free, but was paid for his labour by the week, and remitted the tolls monthly to his master. Nothing was said as to a notice to quit. The master was the lessee of the trustees, and did not have any interest in the house. This was held to be a tenancy at will.⁷ The incidents of salary and tenancy being withdrawn, the indictment must be confined to the owner.⁸ It makes no difference that the master carries on

Inhabitancy of servants. *R. v. Maynard*, Id. *R. v. Hawkins*, Id., where the indictment failed through laying the property in the servant. *R. v. Williams and others*, 1 Hale, P. C. 522, for the burglary at Sir H. Hungate's, at Whitehall. *R. v. Burgess*, Kel. 27; and see East, P. C. 500; Leach, 324.

¹ *R. v. Brown*, East, P. C. 501.

² *R. v. Jobling*, Russ. & Ry. 525.

³ East, P. C. 502.

⁴ *R. v. Collett and others*, Russ. & Ry. 498.

⁵ *R. v. Rees*, 7 C. & P. 568.

⁶ *R. v. James*, 1 Russ. C. M. 815.

⁷ *R. v. Camfield and another*, 1 Moo. C. C. 42.

⁸ *R. v. Stock and another*, Leach, 1015; 2 Taunt. 339. *R. v. Rawlins*, 7 C. & P. 150. See also *R. v. Smith*, cited there. *R. v. Bird*, 9 C. & P. 44.

his business in a part of the dwelling house, not sleeping there, the servant having free access to the whole, for the gravamen is the burglary; but the house might likewise, it was thought, have been laid as that of the master.¹ And the payment of rent is decisive, though the master carries on his business in the house, and the servant has it on account of his service.² And it signified nothing to the contrary (in *Witt's case*) that the burglary happened in the master's part of the premises.³ A., the servant of B., lived close to B.'s place of business. B. did not live in the house, but he paid the rent and taxes, and did not pay anything for occupation. Part of the house, however, was used as a storeroom for B.'s goods. The house was described as the dwelling house of the servant in an indictment for housebreaking, and *Witt's case* was cited. But the court said, that here the dwelling house was that of the master; the house was partly under the master's dominion, and the possession of the servant was that of the master.⁴ So it is, in the case of a governor of a workhouse where the masters reserve a part of the dwelling for themselves, though not for a residence. The prisoner was wrongly convicted upon an indictment laying the house in the governor.⁵

Again, there may be a severance of occupation in the same mansion, as we have already intimated in the instance of the inns of court. Two persons rented different parts of a house, one paying all the taxes, and the burglary was committed in a shop which was divided between the two renters by a partition. It appeared that the doors of each partition were locked at night by each of these parties; but, beyond the doors, there was a common passage which led to a common staircase, and there was no other material severance, except that each had his separate kitchen, &c. Nevertheless, the house was held to be rightly described as the separate property of him whose house was broken open.⁶ Again, two houses were made out of one, and there was no communication except through the outer door into the street. They were inhabited by partners who paid the rent and taxes jointly; but it was held incorrect to lay a joint property in this case, one of the dwellings having been broken open, because the mansions were distinct.⁷ So, where one of two partners paid all the rent and taxes, but received a contribution from the other, and also a sum for board and lodging, it was held right to lay the property in the former, who was the sole lessee of the premises.⁸ On the

¹ *R. v. Witt*, 1 Moo. C. C. 248.

² *R. v. Jarvis and another*, 1 Moo. C. C. 7. Here, although there were two counts, yet, as the burglary happened in the master's part of the building, which was disconnected from the other, the conviction was held wrong.

³ *R. v. Witt*, ut supra; the servant lived free from rent and taxes.

⁴ *R. v. Courtenay*, 5 Cox, 218.

⁵ *R. v. Wilson*, Russ. & Ry. 115. Mansfield, C. J., Heath and Grose, JJ., seemed to dissent. *R. v. Ballard and another*, 1 Russ. C. M. 814. *R. v. Frowen and others*, 4 Cox, 266.

⁶ *R. v. Bailey*, 1 Moo. C. C. 23. *R. v. Jones*, Leach, 537. And see 2 Salk. 532.

⁸ Leach, 537, n.

contrary, where there was a joint demise of a warehouse to two brothers, and a separate demise of the dwelling house, under the same roof, to one only, it was held wrong to lay the property of the warehouse that was broken into in the latter only, because he occupied the warehouse under the joint demise.¹ Nor would it have been competent to lay it in both, because a warehouse not slept in is not, of itself, a dwelling house. Had there been a joint demise of the dwelling house, although one only of the brothers resided, the property might then have been alleged jointly, notwithstanding the absence of the other.² This was a severance by lease. But where a father let part of his house to his son, it was held, upon a case of burglary in the shop annexed, that the house was well described as the property of the father, by reason of its being under the same roof, and communicating internally; but the judges thought it a case of much nicety.³ In the case of the innkeeper, the property must be laid in him.⁴ One under pretence of having been robbed, forced the chamber door of a guest in the night, and committed a felony. It was held, that the indictment should not have stated that the burglary had taken place in the dwelling house of the guest.⁵ Where a box was stolen from a benefit society, it was held right to lay the property in the landlord, although two of the stewards had keys to the box, as, according to the rules, the landlord ought to have had a key, although at the time of the offence, he happened not to have one.⁶

Again, the common rule that the house of the wife is that of the husband, is very strictly adhered to in burglary. The husband refused to have anything to do with the lease of a house where his wife lived apart from him, and yet an indictment laying the property in him was held right.⁷ It was attempted to depart from this rule in a case where the wife lived apart upon a separate income vested in trustees for her separate use; but the judges were clear that the house should have been laid as that of the husband.⁸ And it was held to make no difference that the wife was living in adultery, that her paramour paid the expenses of her housekeeping, and that the improper connection was with the cognizance of the husband.⁹ But if the wife were to have the exclusive property as well as the exclusive possession, the mansion would then be properly laid as her dwelling.¹⁰

¹ *R. v. Jenkins and another*, Russ. & Ry. 244.

² See 1 Moo. C. C. 329, to the same effect. 1 Hale, P. C. 557, 558.

³ *R. v. Sefton*, Russ. & Ry. 202. Graham, B., *dub.* Thompson, B., and Chambre, J., (who tried the case), doubted at first. See *R. v. North Collingham*, 1 B. & C. 578.

⁴ East, P. C. 502.

⁵ *R. v. Prosser*, East, P. C. 502.

⁶ *R. v. Wymer*, 4 C. & P. 391.

⁷ *R. v. Farre*, Kel. 43. *R. v. Smyth*, 5 C. & P. 201.

⁸ *R. v. French*, Russ. & Ry. 491.

⁹ *R. v. Wilford and another*, Russ. & Ry. 517.

¹⁰ East, P. C. 504.

Thus we have endeavoured to discuss the question as to whose house the burglar shall be said to have invaded. A case under the section, which punished striking during burglary with death, may be mentioned here, although the capital penalty under the repealed statute has not been renewed. The attack having been successfully made upon the dwelling house, one of the confederates escaped from the house. An assault then took place upon the person broken in upon. Any one of the burglars then present would be guilty of the more serious charge, but the associate who had escaped was, under Lord Denman's direction, convicted of simple burglary only.¹

Indictment.] The indictment for simple burglary sets forth that A., on, &c., about the hour of [between nine and six], the dwelling house of B., situate, &c.,² feloniously and burglariously did break and enter, with intent the goods and chattels of the said B.,³ in the said dwelling house, then and there being in the said dwelling house, feloniously and burglariously to steal, &c., against the form, &c. If there has been a stealing, state it; and if of the value of 5*l.*, state it, in order, that if acquitted of burglary, the prisoner may be convicted of stealing in the dwelling house. If a breaking out be charged after a burglary within, add: and the said A. having so entered the said dwelling house with the intent aforesaid, afterwards, on, &c., about the hour of, &c., feloniously and burglariously did break the said dwelling house of the said B., in order thereby to get out of the same, and then in the night, as aforesaid, feloniously and burglariously did break out of the same, against the form, &c. If a larceny has been committed, another count is added. An indictment charging a breaking out had two counts, one alleged that the prisoner did break to get out, the other that he did break and got out. Both counts were held bad.⁴ A house was partly situate in two parishes; the room where the burglary was committed was situated in the same way. The breaking took place in the parish of A., and the indictment so alleged it. The stealing was alleged to have been "then and there;" but there was property in the parish of A., although the

¹ *R. v. Harvey and another*, 1 Cox, 21.

² See *R. v. Napper*, 1 Moo. C. C. 44. The omission of "there situate," is not fatal. *R. v. Brown*, Moo. & M. 163. Therefore it is left out in modern indictments. In a case where it was said "The dwelling house of A., &c., of the union, there situate." "There situate" was referred to the parish, not to the union. *R. v. Frowen and others*, 4 Cox, 266.

³ But the indictment is good, without stating whose goods the prisoner meant to steal, so that, upon an attempt to commit sacrilege, the words "with intent then and there the goods and chattels therein feloniously and sacrilegiously to steal," were holden sufficient. *R. v. Nicholas and another*, 1 Cox, 218.

⁴ *R. v. Compton*, 7 C. & P. 139. Because the statute merely uses the words "break out."

articles taken were in that part of the room which was in the parish of B. The verdict was guilty of burglary in the parish in the indictment mentioned; not guilty of stealing. The recorder consulted two learned judges, and they held the conviction good.¹ It is always better to allege the intent to steal, because, if these words should be omitted, and the prosecutor should fail to prove a larceny, the prisoner will be acquitted.² But proof of a larceny will cure the omission of the intent to steal.³ On the other hand, if the intent be stated, as to commit a rape, and the charge of felony be left out, yet proof of an actual rape will be sufficient to satisfy the indictment.⁴ But an allegation of an intent to commit one sort of felony will not be sustained by proof of an intent to commit another,⁵ although several distinct intents may be laid in the same indictment.⁶ An indictment was framed as to the intent, thus: "With intent the goods and chattels in the same dwelling house then and there being feloniously and burglariously to steal, &c., and then the indictment charged a larceny of the goods of E. B. It was shown, that the burglary happened in the dwelling house of E. B., and two others. The court held, that proof of any intent to steal the goods of any person in particular was not required, the necessary proof being of an intent to steal the goods of E. B. generally.⁷ Some hour must be stated,⁸ but the statute defines the hours within which a burglary may be committed. And the words, "about the hour of 11 in the night," were deemed sufficient by Patteson, J., who added, that "burglariously" would satisfy the law, without saying "in the night;" but still the hour should be mentioned.

Having stated the hour, a larceny before that hour cannot be admitted in evidence under the same indictment, should that proof be attempted upon the failure of the charge for burglary.⁹ It might as well be sought to charge the prisoners with a burglary committed in the same place seven years before.¹⁰ The larceny must, of course, be of the subjects of larceny, not of mortgage deeds, because they are choses in action.¹¹ With reference to the place, where the house was laid in the wrong township, the parish having two townships, the prisoner was acquitted.¹² So when the indictment charged a burglary in a warehouse, in the parish of

¹ *R. v. Howell and others*, 1 Cox, 190.

² *R. v. Vandercomb and another*, East, P. C. 514.

³ *R. v. Furnival*, Russ. & Ry. 445.

⁴ *R. v. Locost and another*, Kel. 30.

⁵ East, P. C. 514.

⁶ *R. v. Thompson*, Id. 515.

⁷ *R. v. Clarke*, 1 Car. & K. 421. As to goods, see *R. v. Whitehead*, 9 C. & P. 429.

⁸ *R. v. Waddington*, East, P. C. 513.

⁹ *R. v. Thompson and another*, 2 Cox, 377.

¹⁰ *R. v. Vandercomb and another*, Leach, 711.

¹¹ *R. v. Powell*, Den. & P. 403; 21 L. J. M. C. 78. *Jervis*, C. J., cited, 8 Rep. 33 (a). *R. v. Caley*, 3 Inst. 109. And *Chand v. Rowbotham*, Yel. 68.

¹² *R. v. Wood*, 1 Lew. C. C. 36.

St. Peter the Great, in the county of W., and it turned out that only part of that parish was in the county of W., the indictment was held invalid as to the burglary. The words should have been "in that part of the parish of St. Peter the Great which lies within the county of W."¹ So where the prisoner, "late of the parish of St. Catherine, in the county of Gloucester," was charged with stealing in the dwelling house of A., "*theresituate*," but the proof was partly in that county, and partly in the *county of the city*. Cresswell, J., permitted a conviction for simple larceny only.² But it is not necessary to mention the name of a parish or village at all as a parish. Merely to mention the place, as "Norton juxta Kempsey," is sufficient.³ The name of the person intended to be robbed must not be carelessly treated. A count stating the burglary to have been committed in the house of one Richard —, not mentioning the surname, but leaving a blank, was doubted of; but the reporter (Moor) says it was holden good.⁴ Where the charge was of burglary with intent to steal the goods of W., in the dwelling house of D., whereas the name of W. was inserted in the indictment by mistake for that of D., it was held, that the words, "and of the said Joseph W.," could not be rejected as surplusage, and that the conviction was wrong.⁵ So, again, a burglary was charged in the house of S. W., and D. James was alleged to have been feloniously struck. It turned out that D. Jones and not D. James was the person struck. Upon this, the more serious part of the indictment was abandoned, and the charge of simple burglary was proceeded with.⁶ The name of the owner of the dwelling house should be mentioned, otherwise the prisoner can neither be convicted of burglary, nor of stealing in the dwelling house.⁷

The indictment need not conclude "against the form of the statute." For the alteration of the hours in burglary does not change the offence, and the diminution of the punishment does not make the conclusion necessary.⁸

In cases of burglary with violence, it is necessary to set out all the aggravating circumstances with accuracy. The burglary and the striking must be particularly charged.⁹ Before the passing of 1 Vict. c. 85, s. 11, (now repealed,) the prisoner could not be convicted of an assault upon an indictment for burglary with intent to ravish.¹⁰ And it made no difference, that a beating and wounding in the dwelling house were alleged.¹¹

¹ *R. v. Brookes*, Car. & M. 543.

² *R. v. Jackson*, 2 Russ. C. M. 801. On the authority of *R. v. Brookes*.

³ *R. v. Brookes*, Car. & M. 544.

⁴ *R. v. Cole*, Mo. 466. East, P. C. 513.

⁵ *R. v. Jenks*, Leach, 774; East, P. C. 514.

⁶ *R. v. Perfit*, 8 C. & P. 288.

⁷ *R. v. White*, Leach, 252. *R. v. Woodward*, cited, Id 253, n.

⁸ *R. v. Polly*, 1 Car. & K. 77.

⁹ *R. v. Perfit*, 8 C. & P. 288.

¹⁰ *R. v. Watkins*, 2 Moo. C. C. 217; Car. & M. 264.

¹¹ S. C.

Trial.] With reference to the trial, it must be in the county where the house is broken, although if the prisoner be found with the stolen property in another county, he may be charged there with the larceny; and under 7 Geo. 4, c. 64, s. 12, a concurrent jurisdiction of 500 yards is given to adjoining counties. The words dealt with, apply to justices; the words "inquired of," to the grand jury; and "determined and punished" to the sessions or assizes.¹

Sacrilege in the statute concerning rewards,² is not comprehended in the word burglary.³ Acts of personal courage have been recognized by the judges as deserving of reward; and diligence in the apprehension of an offender is also included. A substantive effect is thus given to the word "exertions."⁴

¹ *R. v. Ruck*, 1 Russ. C. M. 827. the authority of the above, Bolland, B., ruled the same.

² 7 Geo. 4, c. 64, s. 28.

³ *R. v. Robinson*, 1 Lew. C. C. 129, Hullock, B. And, also, upon ⁴ See *R. v. Barnes*, 7 C. & P. 166. *R. v. Blake*, Id. cited there. And Coleridge, J., mentioned the special commission at Bristol.

CHAPTER XIII.

OF BREAKING AND ENTRY INTO BUILDINGS WITHIN THE CURTILAGE, BUT NOT BEING PART OF DWELLING HOUSE, WITH INTENT TO COMMIT FELONY.

By 24 & 25 Vict. c. 96, s. 55, whosoever shall break and enter any building, and commit any felony therein, such building being within the curtilage of a dwelling house, and occupied therewith, but not being part thereof, according to the provision hereinbefore mentioned, or being in any such building shall commit any felony therein, and break out of the same, shall be guilty of felony, and be liable, at the discretion of the court, to penal servitude not exceeding fourteen nor less than three years,—or imprisonment for any term not exceeding two years, with or without hard labour, and solitary confinement.

A curtilage is a court-yard, backside, or piece of ground lying near and belonging to a dwelling house. If there be a communication between a building and the dwelling house, either immediate, or by means of a covered and inclosed passage leading from the one to the other, that is a curtilage, the breaking of which amounts to burglary. But if there be no such communication, nor passage, the breaking of the separated curtilage and stealing in any building within it, and occupied with the dwelling house, any chattel, money, or valuable security, is felony, and the punishments are penal servitude not exceeding eight nor less than four years, or imprisonment not exceeding three years, with or without hard labour, and solitary confinement.

All the incidents of a dwelling house must be present in order to warrant a conviction for breaking within the curtilage. And it is observable, that possibly, many of those buildings which were deemed to be parcel of the dwelling house under the old law of burglary, may not be thought even now to be included within the curtilage, at least for that purpose. The circumstance of their being situated within a common inclosure appears to have been treated as a material ingredient.¹ Upon an indictment for this crime, it appeared, that the building was in the fold-yard of the prosecutor's farm. To get from his dwelling house to the fold-yard, the prosecutor passed through a yard called the pump-yard, into which the back door of the dwelling house opened. This yard was separated from the fold-yard by a wall four feet high. In the wall was a gate, the fold-yard having another gate leading to

¹ See ante, *R. v. Clapham*, 1 Lew. C. C. 200.

fields on one side, and a hedge, with a field leading to the high road, on another. The other sides of the fold-yard were bounded by the farm buildings and a continuous wall from the dwelling house. It was held, that the building in question was within the curtilage.¹ A count for breaking the curtilage may be joined with counts for burglary, housebreaking, and stealing in the dwelling house.²

Indictment.] The indictment states that A., on, &c., feloniously did break and enter a certain building of B., situate, &c., the said building being then within the curtilage of the dwelling house of the said B. there situate, and then occupied therewith by the said B., and there being then no communication between the said building and the said dwelling house, either immediate or by means of any covered and inclosed passage leading from the one to the other, and that the said A. then in the said building feloniously did steal [the property] of the goods and chattels of the said B., &c., then and there being, against the form, &c.

¹ *R. v. Gilbert*, 1 Car. & K. 84.

² See 7 Geo. 4, c. 28, s. 6.

CHAPTER XIV.

OF BREAKING INTO DWELLING HOUSES, SHOPS, &c.

By 24 & 25 Vict. c. 96, s. 56, whosoever shall break and enter any dwelling house, schoolhouse, shop, warehouse, or counting-house, and commit any felony therein, or, being in any dwelling house, &c., shall commit any felony therein, and break out of the same, shall be guilty of felony, and liable to penal servitude not exceeding fourteen years and not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 57, whosoever shall break and enter any dwelling house, church, chapel, meeting house, or other place of divine worship, or any building within the curtilage, schoolhouse, shop, warehouse, or counting-house, with intent to commit any felony therein, shall be guilty of felony, and liable to penal servitude not exceeding seven years and not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 58, whosoever shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling house or other building whatsoever, and to commit any felony therein, or shall be found by night having in his possession, without lawful excuse (the proof of which excuse shall lie on such person), any picklock key, crow, jack, bit, or other implement of housebreaking, or shall be found by night,¹ having his face blackened or otherwise disguised with intent to commit any felony, or shall be found by night in any dwelling house or other building whatsoever with intent to commit any felony therein, shall be guilty of a misdemeanor, and liable to be kept in penal servitude for three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.

And by sect. 59, whosoever shall be convicted of any such misdemeanor as in the last preceding section mentioned, committed after a previous conviction, either for felony or such misdemeanor, shall on such subsequent conviction be liable to penal servitude not exceeding ten years and not less than three years, or to imprisonment not exceeding two years, with or without hard labour.

The rules respecting the dwelling house which have been com-

¹ Night is to be reckoned as in s. 13, and sect. 1 of this Act, the burglary, 14 & 15 Vict. c. 19, last clause.

mented upon in the remarks concerning burglary, apply to this charge. But the offence here is confined to the stealing, consequently, housebreaking in the daytime with whatsoever intention, yet unaccompanied by larceny, will not fall within the clause. Another principle is, that where the breaking happens between 9 P. M. and 6 A. M., the indictment may assume the shape of a charge for burglary.¹ For although upon a count for burglary the prisoner may be convicted of housebreaking, or of stealing in a dwelling house to the value of 5*l.*,² yet upon an indictment for housebreaking, he could not be convicted of burglary. The least asportation, as in larceny, will suffice.³ The breaking out is not noticed in this place. Therefore, if there be an entrance, not felonious, the breaking out is only a trespass. But an attempt to commit felony, which is a misdemeanor, may be involved in the act. There was a charge for housebreaking and stealing chattels. The felonious conduct and attempt were manifest. But all the chattels laid turned out to have been stolen previously by other persons, before the entry, and that fact was found by the jury. The case being reserved, it was contended for the prosecution that the stat. 14 & 15 Vict. c. 100, s. 9, had provided for this event. It was like an attempt to steal a note, by putting a hand into a person's pocket, when, in fact, no note was there, and under that Act, the attempt need not be mentioned in the indictment. But the court said, that they must not confound attempt and intent. The articles were gone, so that the attempt could never have succeeded. They were clearly against the conviction.⁴ Willes, J., said that the prisoner might have been convicted of an attempt to steal the articles *which were then in the house*, that is, upon another indictment.⁵ And by Bramwell, B. : the prisoner is still amenable for what he actually did.⁶

Indictment.] The indictment, omitting the hour, as in burglary, and the mention, as formerly, of the daytime, charges, that A. on, &c. feloniously did break and enter the dwelling house of B., situate, &c., and then in the said dwelling house feloniously did steal, &c., [the property] of the goods and chattels of the said B. then and there being, against the form, &c. An indictment alleged the breaking and entry, and that the prisoner then and there feloniously did steal, &c. It was held not necessary to add, "in the same dwelling house," the words, "then and there being found" having been previously inserted.⁷ An indictment omitted to state whose goods the prisoner meant to steal, but the words "with intent the goods and chattels in the said dwelling house then and there being found, then and there feloniously to steal," were deemed sufficient.⁸ But

¹ See *Whitehead v. Reg.* ante. ⁵ 26 L. J. 135.
² *R. v. Compton*, 3 C. & P. 418, Gaselee, J. ⁶ Id.
³ *R. v. Amier*, 6 C. & P. 344. ⁷ *R. v. Andrews*, Car. & M. 121. See *R. v. Smith*, post.
⁴ *R. v. M'Pherson*, 26 L. J. M. C. 134; Dears. & B. 197. ⁸ *R. v. Lawes*, 1 Car. & K. 62.

an omission to say that the prisoner feloniously did steal, was held fatal in arrest of judgment after verdict. The indictment was for breaking with intent to steal.¹ Where the owner of the house had been attainted of felony, the prisoner was acquitted of house-breaking, although his wife had possession of the house and goods, and he could not be convicted of larceny for stealing the wife's goods, although they had remained in her possession since the husband's conviction. But a count laying the property in Her Majesty was held sufficient to support a conviction for larceny without office found.²

The trial is regulated as in burglary.

Shops.] Goods must be sold to make the place broken a shop. A mere workshop is not enough.³ But, where goods are sold, it is no defence to say that the place is a workshop, as a blacksmith's. The work done there does not neutralize the sale of goods in it.⁴ So if goods are deposited, *bonâ fide*, for removal and sale in a place, it is a warehouse within this Act of parliament.⁵ A house was stated in the indictment to be a counting-house. It was a machine house. Here all goods were weighed prior to their being sent out, and a book was kept for entries. The account of the men's time was taken there, and the wages were paid likewise there, and the books were kept there. This was abundant evidence of a counting-house.⁶ If the shop or other building be parcel of the dwelling house, it will be considered in the same light. The Act interposes its protection in the absence of an internal communication between the shop and the mansion.

Indictment.] The indictment states, that A. on, &c., feloniously did break and enter the shop, [&c.] of B., situate, &c., and then in the said shop feloniously did steal, &c., [the property] of the goods and chattels of the said B. in the said shop then and there being, against the form, &c. It is prudent to allege that the goods were taken in the shop. For want of this averment, a case once failed.⁷ But upon a subsequent occasion, Coleridge and Patteson, JJ., expressed their opinion that this point was not rightly decided in *R. v. Smith*.⁸ The prisoner was charged with stealing goods in the house of K. His brother-in-law carried on a trade in the house, which belonged to K., for K.'s benefit. He had neither a share in the profit, nor a salary. He had authority to sell any part of the stock, and he

¹ *R. v. Wenmouth*, 8 Cox, 348.

² *R. v. Whitehead*, 9 C. & P. 429. A *nol. pros.* was entered as to the breaking. See also *Whitehead v. Reg.* (in error), 7 Q. B. 582. *R. v. Ellis*, 8 Dowl. & Ry. 173.

³ *R. v. Sanders*, 9 C. & P. 79.

⁴ *R. v. Carter*, 1 Car. & K. 173.

⁵ *R. v. Hill*, 2 Moo. & Rob. 458; 1 Car. & K. 168.

⁶ *R. v. Potter*, 20 L. J. M. C. 170; Den. & P. 235.

⁷ *R. v. Smith*, 2 Moo. & Rob. 115.

⁸ In *R. v. Andrews*, ante.

might take money from the till, but he would in that case acquaint K. with it. He, as well as K., bought goods for the shop. Upon this proof the court held that the brother-in-law was a bailee, and that the goods in the shop were rightly laid in him.¹

*Housebreaking with intent to commit any felony, or, being armed, with intent to break and enter.*²] The arming must be with some dangerous or offensive weapon or instrument.³

Indictment.] The indictment states, that A. on, &c., was found by night, to wit, at the hour of —, in the night of the same day [describe the offence], in the dwelling house of B., situate, &c., with intent to commit a felony there.

¹ *R. v. Bird*, 9 C. & P. 44.

² Sects. 57, 58.

³ As to the offensive weapon, see *ante*.

CHAPTER XV.

OF STEALING IN A DWELLING HOUSE TO THE AMOUNT OF 5*l*.

THIS offence is provided against by 24 & 25 Vict. c. 96, s. 60, which enacts, that whosoever shall steal in any dwelling house any chattel, money, or valuable security,¹ to the value in the whole of 5*l*. or more, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

And by sect. 61, whosoever shall steal any chattel, money, or valuable security in any dwelling house, and shall by any menace or threat put any one being therein in bodily fear, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment for any term not exceeding two years, with or without hard labour, and solitary confinement.

The chief questions of law in this matter are, as to the mode of laying the property of the house in the indictment; but it may be noticed as a principle, that the property stolen must be, as it were, under the protection of the house. So, that if the thing be taken under the eye of the owner, but without force, although amounting to 5*l*., the prisoner will only be guilty of simple larceny.² Thus, ring-dropping in a dwelling house was held not to be within 12 Ann. st. 1, c. 7.³ However, if a person goes to bed and places his clothes and money by the bedside, they are under the protection of the dwelling house.⁴ Whereas, where the money was taken from behind a pillow where the person was sleeping, *Chambre, J.*, held, that the house did not protect it, but only the person.⁵ *Bayley, J.*, nevertheless, allowed a *conviction* under similar circumstances; but this last was the case of a guest at an inn, and there might have been a difference in laying the ownership of the dwelling house.⁶ The intention of inhabitation on the part of the owner is a material feature in considering this offence. Where the master placed a person in a house to protect some furniture till he could get a tenant, and the person accordingly slept there, it was held, that the prisoner could not be convicted of stealing in the dwelling house.⁷ So where the prosecutor left his premises without any intention of returning,

¹ See sect. 1.

² *R. v. Campbell*, Leach, 564.

³ *R. v. Owen*, Id. 572.

⁴ *R. v. Thomas*, Car. Cr. L. 295.
R. v. Hamilton, 8 C. & P. 49.

⁵ Anon. Stark. Cr. Pl. 467, n.
R. v. Challenor, Dickinson, Q. S. 245.

⁶ Stark. Cr. Pl., *ut supra*.

⁷ *R. v. Davis*, East, P. C. 499.

meaning to use them as a warehouse only, it was held, that the place could not be considered as his dwelling house, although he had people to guard the property, who, however, were not members of his family.¹ One of the members of a club was charged with robbing the club of some plate. The house steward had the charge of the plate, and slept in the house; but he was accustomed to deliver it every night to another servant. The indictment described the plate as the goods of the house steward, and the dwelling house as his dwelling house; and the court held, that the charge could not be sustained, for the steward was but the servant of the club, and the other servant was not his servant, but a servant likewise of the club.²

Formerly, it was not an offence of this nature for the owner of the dwelling house to steal another's goods in the dwelling house;³ but the judges have held that a conviction might take place under the stat. 7 & 8 Geo. 4, c. 29, s. 12,⁴ and that the punishment for compound larceny might, under such circumstances, be inflicted.⁵ And, before that statute, it was held, that where a *lodger* invited a guest to his room, and then stole his goods, he should be punished for this offence, although a doubt was certainly entertained, whether the prisoner must not have been considered, with reference to the prosecutor, as the owner of the house.⁶ In this last case, the property seems to have been considered as under the protection of the dwelling house. And so, again, where two boxes were left at a house by mistake, and were delivered to the occupier under the idea that they belonged to some one living there, the judges held the conviction proper, the goods being under the protection of the dwelling house.⁷ It makes no difference, that the thief and a servant act in concert. As where the servant admitted a person into the house and left him there, in order to rob it at a future day. The prisoner broke into the bedroom of the master, and stole his cash-box, and his conviction was held right.⁸ So where the servant only pretended to concur in the robbery, and whilst he admitted the prisoner, admitted the police likewise; the charge was sustained for stealing in the dwelling house, the prisoner being detected with a basket of plate in his hand.⁹ It seems, that property to the amount of 5*l.* should be taken at one time, although if several persons were robbed simultaneously, the amount of their aggregate loss would, of course, be added together.¹⁰ The question as to the amount is for the jury.¹¹ As where the prisoner was

¹ *R. v. Flannagan*, Russ. & Ry. 187. See *R. v. Hamilton*, 1 Lew. C. C. 77.

² *R. v. Ashley*, 1 Car. & K. 198.

³ *R. v. Thompson and another*, Leach, 338. *R. v. Gould*, Id. 217, 339, n.

⁴ Succeeded by 24 & 25 Vict. c. 96, s. 60.

⁵ *R. v. Bowden*, 2 Moo. C. C. 285.

⁶ *R. v. Taylor*, Russ. & Ry. 418. By seven judges, three *diss.*

⁷ *R. v. Carroll*, 1 Moo. C. C. 89.

⁸ *R. v. Tuckwell*, Car. & M. 215.

⁹ *R. v. Jones*, Car. & M. 218.

¹⁰ See *R. v. Petrie*, Leach, 294. *R. v. Farley*, East, P. C. 740.

¹¹ See *R. v. Hamilton*, Leach, 348. *R. v. Jones*, 4 C. & P. 217.

charged with stealing 68 yards of lace, and it turned out that he could have taken the whole quantity of a piece at a time, although no one piece was, by itself, worth 5*l*.¹

Indictment.] The indictment is, that A., on, &c., in the dwelling house of B., in the parish of —, feloniously did steal, &c., [the property] of the goods and chattels of the said B., to the value in the whole of 5*l*. and more, in the said dwelling house then and there being, against the form, &c.

Many of the cases as to laying the property have been already referred to, under the head of burglary,² and the rules which govern them are, for the most part, the same. Thus, public buildings should be laid in the sovereign, or in the various companies to which they belong.³ Upon an indictment under the old Act of Anne, it appeared, that M. and G. were partners, that M. was lessee of the premises, paying rent and taxes, that G. had an apartment in the house, and allowed M. a certain sum for board and lodging, and likewise a certain proportion of the rent and taxes for the shop and warehouse. The felony was committed in the shop, and it was contended, that the premises should have been laid jointly in G. and M.; but the judges held, that the indictment had correctly laid the property in M.⁴ Again, the charge was for stealing in the dwelling house of G. B., the monies of R. J. B. R. J. B. was secretary to the Norwich Union Life Company, with a salary, and he occupied the dwelling in question with his servant, but the rent and taxes were paid by the company. The judges held, that the house might well be laid in him, although they would not say, but that it might also have been laid in the house of the company.⁵ And where one partner only resided in a house which was the joint property of all the partners, it was held, that an indictment for stealing in the dwelling house of the firm was right, and that it needed not to have been laid as the mansion of the resident partner.⁶ An indictment charged a stealing in the dwelling house of W. T., and omitted "there situate." But it averred that the act was done at Liverpool, and it was held, that the local situation should be referred to the venue, and the conviction was affirmed.⁷ Again, although the ownership of the goods be omitted, it seems that the indictment for the higher offence is good.⁸ But if the name of the owner be mentioned, and the proof does not meet the name, it is probable, that the conviction would stand good for the larceny only. And where each article, by itself, as it is most common, is

¹ *R. v. Jones*, ut supra. See *R. v. Stonehouse and another*, 1 Cox, 69.

² See *R. v. Turner*, 6 C. & P. 329. 407. And *R. v. Ashley*, sup.

³ *R. v. Peyton*, Leach, 324.

⁴ *R. v. Parminter*, Leach, 537, n.

⁵ *R. v. Witt*, 1 Moo. C. C. 248.

⁶ *R. v. Athea*, 1 Moo. C. C.

⁷ *R. v. Napper*, 1 Moo. C. C.

44.

⁸ *R. v. Lawes*, ante, p. 471.

under 5*l.* in value, but the aggregate amount exceeds that amount, and it is so laid, it is not necessary that there should be a separate allegation that the theft came up to 5*l.*¹

Judgment.] The following is an example of a bad judgment. There were two counts. One charged a stealing in the dwelling house to the amount of 5*l.* The other was for simple larceny. There was a general verdict of guilty. The judgment was, that the party be transported for ten years for the felony aforesaid. If the indictment alleged one felony in two counts, and the verdict did not specify the offence, being general, it was bad for uncertainty, and the court could not apply it to the first count only. If it alleged a separate felony on each count, the judgment was bad, because the jury had found but one offence.²

Stealing in a dwelling house with menaces and threats.] The requisites of a dwelling house must be abided by in this case,³ although the value taken is immaterial. Some menace or threat by which the party was terrified, or might have been terrified at the time of the stealing, must be proved, and we are not now obliged to collect from the circumstances whether the threat used was *calculated* to inspire fear, nor, as we shall see, whether it did cause fear.⁴ Hence, it is of course, that if the prosecutor makes oath that he was put in bodily fear by the menace, and if he appears to have been of a reasonably sound mind, the proof is sufficient. Indeed, no evidence of actual fear is necessary in order to constitute the crime.⁵ Persons were placed with their faces against a wall, and yet, although the evidence showed that they were not alarmed, the charge was considered to be proved, for such conduct was likely to have disturbed a reasonably firm mind.⁶ It is also to be remarked, that the property need not be taken, as in robbery, in the owner's presence. Therefore, if one were to succeed in alarming the inmates below, and thus were to rifle the dwelling house above, it would be an act within the clause. Neither need all the prisoners be in the house in order to convict. So that a threat made by one outside and taken advantage of by those within, will be sufficient to complete the offence against the latter, although the person without will of course be acquitted.⁷

Indictment.] The indictment charges, that A. on, &c., in the dwelling house of B., in the parish, &c., feloniously did steal, &c.,

¹ *R. v. Stonehouse and another*, 1 Cox, 69.

² *Campbell v. Reg.* (in error), 11 Q. B. 799. It would also have been bad for duplicity, if it had clearly appeared in the indictment

that both counts related to one offence.

³ *Ante.*

⁴ *R. v. Little*, 1 Lew. C. C. 201.

⁵ *Supra.*

⁶ *R. v. Murphy*, 6 Cox, 340.

⁷ *R. v. Murphy*, *supra.*

[the property] of the goods and chattels of B., in the said dwelling house then and there being, and did then feloniously in the said dwelling house, by certain menaces and threats, put the said B. in the said dwelling house then being, in bodily fear, against the form, &c. It seems necessary to allege, that the person robbed was put in fear *by the prisoner*. For want of this statement, it was held under the old law that judgment could only be given for simple larceny.¹

¹ *R. v. Etherington and another*, Leach, 671; East, P. C. 635. *R. v. Anderson*, Leach, 673, n.

CHAPTER XVI.

OF STEALING GOODS IN PROCESS OF MANUFACTURE.

By 24 & 25 Vict. c. 96, s. 62, whosoever shall steal, to the value of 10s., any woollen, linen, hempen, or cotton yarn, or any goods or article of silk, woollen, linen, cotton, alpaca, or mohair, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed, or exposed, during any stage, process, or progress of manufacture, in any building, field, or other place, shall be guilty of felony, and liable to penal servitude for any term not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

The words, “during any stage, &c.,” would seem to avoid the difficulties which once arose as to the particular state or condition in which the goods were at the time of the theft.¹ In another case, yarn was left upon the ground unnecessarily, having previously been spread properly, and then thrown into heaps for the purpose of being carried into the house. Thomson, B., seemed to consider that the Act upon which the indictment was framed did not protect goods unless due care were taken of them during their manufacture.² As soon, however, as the goods become fit for sale, they lose this protection. But not until then; so that although the texture be completed, yet if the articles want something to be done to make them saleable, the statute still applies.³

Indictment.] The indictment states, that A. on, &c., in a certain building of B., situate, &c., feloniously did steal, &c.[the property stolen], of the value of 10s. and more, of the goods and chattels of the said B., the said goods and chattels then being laid, placed, and exposed in the said building, in a certain stage, process, and progress of manufacture.

¹ See 18 Geo. 2, c. 27. *R. v. Dixon and others*, Russ. & Ry. 53. The present general words seem to overcome the difficulty in *R. v. Dixon*, where it was held necessary to show that the building in question had been used for printing or drying calicoes.

² *R. v. Hugill*, 4 Com. 240, by Christian, (n. 13.)

³ *R. v. Woodhead*, 1 Moo. & Rob. 549.

CHAPTER XVII.

OF STEALING FROM SHIPS, DOCKS, &c., AND FROM WRECKS.

Larceny from ships, &c.] By 24 & 25 Vict. c. 96, s. 63, whosoever shall steal any goods or merchandise in any vessel, barge, or boat of any description whatsoever in any haven, or in any port of entry or discharge, or upon any navigable river or canal, or in any creek¹ or basin belonging to or communicating with any such haven, port, river, or canal, or shall steal any goods or merchandise from any dock, wharf, or quay adjacent to any such haven, port, river, canal, creek, or basin, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 64, whosoever shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement; and the offender may be indicted and tried either in the county or place in which the offence shall have been committed, or in any county or place next adjoining.

By sect. 65, if any goods, merchandise, or articles of any kind belonging to any ship or vessel in distress, or wrecked, stranded, or cast on shore, shall be found in the possession of any person, or on the premises of any person with his knowledge, and such person, being taken or summoned before a justice, shall not satisfy the justice that he came lawfully by the same, then the same shall, by order of the justice, be forthwith delivered over to or for the use of the rightful owner thereof; and the offender shall, on conviction of such offence before the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit over and above the value of the goods, merchandise, or articles, a sum not exceeding 20*l*.

Lastly, by sect. 66, if any person shall offer or expose for sale any goods, merchandise, or articles whatsoever, which shall have been unlawfully taken, or shall be reasonably suspected so to have been taken, from any ship or vessel in distress, or wrecked, stranded, or cast on shore, in every such case any person to whom the same shall be offered for sale, or any officer of the customs or excise, or peace officer,

¹ See *R. v. Pike*, Leach, 317; East, P. C. 647.

may lawfully seize the same, and shall with all convenient speed carry the same, or give notice of such seizure, to some justice, and if the person who shall have offered or exposed the same for sale, being summoned by such justice, shall not appear and satisfy the justice that he came lawfully by such goods, merchandise, or articles, then the same shall, by order of the justice, be forthwith delivered over to or for the use of the rightful owner thereof, upon payment of a reasonable reward (to be ascertained by the justice) to the person who seized the same; and the offender shall, on conviction of such offence by the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit, over and above the value of the goods, merchandise, or articles, a sum not exceeding 20*l*.

Where the master of a vessel was charged under the old statute with appropriating to his own use goods committed to his care, it was held, that even had the offence been larceny, it would not have been a theft upon a river under 24 Geo. 2, c. 45. There was no breaking bulk as by opening a package, and taking anything out of it.¹ Under the same Act it was held, that Portugal money not made current by proclamation, but commonly current, was not within its provisions.² The luggage of a steam-boat passenger has been considered to come within the clause of the repealed Act, 7 & 8 Geo. 4, c. 29.³

Receiving ships' stores from seamen.] By 2 & 3 Vict. c. 47, s. 26, every person who, within the metropolitan police district, shall knowingly take in exchange from any seaman or other person, not being the owner or master of any vessel, anything belonging to any vessel on the Thames, or in any of the adjacent docks or creeks, or any part of the cargo, or any stores or articles in charge of the owner or master, shall be guilty of a misdemeanor.

Indictment under sect. 63.] This indictment states, that A. on, &c., feloniously did steal, take, and carry away [the goods] of the goods and merchandise of B., in a certain ship or vessel, upon a certain navigable river called —, then being, against the form, &c.

Wrecks, sect. 64.] This indictment states, that on, &c., a certain ship or vessel, the property of some person to the jurors aforesaid unknown, was stranded and cast on shore, and that A. afterwards, to wit, on the day and year aforesaid, feloniously did plunder and steal, take, and carry away [the tackle, &c.], being part of the said ship or vessel, and certain goods [the goods], being goods and merchandise and articles belonging to the said ship or vessel so stranded,

¹ *R. v. Madox*, Russ. & Ry. 92. But now such a person would be guilty under 24 & 25 Vict. c. 96, s. 3.

² *R. v. Grimes*, East, P. C. 647. *R. v. Leigh*, Leach, 52.

³ Sect. 17. *R. v. Wright*, 7 C. & P. 159.

&c., of the goods and chattels of some person to the jurors aforesaid unknown.

By 17 & 18 Vict. c. 104, s. 479, if any person takes into any foreign port or place any ship stranded, derelict, or otherwise in distress, on or near the shore of the sea, or any tidal water situate within the limits of the United Kingdom, or any part of the cargo or apparel thereof, or anything belonging thereto, or any wreck found within such limits as aforesaid, and there sells the same, he shall be guilty of felony, and be subject to penal servitude for a term not exceeding four years.¹

CHAPTER XVIII.

OF LARCENY BY CLERKS AND SERVANTS.

By 24 & 25 Vict. c. 96, s. 67, whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master or employer, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen years, with or without whipping.²

The words of the modern statutes are extensive, inasmuch as all such property as may be the subject of larceny, and which may be in the possession or power of the master, is placed under its provisions. Nevertheless, the possession of the servant was always, at common law, considered to be that of the master, and

¹ See 16 & 17 Vict. c. 99, ss. 6, 7. And "offences in respect of wreck," 17 & 18 Vict. c. 104, ss. 477, 478. Supposing that a man, dog, or cat escape alive from a ship, in which case the ship cannot be adjudged a wreck, it is a misdemeanor not to deliver the goods to persons in the neighbouring town, so that the owner may have restoration of them if he sue within a year and a day. And by 2 & 3 Vict. c. 47, s. 27, whosoever shall unlawfully cut, damage, or destroy any rope, cable, cordage, tackle, head-fasts, or other

furniture belonging to any ship, boat, or vessel, lying in the river Thames, or in any of the docks or creeks adjacent thereto, with intent to steal or otherwise unlawfully obtain the same, or any part thereof, shall be deemed guilty of a misdemeanor.

² See, under the old law, *R. v. Bass*, Leach, 870. *R. v. Watson*, East, P. C. 562. *R. v. Lavender*, Id. 566. The statutes 39 Geo. 3, c. 85, and 3 Geo. 4, c. 38, were repealed by 24 & 25 Vict. c. 101.

as soon as satisfactory proof had been given that the goods had reached that possession, the case for larceny was considered to have been made out. As where the servant was sent by his master with his barge to receive oats in bulk. As soon as the oats were delivered to the servant, he became forthwith invested with the same possession as the master, and having taken some of the property, he was held as much guilty of larceny as if he had stolen it from the granary.¹ So where the master had bought some corn, and sent his servant to bring it home, the like doctrine prevailed.² The master had a right to the exclusive possession of the corn as against all the world except the owner of the vessel.³ So where A. had agreed to buy straw of B. and sent his servant to fetch it, the servant put down the straw at A.'s stable door, and then, having asked for the key of the loft, deposited part of the straw there, and sold the remainder; this, if done feloniously, was held to be larceny, for the delivery to A. of the straw was complete when it was put down at the stable door.⁴ So where the prisoner receives a sum of money, in order to pay an account, and converts it to his own use, he seems to be guilty of larceny, for the possession of the master goes with the money until it is transferred to its destination.⁵ So it was where a clerk, instead of putting a bill of exchange into the post, appropriated it.⁶ So where the prisoner, being sent for some coals, which he was to bring to his master's house, sold some to a third person without licence, he was held rightly convicted of larceny. And Lord Campbell said, that *Spears's case*⁷ could not be distinguished.⁸ Again, the prisoner was in possession of some goods which he had assigned to trustees for his creditors. He removed the goods. The jury found him guilty of larceny, and that the goods were not in his custody as the agent of the trustees. The conviction was thereupon quashed, for the trustees were not his masters.⁹ The prisoner A. was indicted for embezzlement in his character of clerk and servant to the prosecutor. The prisoner B. was charged as accessory. A.'s business was to go about and take orders from customers, and enter them in the books, and he received the money for the goods, *but he had no authority to meddle with the delivery of the goods.* A customer ordered two articles of A., but A. entered one only in the order

¹ *R. v. Spears*, East, P. C. 586; Leach, 825. See 4 Taunt. 276, Heath, J.

² *R. v. Abrahams*, East, P. C. 569; Leach, 824.

³ East, P. C. 570.

⁴ *R. v. Hayward*, 1 Car. & K. 518.

⁵ *R. v. Peck*, 2 Russ. C. M. 180.

⁶ *R. v. Paradise*, East, P. C. 565.

⁷ *Ante*.

⁸ *R. v. Reed*, Dears. 257; 23

L. J. M. C. 25. This case was very fully argued, and at first there appeared to be a difference of opinion, but the case of *Spears* having been found in the Black Book, Parke, B., one of the dissenting judges, was satisfied, and although had it been *res nova*, he would have held otherwise, yet he held himself bound by that case. In *Spears's case* the master *himself* had purchased the cargo of corn.

⁹ *R. v. Pratt*, Dears. 360.

book, whilst B., the carman of the prosecutor, delivered both articles to the customer. The prosecutor made out the bill of parcels for the article entered, and B., the carman, made an entry of the other. The prisoner A. then received the money for both from the customer, but only accounted for one. This was held to be larceny, not embezzlement.¹ But as soon as the actual chattel departs from the possession, the case is altered, and thus where a 5*l.* note was sent by the hands of a servant for change, and the servant embezzled the change, he was held to have been improperly convicted of larceny.² The driver of a glass coach is not the servant of the hirer, and, therefore if he steal property in the coach, he is not guilty of the more serious offence, although of larceny.³ The prisoner was charged with stealing twenty stones weight of sharps from J. B. These were sold by the prisoner, the foreman of J. B., to a customer, who bought them as from the master, and paid for them. But the foreman concealed the whole transaction, and converted the money, without entering the sale in the books, or accounting for the receipt. In reality this was a valid sale as between the buyer and the master, for the prisoner had authority to sell, and did sell on his master's account. He was guilty of embezzlement, but not of stealing. The verdict having been "guilty of larceny," the conviction was quashed.⁴ So where in order to get a sum of 2*l.* from the master, the servant falsified the entries in the account book, he was held to have been wrongly convicted of larceny.⁵ Formerly, if the property appeared to be in the master's possession, the charge for embezzlement was at an end. If it was impossible to prove that the master ever had possession, the count for larceny could not be sustained, but now, under 24 & 25 Vict. c. 96, s. 72, the verdict may be either way.

¹ *R. v. Wilson*, 9 C. & P. 27 ; i. e., larceny of the goods, not of the money. See 1 Moo. C. C. 276.

² *R. v. Sullen*, 1 Moo. C. C. 129.

³ *R. v. Haydon and another*, 7 C. & P. 445.

⁴ *R. v. Betts*, 28 L. J. M. C. 69; Bell, 90. So was the case of buying and selling for employers, and then making a false entry, purport-

ing that certain corn had cost more than it did, upon which the prisoner got the full money from the master, but retained the difference. Here the money, as between the prisoner and the corn salesman, was never in the master's possession. It might have been embezzlement. *R. v. Lyon*, 1 Fost. & F. 54.

⁵ *R. v. Green*, Dears. 323. *R. v. Chapman* was cited.

CHAPTER XIX.

OF EMBEZZLEMENT.

By 24 & 25 Vict. c. 96, s. 68, whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed, and shall be liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen years, with or without whipping.

Embezzlement is from imbecile (verb), to waste, to lessen a fortune privately by the misapplication of a trust. There seem to be three principal questions upon the subject:—First, as to the clerk, or servant, or other person. Second, as to the employment, or exact character under which the party acted at the time of the supposed offence. Third, as to the manner of the embezzlement. For there may be a dishonest receiver of money intrusted, and yet he may be neither clerk nor servant. There may be a clerk or servant and an illegal conversion of the goods, and yet the act may not be done by virtue of the employment. And, thirdly, although both clerk and servant, and acting in his proper place, the person, however faithless, may, upon some occasions, be legally guiltless of embezzlement. It was, beyond doubt, intended that the omission of the words, “by virtue of his employment,” in this Act, should abolish the need of showing the nature of the employment in its strict sense. Probably this view will be successful. But as the words “master or employer” have been used in the new statute, it seems hardly safe in the young state of the consolidated law to lay aside the “virtue of the employment” altogether. The words “master or employer” might be read “master and employer,” or, at all events, “employer,” borrowed from the Irish Act, might embarrass the case. And, under no circumstances, is it safe to omit cases and forms until the fresh law shall have acquired consistency. We have, therefore, unhesitatingly preserved the decisions under the repealed Acts, and also the form in the indictment, “by virtue,” &c. The former must shed some light upon the subject; the latter, if needless, is but surplusage.

Who a clerk or servant.] Clerk and servant are synonymous within the statute. Both are under the control of a master, and receive remuneration for their services. These principles of control and employment will materially help us in our inquiry. The prisoner was the schoolmaster of a day school, the funds of which were confided to a committee, who had their own collector of contributions. The treasurer being confined to his room, left a written direction for the prisoner to receive 15*l.*, being one of the subscriptions,

and which the treasurer had used to call for in person. The prisoner, who was to have no remuneration for this, and was only thus employed in this particular instance, embezzled the subscription. The judges held that he did not stand in the relation of a servant, neither to the treasurer nor to the committee, and that his conviction was wrong.¹ Indeed, he might have refused to obey either the request of the treasurer, or of the committee.² A person was sworn in, at a court leet, as chamberlain of certain common lands. He had no remuneration, but his duty was to collect the money due from the commoners, to account for it to two aldermen, and hand over the balance to his successor. It appeared to Bayley, B., that a verbal imputation of fraudulent embezzlement against such a person would not be actionable, the situation being without emolument, and not known to the law as a public office.³ Again, the prisoner was clerk of a chapelry, and he collected the sacrament money as part of his employment. Upon one occasion he purloined two half-crowns, and the question was, whether he could be convicted of embezzlement. The property embezzled was laid in the perpetual curate, in the churchwardens, and in the poor. The judges recommended a pardon, for it had been objected at the trial that the prisoner was not the servant of any one of these persons.⁴ So it was where a labourer and roundsman absconded with the cash which he had received in payment of a cheque given him by a person who had no control over him as master at the time of the offence.⁵ And in the case of a collector of debts without remuneration, who was awaiting a promise from the prosecutor, his late master, to set him up in Australia. The service was at an end.⁶ And an assistant overseer under 59 Geo. 3, c. 12, s. 7, was held not to be a clerk or servant.⁷

The prosecutors were manure manufacturers. The prisoner was employed to get orders for them, and supply the manure. The prisoner was to collect and pay money at once; he was to send weekly accounts, and to be paid by commission. He kept a refreshment room at B., and in this matter of the manure he was called agent for B. district. The stores were subsequently placed under the prisoner's control, and he supplied the customers. At length, a guarantee society insured the prosecutors as to their connection with the prisoner. The latter signed the printed form, which stated the salary to be 1*l.* a year, besides commissions estimated at 6*l.* The prisoner got into arrear, and was considered a debtor of the prosecutors. He, however, was charged with fraudulently returning the names of three persons as having had the manure without paying for it; in fact, he had received the sums due. The court held that the prisoner and the prosecutors stood in the light of principal and agent, and that he was not their servant.⁸

¹ *R. v. Nettleton*, 1 Moo. C. C. 259.

² *Id.* 262, by the recorder.

³ *Williams v. Stott*, 1 Cr. & M. 675. See also a case cited there by Bolland, B.

⁴ *R. v. Burton*, 1 Moo. C. C. 237.

⁵ *R. v. Freeman*, 5 C. & P. 534.

⁶ *R. v. Hoare*, 1 Fost. & F. 647.

⁷ *R. v. Sampson*, 1 Cox, 355.

⁸ *R. v. Walker*, Dears. & B. 600; 27 L. J. M. C. 207.

So it was, again, where the prisoner made an assignment of his book debts, and the trustees gave him a salary, upon which he collected debts. He received two sums, but did not account for them. He was considered not to be clerk nor servant, and it was also held that debts, being choses in action, could not be legally assigned, and, therefore, that he had only received his own at law, though not in equity.¹ Again, the prisoner was employed to obtain orders for the sale of iron, and to have a commission, and account for any money he might receive. He received money and appropriated it, but it was not expressly found that it was his duty to receive money. The conviction was quashed.² But where a commercial traveller was at liberty to obtain orders for others besides the prosecutor, he was not the less a servant to the latter.³ On the contrary, where the principles of control and emolument are admitted, or control and benefit, the character of clerk or servant attaches. For if a servant had no wages, he would, probably, be gratified by some advantage or equivalent, and, at all events, the control would exist. The captain of a coal barge was allowed two-thirds of the price at which he sold the coals above the charge made at the colliery. He embezzled the money intrusted to him, and was considered to be rightly convicted as the servant.⁴ The prisoner was a traveller for orders and a collector of debts, receiving a commission upon the whole account, a deduction being proportionably made for bad debts. The profit, therefore, depended on payment by the customer. The prisoner did not live with his employers, nor act in their counting-houses. The judges held, that he was a clerk within the statute, being under the control of the respective employers.⁵ So an accountant employed by the owners of a township as their treasurer and money clerk, who made all the payments, and took all the receipts, was deemed to be a servant.⁶ And again, the clerk of a savings bank,⁷ a collector of poor rates,⁸ an extra collector of poor rates,⁹ a servant to a board of guardians, although no time was fixed for the payment of his balances,¹⁰ a solicitor, land agent, and manager of assessments and rating for the Eastern Counties Railway,¹¹ the secretary of a friendly

¹ *R. v. Barnes*, 8 Cox, 129.

² *R. v. May*, 30 L. J. M. C. 81; Leigh & Cave, 13.

³ *R. v. Tite*, 8 Cox, 458. *R. v. May* was relied on. Leigh & Cave, 29; 30 L. J. M. C. 141.

⁴ *R. v. Hartley*, Russ. & Ry. 129. To the same effect *R. v. Holme*, 2 Lew. 256. Anon. Id.

⁵ *R. v. Carr*, Russ. & Ry. 198. See, concerning this case, 8 C. & P. 667, note (a); see post, *R. v. Walker*.

⁶ *R. v. Squire*, Russ. & Ry. 349; 2 Stark. N. P. C. 349.

⁷ *R. v. Jenson*, 1 Moo. C. C. 434.

⁸ *R. v. Townsend*, Den. 167; 2 Car. & K. 168.

⁹ *R. v. Ward*, Gow. 168.

¹⁰ *R. v. Welch*, Den. 199; 2 Car. & K. 296. The prisoner's admission on his bond, and the Act which specified his duties, were held sufficient evidence of his appointment.

¹¹ *R. v. Gibson*, 8 Cox, 436.

society, although a member also.¹ It is not a good objection that the society had not been conducted conformably to the statute, provided it be ostensibly a friendly society. As where the articles were not enrolled.² In one case, it appeared that the rules and orders of the society were not kept in a book as the statute requires, but this was held to make no difference.³ Again, a defence that the servant of a corporation had not been duly appointed was held insufficient, *i.e.*, not under the common seal.⁴ The prisoner being elected clerk by the managers of a savings bank, could not object that he could not be the clerk of the trustees.⁵ Nor a collector of poor rates described in the indictment as a servant to the committee of management of the parish of St. Paul's, that he was elected by the vestrymen.⁶ However, if the assistant overseer be the servant, not of the overseers, but of the guardians, and he receives the money from the overseers and embezzles it, he does not come within the Act. The money is that of the overseers, not of the guardians, nor received for them, nor on their account. The prisoner did not account to the guardians, and he was only liable on his bond for the balance.⁷ So where the trustees of a friendly society appointed the prisoner to receive money on their behalf, which he appropriated, he should have been indicted as the bailee of the trustees, and not of the treasurer, for the property was vested in the trustees.⁸ So in the case of a collector, who could only be dismissed by the poor-law commissioners. The bond only opens a civil liability.⁹ The prisoner was tried for embezzling, as servant, 6*l.*, the property of his master, the agent of the Great Northern Railway Company. The prisoner's duty was to receive parcels from a clerk, to deliver them, and collect the money for carriage, according to a book furnished by the clerk, and to account to the clerk. The prisoner having collected some monies for carriage, gave receipts in the name of the company, but neither

¹ *R. v. Hall*, 1 Moo. C. C. 474. But Maule, J., seems to have held the contrary, saying, that a man could not embezzle his own money. *R. v. Taff*, 4 Cox, 169. And Coleridge, J., had held the same. *R. v. Waite*, 2 Cox, 245. However, *R. v. Hall* was subsequently recognized as law by Patteson, J., although this particular point was not presented to his notice. *R. v. Woolley*, 4 Cox, 255. And a part owner, although clerk to the trustees, was held entitled to be discharged, when he embezzled the funds, upon the pretence that he could make more of the money elsewhere. 2 Cox, 245, *supra*.

² *R. v. Hall*, *ut supra*.

³ *R. v. Miller*, 2 Moo. C. C. 249.

⁴ *R. v. Beacall*, 1 Moo. C. C. 15; 1 C. & P. 457. *R. v. Wellings*, *Id.* 454.

⁵ *R. v. Jenson*, *supra*.

⁶ *R. v. Callahan*, 8 C. & P. 154.

⁷ *R. v. Adey*, 19 L. J. M. C. 149; Den. 571; 3 Car. & K. 339. In this case the collector was employed for two overseers, but there were two churchwardens as well, who were not named in the indictment. It was objected, but in vain, that the landlord, whose name was *not on the rate book*, paid the rate for the tenant, nor was it necessary to lay the monies in the churchwardens and overseers jointly.

⁸ *R. v. Loose*, 29 L. J. M. C. 132; Bell, 259.

⁹ *R. v. Truman*, 2 Cox, 306.

accounted to the clerk, nor to his master, but appropriated the sums received. It was objected, that although he was the agent's servant, he did not receive the money on account of his master, but in the name of the company. The court, however, were clear to the contrary, thinking that this money was received on the master's account.¹ Although the statute 21 Hen. 8, c. 7, did not apply to apprentices nor to servants under eighteen,² it was held that the statute 39 Geo. 3, c. 85 (and the present Act follows that Act) had no such limitation, so that an apprentice under eighteen came within its provisions.³ A coachman was employed by one proprietor of a firm to drive part of a journey. The money received was to be handed over to the proprietor. The prisoner embezzled certain monies, and it was objected, that these monies were received for the use of all the partners, and that the prisoner was the servant of all. But Patteson, J., thought that as between the prisoner and the proprietor the monies were received to the use of the latter, and that he was servant of that person. It was also objected, that there was no embezzlement, because the debt appeared against the prisoner in the books, at the end of the journey, and on the way-bill. But the judge thought that as the entries were made by the book-keeper, and not by the prisoner, it made no difference.⁴ A journeyman miller was within the Act.⁵ All the judges agreed that a female servant was not excepted.⁶ A clerk in a public office is punishable under special statutes, but he is not within the ordinary section respecting embezzlement.⁷ A society which administered unlawful oaths was not within the protection of the Act. The embezzlement of their joint property is not a statutable offence. Upon such an occasion *R. v. Hall* was cited, but the facts were considered to be quite different.⁸

By virtue of the employment.] Secondly, although the party may be under due control, and reap a profit, so as to make him a servant, he may not have acted by virtue of his employment. It was urged for a clerk, whose business it was to receive money *at home* every evening from porters, but who went upon one occasion directly to the customers, and embezzled the receipts, that he was not within the Act, but the judges connected the employment at home with the customers, otherwise the prisoner would have taken advantage of his own wrong.⁹ So, where the servant received money from regular customers, his master never having authorized

¹ *R. v. Thorpe*, 27 L. J. M. C. 264; Dears. & B. 562.

² 1 Hawk. c. 33, s. 12.

³ *R. v. Mellish*, Russ. & Ry. 80.

⁴ *R. v. White*, 2 Moo. C. C. 91; 8 C. & P. 742.

⁵ *R. v. Barker*, 1 Dowl. & Ry. N. P. C. 19.

⁶ *R. v. Smith*, Russ. & Ry. 267. Where it was apparently held, that if a master gives a servant money

to pay rates, &c., she is not guilty of embezzlement if she retains it; and so was *R. v. Peck*, 2 Russ. C. M. 180. But these cases may be simple larceny.

⁷ *R. v. Lovell*, 2 Moo. & Rob. 236.

⁸ *R. v. Hunt*, 8 C. & P. 642.

⁹ *R. v. Beechey*, Russ. & Ry. 319.

him to do so, yet because he was a servant in employment at the place, his conviction was held good.¹ It has been attempted, however, with more show of success to impeach the terms, "by virtue of his employment," where the prisoner received monies in one single instance only. A toll-gate keeper, whose business was usually confined to the collection of tolls, was employed by his master to receive a sum of money due to him from another toll-gate keeper. He embezzled this money, and three learned judges² deemed the matter to be so far out of his employment as not to place him within the statute. But five others³ held, that as the turnpike man had submitted in his character of servant to the employment pointed out to him, the conviction was right.⁴ Nevertheless, Parke, B., said subsequently, that he had never approved of the decision in *R. v. Smith*, and upon a similar occasion he directed an acquittal.⁵ And when the prisoner was ordered to take 30s. but not less than 20s. for leading a stallion to cover, and took 6s. for one covering, but did not account for it, Park and Littledale, JJ., held that this was not a receiving by virtue of the employment.⁶ So, where a miller who had the care of the Worcestershire gaol mill, ground the corn of strangers, and took the earnings, it was not *by virtue of his employment as miller* of the gaol. In this particular transaction he had no master; he intended no doubt to make an improper use of the machine, but he was not guilty of embezzlement.⁷ So, a person occasionally employed in the absence of the governor of a gaol, to receive money, does not act by virtue of his employment, it being no part of his regular duty to receive money. In such a case the prisoner might, however, have had an independent employment by the justices, but the chairman failed to ask the jury this question, which, if answered in the affirmative, would have led to another question, whether he had received the money by virtue of *that* employment.⁸ A person usually employed as a letter carrier was sent from an office where post-office orders were not granted, with some money and envelopes, to procure post-office orders and envelopes in exchange from the next town. To say nothing of the fact that the *animus furandi* was found to have arisen after the conversion of the money and papers, the prisoner was deemed to have received them as a bailee, and not by virtue of his employment.⁹ It was the duty of a drayman, not usually so employed, to sell porter, at 9s. 6d. a dozen. He sold some at 6s. He did not, however, at first receive the money. The customer told the prisoner's employer of the delivery, and the latter requested the customer to pay the dray-

¹ *R. v. Williams*, 6 C. & P. 626.

² Abbott, C. J.; Holroyd, J.; Garrow, B.

³ Park, Best, Burrough, Bayley, JJ. and Hullock, B.

⁴ *R. v. Smith*, Russ. & Ry. 516; 1 Lew. C. C. 86.

⁵ *R. v. Crow*, 1 Lew. C. C. 88.

⁶ *R. v. Snowley*, 4 C. & P. 390.

⁷ *R. v. Harris*, 23 L. J. M. C. 110; Dears. 344.

⁸ *R. v. Arman*, 1 Jur. 1115, probably the same case as *R. v. Ornan*, post.

⁹ *R. v. Glaspe*, 2 Cox, 236.

man, who then received, but failed to account for the money. This was held to be embezzlement, and the decision in *R. v. Snowley* was doubted.¹ The distinction, if any, seems to consist in occasional or single employment, for where the employment is quite independent, there seems to be no doubt. Thus, the prisoner was an occasional servant, and, although employed upon the particular occasion in one instance only, was yet liable to be called upon in various ways. A. agreed to carry parcels and messages when out of employ, being paid at discretion, and he embezzled 2*l*. The judges held the conviction right. The principle of servitude was present.² So, where a collector of notes was paid by commission.³ So, where a butty collier was allowed to sell coals for his employer, and received a poundage when he paid over the money which it was his duty to account for. The sale of the coal, not being compulsory, made no difference.⁴ So where the prisoner received as a club secretary a note indorsed to him under the authority of the club, and sued upon it and recovered, but appropriated the money, he was held rightly convicted, although that was the only occasion in which he had been so employed.⁵ So, an occasional drover, who embezzled the money arising from the sale of cattle, was held rightly convicted.⁶ And the servant of a market gardener employed to do a day's work.⁷ So, where a person was employed in two capacities, as a railway clerk and also to sell coals and lime separately for B., for which he received 10*s*. a week extra, and likewise to sell coals for C., he was held rightly convicted for embezzling B.'s money.⁸

A storekeeper of a gaol had certain duties assigned to him, but the receipt of money was not one. Nevertheless, he received

¹ *R. v. Aston*, 2 Cox, 234; 2 Car. & K. 413.

² *R. v. Spencer*, Russ. & Ry. 299.

³ *R. v. Hughes*, 2 Cox, 104.

⁴ *R. v. Thomas*, 6 Cox, 403.

⁵ *R. v. Tongue*, 30 L. J. M. C. 49. The cases of *Spencer* and *Hughes* were cited. Bell, 289.

⁶ *R. v. Hughes*, 1 Moo. C. C. 370. *R. v. Jones*, 2 Russ. C. M. 174, a case of selling bark. The prisoner had never been employed to receive money before, but he had often been employed by the prosecutor. Littledale, J., distinguished this case from *R. v. Nettleton*, because there the prisoner was not a servant at all. See *R. v. Wellings*, 1 C. & P. 315, 454. In this case it occurred to the recorder (Mr. Knowlys) that *R. v. Nettleton* was in the pri-

soner's favour, because the drover had no extra reward for receiving the money beyond his charge for driving and delivering the cattle. It is, however, to be observed, that the schoolmaster in *R. v. Nettleton* had never been before employed in any matter connected with money, and that he was invited to do so upon that single occasion only, whereas the drover had been occasionally employed to deliver cattle, an employment easily connected with his receipts of the proceeds for them, and in this instance he had submitted to a control which would raise the relation of master and servant,—a circumstance not applicable to the schoolmaster's case.

⁷ *R. v. Winnall*, 5 Cox, 316.

⁸ *R. v. Batty*, 2 Moo. C. C. 257.

money in the absence of the governor, to the knowledge of the justices. He was held to be guilty of embezzlement by virtue of his office.¹ The prisoner was charged with embezzlement under the Constables' Act, 2 & 3 Vict. c. 93. It was the duty of the constable to pay weekly to the superintendent all monies received by him. The superintendent sent to the constable an account, for the superintendent paid weekly wages to the constable, and one amount was set off against the other. On one occasion the constable accounted for 2*l.* 3*s.* 6*d.*, but the superintendent omitted it in the account, and denied its receipt. Patteson, J., said, that there was a constructive receipt of this sum, so as to amount to embezzlement; and it was also held, that the superintendent was the clerk or servant of the chief constable, the money received being on his account, and that he was not the clerk or servant of the treasurer of the liberty.² Of course, if there be no authority to sell, the prosecution fails. An apprentice was employed to go daily for orders, but he had never been authorized to receive money; his conviction was held wrong, for he could not be said to have acted by virtue of his employment.³ So where a debtor paid the creditor's servant a sum of money by mistake, supposing that the latter had authority to receive it, it was held, that there could not be a conviction, neither for embezzlement nor for larceny.⁴ This is, probably, the same case as that reported by Moody under a different name, where the prisoner was standing at a desk with some books near him, upon which the debtor paid him 8*l.* 4*s.* 10*d.*, and the prisoner then gave him a receipt in his own name, and the judges held the conviction wrong.⁵ If there be a privity between the prosecutor and the persons ultimately entitled to the money, such money would be received on behalf of those persons, and the count would be wrong in calling the money that of the prosecutor. Thus, the prosecutor was a contractor for the delivery of coals. The prisoner was his carman. The Great Northern Railway Company was entitled to the proceeds of the coals. The money embezzled was laid in the contractor, but the conviction was held wrong.⁶ The Great Western and three other railway companies have a common station at Chester. A station committee have the management, composed of directors of each company. The committee superintend all the servants at the station, and the delivery clerks. The prisoner, a delivery clerk, delivered a parcel, and received 5*s.*, but altered the figure to 3, and accounted for 3*s.*, keeping back 2*s.* It was held, that he might be described as the servant of the four companies, or of the committee, and the conviction was held right.⁷

¹ *R. v. Ornan*, 1 Jur. (N. S.), 1115.

² *R. v. Baxter*, 5 Cox, 302.

³ *R. v. Mellish*, Russ. & Ry. 80.
R. v. Crawley, 7 C. & P. 281.
Cited by Alderson, B.

⁴ *R. v. Hawkins*, 7 C. & P. 281.

⁵ *R. v. Thorley*, 1 Moo. C. C. 343. See *Id.* 21.

⁶ *R. v. Beaumont*, Dears. 270; 23 L. J. M. C. 54.

⁷ *R. v. Bayley*, Dears. & B. 121; 26 L. J. M. C. 4.

What embezzlement shall be said to be.] Thirdly, the dishonest servant may be engaged in his employment, and yet be not guilty of embezzlement. However, it should be premised, that an attempt to try the honesty of the servant by sending purchasers to him with marked money, will not vary the character of the prisoner's act. This principle was affirmed upon a trial for larceny. The money had been embezzled, but never having been put into the till, it did not come into the master's possession, so that the indictment for larceny failed.¹ *R. v. Hedge* was sustained by the more recent decision in *R. v. Gill*. The prosecutor gave to a third person a piece of marked money to pay over to his servant, who embezzled it, and the conviction for embezzlement was held proper.² But if the property be actually or constructively in the possession of the master, the case will not be within the statute. As, where one clerk gave some money to another clerk, for the purpose of inserting an advertisement in the Gazette, but the latter fraudulently kept back 10s., it was held, that the master had had the possession of the money by the hands of the other clerk, and that the conviction was wrong.³ But the prisoner might have been indicted for larceny.⁴ So that where a clerk abstracted a cheque with an unlawful intent from its place of deposit amongst the paid cheques, it was held, that as the paid cheque was the property of the master, it had been taken out of his possession, and the conviction for *stealing* a piece of paper belonging to his employer was right.⁵ In these cases the servant was in the exercise of his employment, and yet not guilty of embezzlement. This question of possession has a natural influence upon decisions. The master sent a servant with a note to get changed, and the servant embezzled the change. Here the offence was embezzlement, for the master never had possession, and the conviction for larceny was held wrong.⁶ So, where a banker's clerk embezzled money and notes at the shop's counter, before he placed them in the till, he was considered to be guilty of embezzlement.⁷ So where a clerk received money on account of his master from another clerk, in due course of business, his offence in appropriating it was embezzlement, and *R. v. Murray*⁸ was considered to be clearly distinguishable, inasmuch as there the master had had possession of the money. Here the money never reached the master, it was

¹ *R. v. Bull*, cited, Leach, 841. And *R. v. Waite*, Id. 28, was relied on. S. P. *R. v. Hedge*, Russ. & Ry. 160, decided upon the strength of *R. v. Bull*, Leach, 1033. The charge was for embezzlement, and the conviction was held right. S. P. *R. v. Whittingham*, Leach, 912.

² *R. v. Gill*, Dears. 289; 23 L. J. M. C. 50.

³ *R. v. Murray*, 5 C. & P. 145.

⁴ See *R. v. Smith*, Russ. & Ry.

267, where the indictment ought, as it should seem, to have been for larceny, had it been possible to have supported any charge. See also *R. v. Savage*, 5 C. & P. 143. *R. v. Wilson*, 8 C. & P. 27.

⁵ *R. v. Watts*, 19 L. J. M. C. 192; Den. & P. 14. He was convicted as a servant.

⁶ *R. v. Sullen*, 1 Moo. C. C. 129.

⁷ *R. v. Bazeley*, Leach, 835.

⁸ 5 C. & P. 145. *Supra*.

stopped in its way to him.¹ So, again, where a servant was intrusted by his master with a quantity of clothes, and 10*l.* in silver, to enable him to give change to customers, with which he absconded, it was held, that he had committed larceny, and that the conviction for embezzlement was wrong, for the goods were received direct from the master, and were in his possession.² It was the duty of the prisoner to receive remittances from customers to a journal. He entered them in a cash book, and entered the whole on the credit side of a banker's deposit account. He was also to pay the amount into the banker's. Then it was his duty to post the respective accounts in a ledger. He received a remittance and appropriated it. He made an entry of this remittance in the ledger to the debit of the customer, but made no other entry of its receipt. It was contended, that the entry in the ledger saved him. But the conviction was held right by the court of appeal, and if he had entered the receipt in all the books, with intent to deceive, it would, probably, have made no difference.³

It is no objection that the prisoner is to receive a proportion of the price for making certain articles, as a recompense for his labour.⁴ Nor, that the prisoner happens to have paid over every identical piece of money which he received at the time of the embezzlement, if he contrives to lend the money thus taken, with other money received during the day. As where he received 18*l.*, and made a false entry of 12*l.* In the course of the day he received 10*l.* 4*s.* 2*d.* more; in the evening he paid to his employer 11*l.* 6*s.* 2*d.* So that, in reality, he might have paid over the 6*l.* of deficiency which he had created in the morning of his false entry in the identical bank notes. Bayley, J., held, that having represented to his master that he had only received 12*l.* at first, and thus had led the master to suppose that the subsequent monies had been received from other customers, he was guilty of embezzlement; and when the question was stated for the opinion of the judges, Bayley, J., added this question:—Suppose, instead of paying over the six notes to Messrs. H. & Co. (his employers), as for money received from other customers, he had paid it to them for a debt he owed them, would it not have been an embezzlement?⁵ The conviction was held right, the offence being complete

¹ *R. v. Master*, cor. M. D. Hill, Recorder of Birmingham, Den. C. C. 332; 18 L. J. M. C. 2; 2 Car. & K. 930. See *R. v. Hawkins*, Den. C. C. 584.

² *R. v. Hawkins*, Den. *ut sup.*; 4 Cox, 224. For the conviction a dictum in *R. v. Whittingham*, Leach, 912, was referred to. If the servant receives the money either from the master, or from a third person, on his master's account, it is sufficient. But Wilde, C. J., said, that this dictum must have been

associated with some facts which did not appear in the report of the case. Den. C. C. 588.

³ *R. v. Lister*, Dears. & B. 118.

⁴ *R. v. Hoggins*, Russ. & Ry. 145.

⁵ If a person owes a master 5*l.* and the clerk sets against it a sum of 1*l.* 4*s.* due from himself to the person, and receives the balance, and debits himself in the master's books with the balance only, whether embezzlement? 7 C. & P. 833.

when the false entry was made.¹ Setting aside the point of the identical notes, the case of embezzlement was clear.²

The next point is, whether it is necessary to show the embezzlement of a specific sum. There was a general deficiency of monies, and the prisoner threw himself upon the mercy of his employer. The question raised was, whether proof should not have been given of a defalcation of a specific sum. Eight judges³ were of opinion that the indictment for embezzlement could not be supported under such circumstances.⁴ Seven held the contrary opinion.⁵ Nevertheless, Alderson, B., one of the dissenting judges in *Grove's case*, declared that that case must be taken with reference to its peculiar facts, and he required proof of a specific sum;⁶ and Williams, J. (one of the majority), required such proof under the following circumstances:—A clerk was to receive money for his employer, and to pay wages out of it; he was to enter all receipts and payments in a book, and the weekly total of receipts and payments were to be entered in another book; the balances paid to his employer were paid according to the balances stated in this second book. The clerk made entries of weekly payments in the first book, amounting to 25*l.*, but in the second, he entered the sum as 35*l.*; the balance being 10*l.*, he paid over to his employer a sum short that deduction. Here the embezzlement of a particular sum was required in proof, and proof also that the prisoner had converted the whole or part of it to his own use.⁷ The prisoner was employed by a banking company to conduct a branch bank; in the office was an iron safe, provided by the bank, and it was the prisoner's duty to put money, not wanted in the day, into the safe. The manager kept one key, and the prisoner another, and weekly accounts were rendered. There was some neglect in examining these accounts after the lapse of a few years, and at length the prisoner handed over the manager 755*l.* 10*s.* out of 3,000*l.*, and he took the money from a drawer in the counter, and not from the safe. He then admitted before the magistrates that he had taken the money found deficient.

¹ *R. v. Hall*, Russ. & Ry. Bosanquet, Williams, JJ.; Vaughan, 463. Wood, B., *dub.*, Abbott, C. J., Gurney, BB.

diss. Because the point as to the identical notes had not been left to the jury. 3 Stark. N. P. C. 67. *R. v. Tyers*, acc., as to this point, Russ. & Ry. 402. In this case of *R. v. Hall*, a receipt from the debtor upon unstamped paper was tendered in evidence, but Bayley, J., rejected it, and other evidence was then resorted to. 3 Stark. 68.

² *R. v. Patinson*, Leach, 850, *n.* ³ Lord Denman, C. J.; Tindal, C. J.; Lord Abinger, C. B.; Park, 119; 1 Cox, 47. See *R. v. Green*, ante.

⁴ *R. v. Grove*, 1 Moo. C. C. 447. Williams, J., tried the case. See also *R. v. Lloyd Jones*, 8 C. & P. 288; 2 Russ. C. M. 184; and *R. v. Moah*, 7 Cox, 60.

⁵ Littledale, Gaselee, Patteson, Coleridge, JJ.; Parke, Bolland, Alderson, BB. ⁶ *R. v. Fry*, Dears. 449; 27 L. J. M. C. 68. S. P. *R. v. Lambert*, 2 Cox, 309.

⁷ *R. v. Chapman*, 1 Car. & K. 119; 1 Cox, 47. See *R. v. Green*, ante.

The jury, under the direction of Crompton, J., found the prisoner guilty of larceny (the indictment was for embezzlement), as a clerk, in having stolen some money received from customers, which before such stealing had been made the subject of a weekly account. It was held, that the evidence was sufficient, and that the finding of a theft of *some money* was likewise certain enough, and that it was not necessary to prove that any specific amount was stolen on any particular day.¹

There is another principle in embezzlement. There must be some concealment or omission by the prisoner. A wilful omission is equivalent to a denial of the receipt of the money. If the clerk's book does not show the entry of the receipt, a denial of the receipt will be important, otherwise something of a nature likely to connect the prisoner with the dishonesty charged against him should be brought forward.² It made no difference that the denial took place at a time not usually fixed for the settlement of accounts, as where the prisoner's denial was on the 4th of October in respect of a valuation made at Michaelmas.³ A servant was accustomed to account every evening to his employer for money received during the day, and to pay over the amount. On three several days he received three several sums, but neither accounted for them, nor paid them over. On the other hand, he did not deny having received them, nor did he offer any written account in which they were omitted. It was held that the wilful neglect to account and pay over these sums was embezzlement, and equal to a denial of the receipt of them.⁴ As soon as the prisoner admits the receipt of the monies, he becomes entitled to an acquittal for embezzlement. Mere omission is not embezzlement.⁵ The collector of a water company intrusted the turncock with certain receipts, subsequently he asked the turncock if he had received the money; the turncock said he had, and that he would pay it over on Monday. Instead of doing so, he absconded. This was not embezzlement. Had the turncock given an account, and omitted the receipt, he would have been guilty of the offence,⁶ for that would have been a wilful, not a *mere* omission. It makes no difference that the prisoner pretends to have a right to the money, or sets up a frivolous excuse, if he admits the receipt, or even the appropriation.⁷ The prisoner, a clerk, was charged with embezzlement; he had received sums of money at different times to buy skins; he got the skins, but appropriated the money, but he debited the prosecutor in his day cash book with several sums as having been paid for the skins. The verdict was "not guilty of embezzlement, but guilty of larceny," and the conviction was held

¹ *R. v. Wright*, Dears. & B. 431; 27 L. J. M. C. 65.

² *R. v. Jones*, 7 C. & P. 833.

³ *R. v. Wortley*, Den. & P. 333; 21 L. J. M. C. 44.

⁴ *R. v. Jackson*, 1 Car. & K. 384.

⁵ *R. v. Hodgson*, 3 C. & P. 422.

⁶ *R. v. Creed*, 1 Car. & K. 63.

⁷ *R. v. Norman*, Car. & M. 501. In *R. v. White*, ante, the entries were made not by the prisoner, but by the book-keeper.

wrong.¹ A letter carrier charged treble, instead of double postage. Upon being called upon to account for the overcharge, he refused to do so, and it was held, that the person to whom the letter had been thus charged was enabled to demand the difference, and that the neglect of the postman was evidence of embezzlement.² Where there was a written instrument, Patteson, J., refused to admit parole evidence of the employment, and said, that there were two or three unreported cases tried at Warwick, before Coleridge, J., to the same effect.³ However, if the money were appropriated, and the receipts obtained on the faith of previous payment, as in the case of an assistant overseer, no subsequent debit to the prosecutor's account will absolve the prisoner from the original fraud.⁴

Indictment.] The indictment for embezzlement usually states that A., on, &c., was clerk or servant to B., and that A., by virtue of his employment as such clerk or servant, and whilst he was so employed, received for and on account of his master the property in question, and that A. on, &c., fraudulently and feloniously did embezzle the same, and so did feloniously steal the property. With reference to the mode of stating the day, it has been held, that the words "on the same day, and in the year aforesaid," might be rejected. The indictment charged, that A. on, &c., being the servant of B., on the same day and year aforesaid, one gold ring, &c. feloniously did steal. Here it sufficiently appeared that A. was servant of B. at the time of the larceny, and consequently, that the conviction was right.⁵ With regard to the word "feloniously," it may be observed, that where the indictment stated that the prisoner did fraudulently embezzle, and so did feloniously steal, the judges held the conviction right, although the felonious embezzling had not been stated in direct terms.⁶ It is necessary to state the name of the person who has been defrauded, or whose property the thing embezzled was,⁷ although it seems that the name of the party from whom the subject matter of the indictment was received need not be mentioned.⁸ In charging a prisoner it has been deemed sufficient to call him clerk to the trustees of a savings bank, although the *managers* had elected him.⁹ Again, clerk and servant to the trustees of a friendly society, although there had been no enrolment of the rules.¹⁰ In

¹ *R. v. Goodenough*, Dears. 210. See *R. v. Gorbett*, post.

² *R. v. Borrett*, 6 C. & P. 124.

³ *R. v. Clapton*, 3 Cox, 126, 134.

⁴ *R. v. Guelder*, 30 L. J. M. C. 34; Bell, 284. With respect to pilloined or embezzled materials, under 17 Geo. 3, c. 56, s. 10, which was made a misdemeanor, but not an indictable misdemeanor, &c, see *R. v. Edmundson*, 28 L. J. M. C. 213. Part of this statute is repealed, but not sect. 10.

⁵ *R. v. Somerton*, 7 B. & C. 463.

⁶ *R. v. Crighton*, Russ. & Ry. 62.

⁷ *R. v. Sherrington and Bulkeley*, Leach, 513. *R. v. M'Gregor*, Russ. & Ry. 23; Leach, 932; 3 Bos. & P. 106.

⁸ *R. v. Beacall*, 1 Moo. C. C. 15.

⁹ *R. v. Jenson*, 1 Moo. C. C. 434.

¹⁰ *R. v. Hall*, 1 Moo. C. C. 474.

charging the shareholder of a joint-stock banking company, he may be described as the clerk of one J. T., one of the public officers of the C. and L. banking company.¹ Where a traveller is employed by several houses to receive money, he may be described as the individual servant of each.² And if the private money of one partner be embezzled by one who is the servant of both, it is no objection to say that the prisoner should have been described as the joint instead of the separate servant.³ It was never considered necessary to set out the particulars of each note embezzled, as one bank note of the value of 1*l.*, &c. Therefore, the general description, "nine bank notes for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of 9*l.*,"⁴ &c., was deemed sufficient.

But now by 24 & 25 Vict. c. 96, s. 71, for preventing difficulties in the prosecution of offenders in any case of embezzlement, fraudulent application or disposition, it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, or of fraudulent application or disposition, not exceeding three, which may have been committed by him against Her Majesty, or against the same master or employer, within the space of six months from the first to the last of such acts; and in every such indictment where the offence shall relate to any money or any valuable security, it shall be sufficient to allege the embezzlement, or fraudulent application or disposition, to be of money, without specifying any particular coin or valuable security;⁵ and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled or fraudulently applied or disposed of any amount,⁶ although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled or fraudulently applied or disposed of any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly. It is not sufficient to state that monies have been received within six months, unless it be also stated that they were embezzled within six months. In an indictment for embezzlement there were three counts; in the second and third the allegation above mentioned was omitted. There was a general allegation of embezzlement on the day and year afore-

¹ *R. v. Atkinson*, 2 Moo. C. C. 278. By five judges against four. See 1 & 2 Vict. c. 85; 3 & 4 Vict. c. 111. See also *R. v. Townsend*, ante, pp. 487, 488.

² *R. v. Adey*, ante, 3 Stark. N. P. C. 71; Bayley, J.

³ *R. v. Leech*, Id. 70.

⁴ *R. v. Johnson*, 3 M. & S. 539; Leach, 1003.

⁵ *R. v. Furneaux*, Russ. & Ry. 335. *R. v. Tyers*, Id. 402. *R. v. Hall*, Id. 463.

⁶ *R. v. Carson*, Russ. & Ry. 303.

said, but Cresswell, J., said, that this expression was not certain to a common intent as to the day. For the time in the second count might be within six months before the day in the first count, and the time in the third count might be six months after that day, so as to cover twelve months, which is not allowed by the statute. The prosecutor was confined to the first count, which contained both allegations, and a verdict of guilty was returned.¹ The first count against a prisoner charged him with embezzling the property of A., the second, of B. It was held, that the words connecting the first with the second count should be rejected as surplusage, so as to leave the second count independent, for the statute requires that the embezzlement should be of money belonging to the same master.² And where three sums were severally alleged to have been embezzled, Williams, J., allowed evidence of the embezzlement of sums not mentioned in the indictment, so that a defence founded upon mistakes in book-keeping would not have an undue weight.³ But where one sum only was charged in the indictment as the subject of embezzlement on a particular day, and there was only one count, and the proof was, that the money had been received in different sums, on different days, the prosecutor was required to confine himself to that sum and one day.⁴ Again, under a similar section, there was only one count. It charged that the prisoner received three sums within three calendar months, and a day was laid for the receipt of each. The count then stated that in the several days aforesaid the prisoner embezzled these sums, and consequently, it did not appear on the record that the sums in question were embezzled within six months of each other. This statement was held bad, and the objection was held properly available upon demurrer. In embezzlement it was likewise said, that if the demurrer be decided against the prisoner, he may still plead over.⁵ As it is not necessary to name in the indictment the person from whom the money or other thing embezzled has been received, recourse is had to a judge's order, that the prisoner may know the specific acts of embezzlement of which he is accused. And, upon a motion supported by proper affidavits, the judge will postpone the trial, or order that such a particular may be applied for.⁶ But the application should be made to the judge at the assizes or sessions, unless the case is removed by *certiorari*.⁷ No copy or *fac-simile* of an instrument charged to have been embezzled needs to be set forth in the indictment⁸ in any averment respecting it.

¹ *R. v. Noakes*, 2 Car. & K. 620.

² *R. v. Woolley*, 4 Cox, 251.

³ *R. v. Richardson*, 8 Cox, 448.

⁴ *R. v. Williams*, 6 C. & P. 626.

⁵ *R. v. Purchase*, Car. & M. 617;

2 Russ. C. M. 188; citing also, *R. v. Jeyes*, note (m). Whether three acts of embezzlement can be

charged in one count, *qu.*? It is better to put each act into a separate count.

⁶ *R. v. Hodgson*, 3 C. & P. 422. *R. v. Bootyman*, 5 C. & P. 360.

⁷ *R. v. Haslam*, 1 Jur. (N. S.), 1139.

⁸ 14 & 15 Vict. c. 100, s. 7.

Verdict.] By 24 & 25 Vict. s. 72, if upon the trial of any person indicted for embezzlement, or fraudulent application or disposition, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not be acquitted, but the verdict may be not guilty of embezzlement, or fraudulent application or disposition, but guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, or as a person employed in the public service, or in the police, as the case may be; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and *vice versâ*, not guilty of larceny, but guilty of embezzlement or fraudulent application or disposition; and thereupon such person shall be punished as if he had been convicted upon an indictment for such embezzlement, fraudulent application or disposition; but no person so tried for embezzlement, fraudulent application or disposition, or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny, fraudulent application or disposition, or embezzlement, upon the same facts.

Nevertheless, if a person be charged with stealing, and there be abundant evidence of embezzlement, but not any of stealing, however correct a verdict of guilty of embezzlement might be, a conviction for larceny is wrong, and will be quashed.¹ To interpret the Act aright, it must be understood, that a prisoner cannot be convicted of stealing unless there is some evidence of stealing, nor of embezzlement unless there is some evidence of embezzlement, and therefore, instead of the general verdict of guilty, the jury should say "guilty of embezzlement, but not of larceny." The prisoner was indicted for stealing sovereigns and half-sovereigns, but the jury could not specify which he had taken, although asked to do so, and some coin undoubtedly had been taken. There was a general verdict of guilty. It was holden insufficient.² It may be right for the legislature to interfere, and to liken the case to indictments for embezzlement, but the law is, that some definite crime must be charged in the indictment, and proved.³

Trial.] It seems that the trial for this offence may take place in any county where an act of embezzlement can be proved. Thus, where the party was accused in Middlesex with having received money in Surrey, upon which he denied the receipt of the money, it was held that he was properly indicted in Middlesex; and the more so, because there was no evidence in Surrey of the intent to embezzle, and the offence was not completed until the prisoner had denied the receipt of the money. And the judges

¹ *R. v. Gorbutt*, 26 L. J. M. C. 47; Dears. & B. 166.

² *R. v. Bond*, 19 L. J. M. C. 138.

³ 19 L. J. M. C. 143; Alderson, B.

said, that if there had been evidence of embezzlement in Surrey, the trial would not have been necessarily confined to that county.¹

Again, the prisoner was proved to have received money in Salop, and he denied its receipt in Staffordshire. He also did some acts afterwards at Shrewsbury calculated to strengthen the denial. It was submitted, first, whether an indictment might not be found and tried where the money or goods were received, although there was no other evidence of any other fact arising within the same county. Secondly, if further local proof were necessary, whether the subsequent conduct of the prisoner at Shrewsbury had not destroyed the objection as being acts done in furtherance of the secreting or embezzling. The judges held, that the indictment might be in either county, and indeed, in any county where he might have carried the property, as well as that in which he embezzled it by denying the receipt of it.²

The prisoner, a travelling salesman, went into Derbyshire on Mondays, and returned to Nottingham on Saturdays. His duty was to sell goods and receive the money. On one occasion he received two sums in Derbyshire, but did not return to account. Two months afterwards his master met him in Nottingham, and asked him what he had done with the money, upon which he admitted the embezzlement. He was convicted in Nottingham. Parke, B., seemed to think that the facts of not returning and not accounting were alone sufficient proof of embezzlement; but the other judges considered that the non-accounting upon demand was evidence of the offence in Nottingham.³

¹ *R. v. Taylor*, Russ. & Ry. 65; 3 Bos. & P. 596.

² *R. v. Hobson*, Russ. & Ry. 56; Leach, 975, cited. Lawrence, J., Le Blanc, J., *diss.*

³ *R. v. Murdock*, 21 L. J. M. C. 22; Den. & P. 298. *Taylor's case* was mentioned by Parke, B., and *Hobson's case* was referred to by counsel *arguendo*.

CHAPTER XX.

OF LARCENY AND EMBEZZLEMENT BY PERSONS IN THE
QUEEN'S SERVICE, OR BY THE POLICE.

By 24 & 25 Vict. c. 96, s. 69, whosoever being employed in the public service of Her Majesty, or being a constable or other person employed in the police of any county, city, borough, district, or place whatsoever,¹ shall steal any chattel, money, or valuable security belonging to or in the possession or power of Her Majesty, or intrusted to or received or taken into possession by him by virtue of his employment, shall be guilty of felony, and liable to penal servitude not exceeding fourteen years and not less than three years, or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement.

The indictment will follow the ordinary precedent, only stating the conviction of the person embezzling and the particular trust. The prisoner was charged with embezzlement. He was an officer of inland revenue. The surveyor-general reminded him that there was an excise balance in his hands of 300*l.*; he took out 28*l.*, and said that was all the money he had in the world; he said he had spent the rest in an unfortunate speculation. It was held that this was evidence of his having fraudulently applied part of the 300*l.* to his own use, and that the conviction was right, and Pollock, C.B., said that he might have been charged simply with stealing the money.²

By sect. 70, whosoever, being employed in the public service of Her Majesty, or being a constable or other person employed in the police of any county, city, borough, district, or place whatsoever,³ and intrusted by virtue of such employment with the receipt, custody, management, or control of any chattel, money, or valuable security, shall embezzle any chattel, money, or valuable security which shall be intrusted to or received or taken into possession by him by virtue of his employment, or any part thereof, or in any manner fraudulently apply or dispose of the same or any part thereof to his own use or benefit, or for any purpose whatsoever except for the public service, shall be deemed to have feloniously stolen the same from Her Majesty, and liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard

¹ "Liberty" is omitted; "place" will not satisfy the omission.

² *R. v. Moah*, 25 L. J. M. C. 66; 7 Cox, 60.

³ "Liberty" is omitted.

¹ As to embezzlements connected with the public revenue, see "Indictable Offences against the Public Revenue."

¹ As to embezzlements connected with the public revenue, see "Indictable Offences against the Public Revenue."

CHAPTER XXI.

OF EMBEZZLEMENT BY OFFICERS OF THE BANK OF ENGLAND
AND IRELAND.

By 24 & 25 Vict. c. 96, s. 73, whosoever, being an officer or servant of the governor and company of the Bank of England or of the Bank of Ireland, and being intrusted with any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity or interest, or money, or with any security, money, or other effects of or belonging to the said governor and company, or having any bond, &c. of any other person, body politic or corporate, lodged or deposited with the said governor and company, or with him as an officer or servant of the said governor and company, shall secrete, embezzle, or run away with any such bond, &c., or any part thereof, shall be guilty of felony, and liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement.

Formerly it seems that it was not competent to convict an officer of the bank for embezzling the property of his employers, and a statute was passed in the interval between a serious robbery of this kind committed by one of the cashiers and his trial for the offence. The cashier was acquitted under the direction of the court, the India bonds which he stole not having been deposited by him in the usual place, so that it appeared to the judges who tried the prisoner that the bank could not be said to have possession of them.¹ In another case of embezzlement by an officer of the bank, we have seen that although bills issued by government, as exchequer bills, are not valid bills unless properly signed, they were, nevertheless, effects under 15 Geo. 2, c. 13, s. 12.² Still the trust must have been on the prisoner. A bank clerk whose business it was to post in the ledger and read from the cash book bank notes from 100*l.* to 1000*l.*, took from a pile of paid notes, to which other clerks had access, a paid note for 50*l.* The judges held, that he ought not to have been convicted of embezzlement under 15 Geo. 2, c. 13; for although he had access to the cancelled notes, he could not be said to have been intrusted with it.³

¹ *R. v. Waite*, East, P. C. 570; Leach, 28.

² *R. v. Aslett*, ante. *Bakewell's case*, infra, was decided upon another point. See Leach, 962, by Le Blanc, J.

³ *R. v. Bakewell*, Russ. & Ry. 35; Leach, 943. It was surmised at one time that the stat. 39 Geo. 3, c. 85, concerning embezzlement, had superseded the capital punishment, but in *R. v. Aslett*, the judges, after

The indictment for these two offences may be framed in a similar manner to the ordinary form, only mentioning that the prisoner was a clerk in the employment of the bank or of the South Sea Company.

hearing an argument, were unanimous that no such repeal had taken place; Leach, 970; but if the second statute relates to the same subject matter, if it should itself inflict a milder penalty, it will operate to repeal the more severe punishment. *R. v. Davis*, Leach, 971. See also *R. v. Cator*, 4 Burr. 20, 26; *R. v. Heath*, Leach, 274, n. The two statutes must stand consistently with each other in order to create the repeal. A general Embezzlement Act, therefore, will not destroy a provision which applies to particular servants. Nor will Acts passed in the same session, although in *pari materia*, be so far inconsistent as that the milder penalty must operate. As in the case of destroying shrubs and trees. *R. v. Howe*, Leach, 481. But should such Acts pass in separate sessions, the case will be different. *Id.* 483, n. Buller, J.

S. P. *R. v. Brady*, Leach, 274, n. *A fortiori* is it, where the statutes are entirely distinct, as in the case of an illegal demand of money, and of an act which falls short of a demand, both offences being made punishable by separate statutes. *R. v. Robinson*, Leach, 767. And in continuing an act through the medium of another, no particular form of words need be used. *R. v. Longmead*, Leach, 694. Where a statute abolished the punishment of death as to persons convicted of certain felonies, not using the words "*who shall be convicted*," it was held, that the mitigated sentence was applicable to convicts, who although they had been tried before the passing of the new Act, had not been brought up for sentence until afterwards. *R. v. Lewis*, 1 Moo. C. C. 372. See *R. v. Mackenzie*, Russ. & Ry. 429.

CHAPTER XXII.

OF EMBEZZLEMENT—MUTINY ACTS AND PUBLIC REVENUE.

Embezzlement under Mutiny Acts.] Embezzlements of money, provisions, forage, &c., under the Mutiny Acts, are punishable with penal servitude for not less than four years, or with fine and imprisonment, dismissal from the service, reduction to the ranks if a warrant or non-commissioned officer, and incapacity to serve Her Majesty in any civil or military office. The loss or damage moreover may be recovered from the offender, or if he remain in the service, he may be put under stoppages not exceeding one-half of his pay and allowances.¹

Embezzlement—First fruits.] By 26 Hen. 8, c. 3, s. 4, confirmed by 1 Eliz. c. 4, s. 24, if any person or persons to whom any deputation shall be made by commission, to compound and agree for the payment of first fruits, their heirs, executors, or administrators, shall conceal or embezzle any specialties or bonds, taken for the payment of the said first fruits, and do not deliver them according to the tenor of the Act, he shall forfeit that office of deputation, and, over that, make fine and ransom at the king's own pleasure and will.

Embezzlement of public stores.] Under the provisions of several Acts,² embezzling any stores of war, or naval, ordnance, or victualling stores, marked according to particular statutable regulations, or concealing them, or any cordage belonging to His Majesty,³ or any public stores whatsoever under the care, superintendence, or control of any officer or person in His Majesty's service, or employed in any public department or office, is made punishable by transportation for fourteen years,⁴ or by public whipping, fine, or imprisonment, one or all of them, at the discretion of the court. And for a second offence of the kinds mentioned above, the sentence of transportation⁵ for fourteen years is to pass at all events.⁶

¹ 24 Vict. c. 7, s. 17; and the Marine Mutiny Act, 24 Vict. c. 8, s. 22.

² 9 & 10 Will. 3, c. 41; 9 Geo. 1, c. 8; 39 & 40 Geo. 3, c. 89, ss. 1, 7, extended to Ireland as far as they relate to the naval, ordnance, and victualling stores, by 52 Geo. 3, c. 12, but no summary proceeding before justices is to be taken without the

consent in writing of the naval storekeeper for the time being, at any port in Ireland. 56 Geo. 3, c. 138, s. 2.

³ 54 Geo. 3, c. 60.

⁴ Penal servitude.

⁵ Id.

⁶ See 9 & 10 Will. 3, c. 41; 39 & 40 Geo. 3, c. 89, ss. 5, 7; 56 Geo. 3, c. 138, s. 2.

By 1 Geo. 1, st. 2, c. 25, ss. 1, 3, the commissioners of the navy may cause search to be made for embezzled goods, as justices of peace may do in cases of felony, and may, in cases where the property embezzled does not exceed 20s., fine the offender 20s., and imprison him for one week, and may cause the goods to be brought back. In the case of nonpayment the offender may be imprisoned, with hard labour, for two months.

By sect. 4, the treasurer and other officers of the navy may also punish by fine or imprisonment at their discretion, where the embezzlement does not exceed 20s.¹

Embezzlement—Warehoused goods, customs of excise.] By 4 Geo. 4, c. 24, s. 72, if through any wilful misconduct of any officer or officers of customs or excise, any embezzlement, waste, spoil, or destruction, should be made of or in any goods or merchandise warehoused in warehouses under the authority of 4 Geo. 4, c. 24, (an Act which requires payment of duty upon the first entry of such goods,) such officer or officers shall be guilty of a misdemeanor.²

Post Office—Embezzlement of printed papers.] By 1 Vict. c. 36, s. 32, for the protection of printed votes and proceedings in parliament, and printed newspapers sent by the post, it is enacted, that every person employed in the post office who shall steal, or shall for any purpose embezzle, secrete, or destroy, any printed votes or proceedings in parliament, or any printed newspaper, or any other printed paper whatever, sent by the post without covers, or in covers open at the sides, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland, of a crime and offence, and being convicted thereof, shall suffer such punishment by fine or imprisonment, or by both, as to the court shall seem meet.³

¹ Under sect. 3, if the offence be of a higher nature, the commissioners may commit the offender till he enters into recognizances to appear in the exchequer, to answer

any prosecution against him within one year afterwards.

² And punishable by fine and imprisonment, or both.

³ With or without hard labour and solitary confinement (sect. 42).

CHAPTER XXIII.

OF LARCENY BY TENANTS AND LODGERS.¹

Larceny by tenants and lodgers.] By 24 & 25 Vict. c. 96, s. 74, whosoever shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her or by her husband, or by any person on behalf of him or her or her husband, shall be guilty of felony, and liable to imprisonment not exceeding two years, with or without hard labour, or solitary confinement, and, if a male under sixteen years, with or without whipping, and in case the value of such chattel or fixture shall exceed the value of 5*l.*, shall be liable to penal servitude not exceeding seven years and not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement, and, if a male under sixteen years, with or without whipping; and in every case of stealing any chattel in this section mentioned, it shall be lawful to prefer an indictment in the common form as for larceny, and in every case of stealing any fixture in this section mentioned, to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire.

Where a person got possession of a house under a written agreement between him and the landlord, and then stole the lead fixed to the freehold, the jury having found the original intention felonious, the judges held, that he had been properly convicted under the old statute of 4 Geo. 2.²

Indictment.] The indictment is in general the same as for ordinary larceny, but if fixtures be stolen, the form for stealing such should be adopted. It is not now necessary to state, nor to prove the letting. Where A. had a concurrent use of the lodging, and the indictment stated an exclusive letting to the prisoner, the conviction was held wrong.³ And two persons cannot be convicted on the same indictment, unless a joint contract be stated.⁴ But it should be remarked, that when property of this kind is taken by another person than the tenant or lodger, it must be laid in the lodger, because the owner cannot maintain trespass.⁵

¹ *R. v. Munday*, Leach, 850.

² See *R. v. Pope*, Leach, 336.

³ *R. v. Bew*, Russ. & Ry. 480.

⁴ *R. v. Goddard and another*, Leach, 545. As to the old law, see *R. v. Healey*, 1 Moo. C. C. 1. *R. v.*

Burnel, Leach, 588; East, P. C.

587. *R. v. Hurrell*, Ry. & Moo. N. P. C. 296.

⁵ *R. v. Belstead*, Russ. & Ry. 411.

CHAPTER XXIV.

OF FRAUDS AND EMBEZZLEMENTS BY BANKERS, &C., FACTORS,
AND AGENTS.

Frauds by agents, bankers, or factors.] By 24 & 25 Vict. c. 96, s. 75, whosoever, having been intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security or any part thereof respectively, or the proceeds or any part of the proceeds of such security, for any purpose, or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security, or proceeds, or any part thereof respectively; and whosoever, having been intrusted, either solely, or jointly with any other person, as a banker, &c., with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of the United Kingdom, or any part thereof, or of any foreign state, or in any stock or fund of any body corporate, company, or society, for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, shall be guilty of a misdemeanor, and liable to penal servitude not exceeding seven nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement; but nothing in this section contained relating to agents shall affect any trustee in or under any instrument whatsoever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage; nor shall restrain any banker, merchant, broker, attorney, or other agent from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this Act had not been passed; nor from selling,

transferring, or otherwise disposing of any securities or effects in his possession upon which he shall have any lien, claim, or demand entitling him by law so to do, unless such sale, transfer, or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim, or demand.

A direction in writing was necessary under the old Act to the person employed, (a broker, for instance,) as to the application of the proceeds.¹ It affords no defence to say that an order to sell the chattel had been given, if the order was subsequently countermanded.²

Indictment.] The indictment charges, that A., before and at the time of committing the offence hereinafter mentioned, to wit, on, &c., was (agent)³ to B., and that, whilst the said A. was such (agent) to the said B., to wit, on, &c., the said B. did intrust to the said A. as such (agent), certain monies, to wit, — [or a certain valuable security, to wit, —], with a direction in writing from the said A., and with his signature, to apply such monies [or security] to [state the purpose], and that the said A. being such (agent) well knowing the premises, did, as such (agent) take the said monies [or security] into his possession, from the said B., for the purpose aforesaid, and whilst he was such (agent) to the said B. as aforesaid, afterwards, to wit, on, &c., in violation of good faith, and contrary to the purpose specified in the said written direction, unlawfully did convert to his own use the said monies, [or security,] against the form, &c.

The second indictment charges, that A., before and at the time of committing the offence hereinafter mentioned, to wit, on, &c., was an (agent) to one B., and whilst the said A. was such (agent) to the said B., to wit, on, &c., the said B. did intrust to the said A. as such (agent) for safe custody, [or for a special purpose, to wit,] [state the chattel,] without any authority to sell, negotiate, transfer, or pledge the same, and which the said [chattel] the said A., so being such (agent) as aforesaid, well knowing the premises, did then as such (agent) receive and take into his possession for safe custody as aforesaid [or, for the purpose aforesaid,] from the said B., and that the said A. afterwards and whilst he was such (agent) to the said B., to wit, on, &c., in violation of good faith, and contrary to the object and purpose for which the said [chattel] was so intrusted to him as aforesaid, unlawfully did sell, &c., and convert to his own use and benefit the said [chattel], (or the proceeds or part thereof,) against the form, &c.

The special purpose, if there be one, must be set out correctly.⁴ An indictment was preferred under this statute in the ordinary form, and it concluded *contra formam statuti*. It was objected,

¹ *R. v. Golde*, 2 Moo. & Rob.
⁴ 5.

² *R. v. Gomme*, 3 Cox, 64.

³ As the case may be — banker, broker, &c.

⁴ *R. v. Prince*, Moo. & Malk. 21; 2 C. & P. 517.

that the sections should have been specially set forth, but the count was deemed sufficient.¹

On the other hand, it was alleged that the defendant had received 10*l.* 8*s.* for safe custody as an agent. The defendant was the proprietor of a weekly savings bank. The prosecutor paid in subscriptions to that amount. Park, J., held that there was no keeping for safe custody within the statutes.²

By 24 & 25 Vict. c. 96, s. 76, whosoever, being a banker, merchant, broker, attorney, or agent, and being intrusted, either solely or jointly with any other person, with the property of any other person for safe custody, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor, and liable to any of the punishments awarded by the 75th section.

By sect. 77, whosoever, being intrusted, either solely, or jointly with any other person, with any power of attorney for the sale or transfer of any property, shall fraudulently sell or transfer or otherwise convert the same, or any part thereof, to his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor, and liable to any of the punishments awarded by the 75th section.

By sect. 78, whosoever, being a factor or agent intrusted, either solely, or jointly with any other person, for the purpose of sale or otherwise, with the possession of any goods, or of any document of title to goods,³ shall, contrary to or without the authority of his principal in that behalf, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, make any consignment, deposit, transfer, or delivery of any goods or document of title so intrusted to him as in this section before mentioned, as and by way of a pledge, lien, or security for any money or valuable security borrowed or received by such factor or agent at or before the time of making such consignment, deposit, transfer, or delivery, or intended to be thereafter borrowed or received, or shall, contrary to or without such authority, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, accept any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, transfer, or deliver any such goods or document of title, shall be guilty of a misdemeanor, and liable to any of the punishments awarded by the 75th section; and every clerk or other person who shall knowingly and wilfully act and

¹ *R. v. Haigh*, 7 Cox, 403.

² *R. v. Mason*, Dowl. & Ry. N. P. C. 22. There was another point fatal to the case. Each member paid in weekly 2*s.* 1*d.*, and this was correct. But the indictment

averred that the defendant had received 10*l.* 8*s.* from the prosecutrix, whereas the evidence showed that she had not received at one time more than 2*s.* 1*d.*

³ See sect. 1.

assist in making any such consignment, &c., or in accepting or procuring such advance as aforesaid, shall be guilty of a misdemeanor, and liable to any of the same punishments. Provided, that no such factor or agent shall be liable to any prosecution for consigning, depositing, transferring, or delivering any such goods or documents of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, &c., was justly due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal, and accepted by such factor or agent.¹

By sect. 79, any factor or agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods, or obtained by reason of such factor or agent having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed to have been intrusted with the possession of the goods represented by such document of title; and every contract pledging or giving a lien upon such document of title as aforesaid shall be deemed to be a pledge of and lien upon the goods to which the same relates; and such factor or agent shall be deemed to be possessed of such goods or document, whether the same shall be in his actual custody, or shall be held by any other person subject to his control, or for him or on his behalf; and where any loan or advance shall be *bonâ fide* made to any factor or agent intrusted with and in possession of any such goods or document of title, on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver such goods or documents of title, and such goods or document of title shall actually be received by the person making such loan or advance, without notice that such factor or agent was not authorized to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods or document of title within the meaning of the last preceding section, though such goods or document of title shall not actually be received by the person making such loan or advance till the period subsequent thereto; and any contract or agreement, whether made direct with such factor or agent, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such factor or agent; and any payment made, whether by money or bill of exchange or other negotiable security, shall be deemed to be an advance within the meaning of the last preceding section; and a factor or agent in possession as aforesaid of such goods or document shall be taken, for the purposes of the last preceding section, to have been intrusted therewith by the owner thereof, unless the contrary be shown in evidence.

¹ The proviso in the repealed section of 5 & 6 Vict. c. 39, s. 6, as to disclosure upon compulsory process

at law or in equity, is omitted. See *R. v. Skeen*, 28 L. J. M. C. 91.

The Act is strictly limited to the agents or depositaries which it mentions. And it is also confined to such persons when they are exercising their functions or business. Consequently, where a deposit was made with a private friend, and in that capacity, it was held, that the case did not come within the Act.¹ And if the deposit be made of money, the proceeds of certain securities, for the purpose of being invested in the funds, with a written direction to that effect, in case any accident should happen to a particular individual, and no accident happening, the defendant should convert the money to his own use, it seems that it would not be an offence under the statute, because the contingency did not take place which would have involved the defendant in a violation of the written direction given to him.² But if the defendant had had the securities themselves in his custody committed to him for safety, or for some special purpose, and had sold them, the case would have been different, and such an offender would be punished under the statute for embezzling the securities. The defendant had established a savings bank, each member of which paid a certain subscription, and the defendant received as a recompense for his trouble an odd penny, which formed part of the subscription. The funds were disposed of once a week by lottery. The defendant absconded after having received 10*l.* 8*s.* from an individual who had received no benefit from his subscription. It was held, that the defendant was not indictable under 52 Geo. 3, c. 63, either as an agent, or as a person having the safe custody of money in his possession.³

Indictment.] The indictment states, that A., on, &c., being then a factor and agent, was intrusted as such factor and agent by B. with the possession of certain goods and chattels of B., that is to say, &c., and the said A., well knowing the premises, afterwards, to wit, on, &c., without any authority from the said B., his principal, did, for his own benefit, and in violation of good faith, deposit the same with one C. by way of pledge, lien, and security, against the form, &c.

Another indictment may be that A. did accept an advance of certain money on the faith of an agreement to transfer or deliver the same to C.

¹ *R. v. Prince*, 2 C. & P. 517.
Moo. & Malk. 21, under 52 Geo. 3,
c. 63.

² *R. v. White*, 4 C. & P. 46;
under 52 Geo. 3, c. 63, repealed.

³ *R. v. Mason*, Dowl. & Ry. N.
P. C. 22.

CHAPTER XXV.

OF FRAUDS BY TRUSTEES AND DIRECTORS.

We now come to offences by trustees and directors.

By 24 & 25 Vict. c. 96, s. 80, whosoever, being a trustee of any property for the use or benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise dispose of or destroy such property or any part thereof, shall be guilty of a misdemeanor, and liable to any of the punishments under the 75th section. Provided, that no proceeding or prosecution for any offence included in this section shall be commenced without the sanction of Her Majesty's attorney-general, or, in case that office be vacant, of Her Majesty's solicitor-general. Provided also, that where any civil proceeding shall have been taken against any person to whom the provisions of this section may apply, no person who shall have taken such civil proceeding shall commence any prosecution under this section without the sanction of the court or judge before whom such civil proceeding shall have been had or shall be pending.

By sect. 81, whosoever, being a director, member, or public officer of any body corporate or public company, shall fraudulently take or apply for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company, shall be guilty of a misdemeanor, and liable to the punishments awarded by sect. 75.

By sect. 82, whosoever, being a director, public officer, or manager of any body corporate or public company, shall as such receive or possess himself of any of the property of such body corporate or public company otherwise than in payment of a just debt or demand, and shall, with intent to defraud, omit to make or to cause or direct to be made a full and true entry thereof in the books and accounts of such body corporate or public company, shall be guilty of a misdemeanor, and liable to the punishments of sect. 75.

By sect. 83, whosoever, being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false

entry, or omit or concur in omitting any material particular, in any book of account or other document, shall be guilty of a misdemeanor, and punishable under the 75th section.

By sect. 84, whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and punishable as above.

By sect. 85, nothing in any of the last ten preceding sections of this Act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanors in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency. This disclosure must be *bonâ fide*, not of facts known before.¹

By sect. 86, nothing in any of the last eleven preceding sections of this Act contained, nor any proceeding, conviction, or judgment to be had or taken thereon against any person under any of the said sections, shall prevent, lessen, or impeach any remedy, at law or in equity, which any party aggrieved by any offence against any of the said sections might have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him; and nothing in the said sections contained shall affect or prejudice any agreement entered into or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated.

Lastly, by sect. 87, no misdemeanor against any of the last twelve² preceding sections of this Act shall be prosecuted or tried at any court of general or quarter sessions of the peace.

¹ *R. v. Sheen and another*, Bell, 97; 28 L. J. M. C. 91. *R. v. Strahan*, 7 Cox, 75; and *post*, "Frauds by Bankrupts."
² *Id est*, beginning at "frauds by agents, bankers, or factors." sect. 75.

CHAPTER XXVI.

OF OBTAINING MONEY, &c. BY FALSE PRETENCES.

Obtaining money, &c. by false pretences.] The common law requires a certain degree of caution from individuals, in order that they may not be the dupes of ordinary frauds; but it was discovered, that the proportion of those who possessed this necessary vigilance was not so great but that numerous and gross cheats were constantly put in action to the prejudice of the less wary, and the legislature, therefore, interfered to protect a class which have been called "the weaker part of mankind."¹

Still, if the pretence be absurd or irrational upon the face of it, or such as the party has, at the very time, the means at hand of detecting,² it has been deemed proper to exclude his case from the operation of the enactments.³ Such pretences as are calculated to throw those off their guard who, through defect of education or of natural quickness, are not so shrewd as some of their neighbours, are the offences which the statutes have proposed to punish. In the first instance, by the 33 Hen. 8, c. 1,⁴ privy tokens and counterfeit letters in other men's names were made the subjects of attention, as a key, a ring, or something denoting a real visible mark.⁵ And writings generally, if made in the names of third persons, seem to have been within the purview of the statute.⁶ One Munoes persuaded a woman to let him have a note for 500*l.* upon the false pretence of finding a person in the next room who would discount it.⁷ This was not a case within the statute of Hen. 8. But where a woman, in haste, gave change of a 5*l.* note for a 1*l.* note, believing the allegation of its being a 5*l.* note, the pretence was deemed sufficient under the statute of Geo. 4.⁸ The next Act was the 30 Geo. 2, c. 24.⁹ The third Act was the 7 & 8 Geo. 4, c. 29, s. 53.

And now by 24 & 25 Vict. c. 96, s. 88, whosoever shall by any false pretence obtain from any other person any chattel, money, or valuable security,¹⁰ with intent to defraud, shall be guilty of a misdemeanor, and liable to be kept in penal servitude for the term

¹ 3 T. R. 105, by Ashhurst, J.

² East, P. C. 828.

³ See *post* in this section.

⁴ Now repealed.

⁵ *R. v. Gratland*, East, P. C. 826; 7 Mod. 315; S. P. Id. 316, 8 Ann. cited.

⁶ East, P. C. 827.

⁷ *R. v. Munoes*, 7 Mod. 315; Str. 1127.

⁸ *R. v. Jessop*, 29 L. J. M. C. 70; Dears. & B. 442.

⁹ Repealed. As to the old statutes, see *R. v. Pear*, East, P. C. 689, 832.

¹⁰ See sect. 1.

of three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement. Provided, that if upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts. Provided also, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretences, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money, or valuable security; and on the trial of any such indictment it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud.

By sect. 89, whosoever shall by any false pretence cause or procure any money to be paid, or any chattel or valuable security to be delivered to any other person, for the use or benefit, or on account of the person making such false pretence, or of any other person, with intent to defraud, shall be deemed to have obtained such money, chattel, or valuable security within the meaning of the last preceding section.

By sect. 90, whosoever, with intent to defraud or injure any other person, shall by any false pretence fraudulently cause or induce any other person to execute, make, accept, indorse, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or co-partnership, or the seal of any body corporate, company, or society, upon any paper or parchment, in order that the same may be afterwards made or converted into or used or dealt with as a valuable security, shall be guilty of a misdemeanor, and liable to penal servitude for three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

However, if the case turn out to be a misdemeanor, the prisoner must be acquitted of the larceny. Whilst, on the other hand, the statute goes no further than larceny, and, therefore, where a letter was produced in evidence with this request,—“Please to let the bearer (A. B.) have, for (C. D.), four yards of linen”—signed, (C. D.)—it was held, that the indictment could not stand, for this proof disclosed the heavier crime of forgery under 1 Will. 4, c. 66, s. 10.¹

This statute is very general in its operation. Two men bought some goods of a jeweller at Cheltenham, and tendered their own cheque upon some London bankers, which was accepted. It was proved, however, that they kept no cash with the bankers, nor had any account with them. For the defendants, *R. v. Lara*, 6 T. R.

¹ *R. v. Evans*, 5 C. & P. 553.

565, was cited, but Bayley, J., said, that the point had lately been before the judges,¹ and overruled the objection.² In that case, Freeth had uttered a counterfeit note for 10s. 6d., for which he obtained change, but without saying that the note was genuine, or making any representation respecting it, and the judges held, that he had been properly convicted under 30 Geo. 2, c. 24.³ So where the defendant availed himself of a post-dated cheque, drawn by himself, to obtain a watch and chain, accompanying the cheat by false representations, the judges were of opinion, that the conviction was proper.⁴ The prisoner accepted a bill, which the drawer negotiated, and then under pretence of being prepared to pay the residue, the prisoner borrowed money from the drawer in order to pay a part of the bill. It was in evidence that the prisoner was not so prepared, and did not intend to apply the money to the service of the bill. Patteson, J., held this to be an offence within 7 & 8 Geo. 4, c. 29, s. 53.⁵ But where the prisoner got possession of 30*l.* under the pretence of having completed two houses, and so seemed to escape a forfeiture for the non-performance of a contract, the pretence was *not* made out.⁶

We come now to mention the false pretences which the Act contemplates. The words being "chattel, money, or valuable security;" obtaining a lodging is not within the Act. The prisoner took a lodging on November 17th, on pretence of being a naval officer. On the 25th he became a boarder. This was too remote. The prisoner made use of no false pretence when he came to board.⁷ A surveyor of highways ordered gravel, having authority, but applied it to his own use. He was held to be free from any charge of false pretence. But, if at first, he meant to steal it, he might have been guilty of larceny.⁸ If A. come to B., and pretend that he has been sent by C. to receive a debt due from B. to C., and receive it, however secure A. may be from an indictment for a fraud at common law, he is guilty of a false pretence within the Act.⁹ So, if a tradesman be imposed upon by a defendant under a pretence that the defendant was sent by a customer to order goods, it is a false pretence, if the goods be obtained.¹⁰ So, where

¹ See 1 Moo. C. C. 229, where *R. v. Freeth*, Russ. & Ry. 127, is mentioned as the case in question.

² *R. v. Jackson and another*, 3 Camp. 370. The defendants were sentenced to be transported for seven years. See also 1 Moo. C. C. 228.

³ *R. v. Freeth*, Russ. & Ry. 127.

⁴ *R. v. Parker*, 2 Moo. C. C. 1; 7 C. & P. 825, although it was contended, that the pretence did not refer to any existing fact, but to a future event. The conviction was held good on a count which charged simply the pretence of the post-dated cheque, and the result, namely,

the obtaining the watch and chain. Eight judges to six.

⁵ *R. v. Crossley*, 2 Moo. & Rob. 17.

⁶ *R. v. Stone*, 1 Fost. & F. 311.

⁷ *R. v. Gardner*, 25 L. J. M. C. 100; Dears. & B. 40. Whether it was not a question for the jury as to a continuing pretence, qu.? Coleridge, J., 25 L. J. 101.

⁸ *R. v. Richardson*, 1 Fost. & F. 488.

⁹ *R. v. Hannon*, 6 Mod. 311.

¹⁰ *R. v. Cockwaine*, Leach, 498. *R. v. Adams*, Russ. & Ry. 225.

the prisoner went to a tradesman, as from a neighbour, requesting a loan of some silver, which was granted, the court held, that it was not a felonious taking, but a false pretence.¹ So again, where the prisoner wrote a letter in another's name, to a third person, in order to borrow money, in which he succeeded, it was held to be a misdemeanor, and not felony.² Here the name and credit of a third person were employed. So, where Young and others contrived to get from the prosecutor the sum of twenty guineas under a pretence of a bet with a colonel in the army, the defendants having made themselves the depositaries of the supposed stakes, the Court of King's Bench were clear, after much argument, that the indictment for false pretences had been well preferred, and that the conviction was right.³ So, again, Count Villeneuve was convicted, and sentenced to hard labour on the Thames, for obtaining money from Sir T. Broughton, upon the plea of the count having been intrusted by the Duke de Lauzun to take some horses from Ireland to London, that he had been detained by contrary winds, and had spent his money.⁴ So, where the owner of goods had intrusted them to a carrier in order that they should be delivered to the consignee, and the carrier, instead of delivering them, went to the consignor and demanded 16s. for the carriage, pretending that he had lost or mislaid the receipt, the carrier was held, upon error brought, to have been rightly convicted.⁵ And so it was, where an attorney persuaded a person to make up a matter punishable upon summary conviction, upon condition of receiving some money which, was never paid, but the attorney obtained money from the prosecutor by reason of the composition.⁶ *A fortiori*, where the false token is produced, the offence comes within the Act. As in the case of *Witchell*, who was employed by certain clothiers to keep the account of shearmen's work, which he delivered in to a clerk weekly, and received the amount. He was not authorized to draw from the clerk for money generally on account, but only for so much as the shearmen actually earned. On the occasion which gave rise to the charge, he gave in a note to the clerk for 44*l.* 10*s.*, the general account of the week's wages, and received it. But, it appeared from a book, in which he kept the items of account, that he had charged not only for men who had not been employed at all, but likewise for more work than those who had been working had really earned, and he was found guilty. And the judges said, that as the defendant would not have obtained the credit but for the false account he had delivered in, the false pretence had created the credit, and they affirmed the conviction, one of the judges observing, that the defendant was not to have any sum that he thought fit on account, but only so

¹ *R. v. Coleman*, East, P. C. 672; S. C. cited, Leach, 303, *note*.

² *R. v. Atkinson*, East, P. C. 673.

³ *Young and others v. The King* (in error), 3 T. R. 98.

⁴ *R. v. Count Villeneuve*, Id. 104,

cited by Buller, J., with approbation, as having been tried at Chester before himself and Moreton, C. J., of Chester.

⁵ *R. v. Airey*, East, P. C. 831.

⁶ *R. v. Asterley*, 7 C. & P. 191.

much as was worked out.¹ The prosecutors, grocers, bought kitchen stuff, and the prisoner, who was on their premises, bought it for them, and, upon producing a ticket, was entitled to receive the money from the chief clerk. He produced a false ticket, with the seller's name, and received the money. This was a false pretence, not larceny, because the clerk, when he paid the money, parted with both property and possession.² So, the porter, who delivered a false ticket with a basket of fish, was held clearly to be within the old Act of 30 Geo. 2.³ The prisoner pretended that the prosecutors owed money to a lodge, and produced a paper purporting to be a summons; this was deemed a false pretence.⁴ The prisoner pretended that a society had a sum of money in a bank in order to induce persons to enter into the society. This was a false pretence.⁵ The prisoner was to make some teeth, but not to have any money till the work was done. In order to this he brought a letter of recommendation from G., and obtained 30s. This was false. He was also charged with having obtained 13s. under pretence of obtaining a gold palate in exchange. It was held, that the *bonâ fide* conduct of the prisoner with regard to the gold palate should be left to the jury, although the falsehood of the specific fact could not be proved by positive testimony.⁶ Again, a railway ticket, although to be delivered up at the end of the journey, is a "chattel" belonging to the company, and within the Act. The prisoner had obtained it by false pretences in order to get a free passage.⁷ And a begging letter impostor is clearly within the Act.⁸

We have now shown, that whether the pretence be put forward under a colourable deceit connected with a third person or not, the defendant comes equally within the provisions of the 7 & 8 Geo. 4, c. 29.

The trick may be carried on without words. The production of a false token is, therefore, sufficient, without a representation of its truth.⁹ The prisoner went to the postmistress at Nottingham, and asked for letters addressed for John Story, which was his name. He got by mistake a letter with a post-office order for

¹ *R. v. Witchell*, East, P. C. 830.

² *R. v. Barnes*, 20 L. J. M. C. 34; Den. & P. 59.

³ *R. v. Douglass*, 1 Camp. 312. In this case it was contended, that the Act 39 Geo. 3, c. lviii. for regulating the rates of portage in London and Westminster, and other places, had provided for the offence; and so, in this instance, had superseded the 30 Geo. 2. But Lord Ellenborough held, that the remedy given by the stat. 39 Geo. 3 was cumulative, and the objection was overruled. 1 Camp. 214.

To collect subscriptions for a public company, under colour of

being their secretary, was said by Lord Ellenborough to come so near obtaining money by false pretences, that if a man were indicted for so doing, he could not be considered as prosecuted without any reasonable or probable cause. 1 Camp. 549, note.

⁴ *R. v. Woolley*, 19 L. J. M. C. 165.

⁵ *R. v. Milman*, 22 L. J. M. C. 118.

⁶ *R. v. Jones*, 4 Cox, 467. Verdict, guilty generally.

⁷ *R. v. Boulton*, 19 L. J. M. C. 67; Den. 508; 2 Car. & K. 917.

⁸ *R. v. Jones*, 19 L. J. M. C. 162; Den. 551.

⁹ As in *R. v. Freeth*, ante.

"John Storer;" he wrote his real name on the order, and got 1*l*. The prisoner then begged the woman to look again, and she would find another letter for him, which turned out to be the case. The order was in favour of John Storer. It was objected, that as no untrue declaration nor assertion had been made, the case was not within the statute, but the learned judge allowed a conviction to take place, reserving the point in question, as well as a question whether this was not a forgery of a receipt for money. The judges considered the case, and were of opinion, that as the prisoner had signed his real name, it could not be a forgery; but they held, that as he had represented himself to be the person mentioned in the money order by presenting it for payment, he had been properly convicted of obtaining the 1*l*. by a false pretence.¹

The prisoner pretended he was Mr. — —, who had cured the eye of the prosecutor's child by a bottle of liquid. On this, the prosecutor bought a bottle, and gave the prisoner 5*s*. The indictment was sustained.² The prisoner produced eleven thimbles to a pawnbroker and said he wanted 5*s*. on them. Being asked, he said they were silver. This was an attempt to commit a statutable misdemeanor. Had he obtained the money he would have been guilty of the statutable false pretence.³ The imitation of authentic goods needs not to be precise. As in the case of labels denoting "Everett's Premier Blacking."⁴ It is likewise no defence that the money was obtained through a contract which the prosecutor was induced to enter into.⁵ And, upon the authority of this case, it was held to be a false pretence to allege that certain "cheese-tasters" corresponded with the cheese out of which they were taken, whereas they were taken from superior, and inserted in inferior cheeses.⁶ A collier placed certain tallies in a tub which, in the ordinary course of business, would have been hung on the tally board, and he would have received payment for having raised so many tubs of coal as the tallies represented. This was a complete false pretence.⁷

"Bolton United Burial Society, No. 23.

"Bolton, Sept. 1, 1853.

"Mr. A. Entwistle, Treasurer,—Please to pay the bearer 2*l*. 10*s*., Greenhalgh, and charge the same to the above society.

"Robert Lord. Benjamin Beswick, President."

This was deemed as a valuable security within the statute.⁸ Again, the prosecutor was induced to trust the defendant with goods under the assurance that he wanted them for a person of opulence, whereas there was no such person. This was a false

¹ *R. v. Story*, Russ. & Ry. 81. & K. 630. Sustained by *R. v. Goss*,

² *R. v. Bloomfield*, Car. & M. 537. Bell, 208. S. P.

³ *R. v. Ball*, Id. 249.

⁷ *R. v. Rigby*, 7 Cox, 507.

⁴ *R. v. Dundas*, 6 Cox, 380.

⁸ *R. v. Greenhalgh*, Dears. 267.

⁵ *R. v. Kendrick*, 5 Q. B. 49; Dav. & M. 208.

R. v. Dark, Den. 276. *R. v. Garlick*, Id. *R. v. Goss*, Bell, 208; 29

⁶ *R. v. Abbott*, Den. 273; 2 Car. L. J. M. C. 87.

pretence.¹ The prosecutor parted with a cheque for 80*l.* upon the deposit of a lease, but the lease had been mortgaged. The judges said, they would be governed by the authorities, and they affirmed the conviction.² So it was where a woman left a box of stones as a pledge for 10*s.*, saying she had a shop on Northumberland Heath.³ A false representation of profits so as to induce a partnership is different.⁴ Taking a reward for the recovery of stolen goods falls under an independent enactment; but still there may be an indictment for a false pretence with reference to this unlawful transaction, and the evidence needs not to show any connection with the previous felony. It is sufficient to have a corrupt and improper design, and that the defendant did not *bonâ fide* attempt to detect and punish the thief.⁵ The prisoner represented that there were 15 cwt. of coal in a cart, but owing to a particular mode of building the coal called "tunnelling," there were not more than 8 or at the most 10 cwt. This was a false pretence.⁶ So where the prisoner delivered coal which he knew to weigh only 14 cwt. as and for 18 cwt., producing a ticket at the same time, and obtaining payment for 18 cwt., his conviction was held right.⁷ The prisoner pretended to be a provision dealer; here was an existing fact holding out the means of paying and the readiness and willingness to pay. Had there been an intention to do a future act, he might have escaped.⁸ So where a person obtained goods by the cheat of wearing a commoner's gown and cap at Oxford, he was held to have committed an offence within the Act, although nothing passed in words.⁹ In the case of the skins, the prisoner obtained a loan upon the pretence of having bought some skins of A., and the promise of selling them to the prosecutrix. His conviction was affirmed, and *Fry's case* was cited as governing the matter before the court.¹⁰ So in the case of a false return of fees to the commissioners of the treasury.¹¹

Yet there are several instances where defendants have obtained verdicts of acquittal upon these charges. It never was the intention of the legislature to dispense with the most ordinary caution in dealings between man and man. The prisoner came to Thomas

¹ *R. v. Archer*, Dears. 449. So was *R. v. Burnside*, Bell, 282.

² *R. v. Burgon*, 25 L. J. M. C. 105; Dears. & B. 11. *R. v. Cordrington* was referred to.

³ *R. v. Fry*, Dears. & B. 449; 27 L. J. M. C. 68.

⁴ *R. v. Watson*, 4 Jur. 14.

⁵ *R. v. King*, 1 Cox, 36. *R. v. Hart*, 2 Law Times, 248.

⁶ *R. v. Ragg*, Bell, 214; 29 L. J. M. C. 88.

⁷ *R. v. Sherwood*, Dears. & B. 251; 26 L. J. M. C. 81. This case overruled *R. v. Reed*, 7 C. & P. 848, and Lord Denman declared,

that *R. v. Reed* had never been before the judges. There the defendant pretended to sell 16 cwt. of coals by a delivery of 8 cwt., and produced a weight of 28 lbs., pretending that it was one of 56 lbs., whereby he got a sovereign instead of 10*s.* And the officer of the court mentioned a case to the same effect at Shrewsbury.

⁸ *R. v. Bates*, 3 Cox, 201.

⁹ *R. v. Barnard*, 7 C. & P. 784.

¹⁰ *R. v. West*, 27 L. J. M. C. 227; Dears. & B. 575.

¹¹ *R. v. Cooke*, 1 Fost. & F. 64.

Perks's shop to buy meat, and being told that he could not have it upon trust, he promised if the meat were sent, to remit the money by the bearer. The butcher's servant took the meat, and informed the prisoner, that it must go back again if payment were not made. "Aye, sure," said the prisoner, and wrote a note as follows:—"Mr. Perks,—Sir, I have a bill of Wallsall bank, which is a very good one, if you will send me the change, or I'll see you on Wednesday certain. Yours, M. G." The prisoner obtained the meat, and the jury found that he intended to cheat Perks. The judges, however, held the conviction wrong, for the prisoner's behaviour and note merely amounted to a promise for future conduct, and common prudence and caution would have prevented any injury arising from the breach of it.¹ The prosecutor lost some horses, and the prisoner, a horse-dealer, pretended to be a police officer, said he knew where the animals were, and would tell him upon the receipt of a sovereign. After much hesitation and reluctance, the prosecutor gave two half-sovereigns to the defendant, who took them and then refused to tell. Here the statement of knowledge as to an important fact, which might lie exclusively within the defendant's means of information, formed a very sufficient ground for throwing a vigilant man off his guard. But when the judges came to examine the indictment they found that the pretence laid was that the prisoner pretended he would tell where the horses were, and not, as it ought to have been stated, that he pretended he *knew*, &c., and the conviction was held improper,² for here was but a bare affirmation and lie.

A pretence was made to A. that the defendant was sent by B. for an order to go to C. for a pair of shoes. He got the shoes. Another count charged, that the defendant pretended to A. that B. had said that A. was to give him an order to go to C. for shoes, and that he got them in A.'s name from C. Both the counts were held bad in arrest of judgment, because neither charged a sufficient false pretence.³ Again, a count stated that under pretence of hiring a house, the prisoner obtained 22*l.* from the prosecutrix. Here the money having been got before the house was hired, it was doubted whether the conviction could be sustained. A second count stated that the prisoner obtained 4*l.* from the prosecutrix under pretence of paying for a wedding suit, there being a promise of marriage. The conviction was holden bad.⁴ The false pretence cannot be *after* the credit is gained.⁵ It was different where the prisoner was a married man and paid his addresses to the prosecutrix, and threatened her, moreover, with an action for breach of promise unless she gave him money, with which she complied under the force of the statement and menaces.⁶ Then, as to work; for

¹ *R. v. Goodhall*, Russ. & Ry. 461.

² *R. v. Douglas*, 1 Moo. C.C. 46.

³ *R. v. Fully*, 9 C. & P. 227.

⁴ *R. v. Johnston*, 2 Moo. C. C. 254.

⁵ *R. v. Brooks*, 1 Fost. & F. 502.

⁶ *R. v. Copeland*, Car. & M. 516.

Per Lord Denman as to the first pretence. By Maule, J., as to both.

instance pretending to have done more work than is the fact, it is to be observed, that a mere overcharge will not sustain the indictment.¹ The fact charged was insufficient. Every overcharge might come under such a rule. Again, wages were due to J. B. The prisoner said, to a boy, "I will give you a penny if you will go and get J. B.'s money." He got it by these means. This count was not sustainable on any of the following grounds:—1. On the charge of obtaining the money on the pretence of an authority from J. B. to receive his money. 2. Of obtaining it from the treasurer of a company and the boy on the pretence of such authority. 3. Of obtaining it from the boy on the like false pretence to the boy. The charge should have been, falsely pretending to the treasurer that the boy had authority from J. B. to receive the amount.² Again, the prisoner pretended that he had never been in the army nor the militia, and answered questions accordingly. Here was no false pretence under the statute nor under the Mutiny Act, for the questions were not in the schedule of that Act.³ The prisoner had insured her house and furniture, and a fire took place. Upon this she delivered a sham inventory. Some of the goods were discovered, and a prosecution ensued. It was argued for the prisoner that no existing contract was shown, that it was not alleged how the inventory was untrue, that although a claim was set forth in the indictment, no claim beyond that of delivering the inventory was proved. This was in arrest of judgment, and Platt, B., said he would consult the judges.⁴

The question as to the future pretence has been much canvassed, but it does not appear to have been settled. It might have arisen in the following case. A parcel (a case) was tendered to go to Brighton. The carriage was 11s. 9d. The defendant gave the card to the clerk, who sent it to the manager, and he sent the carman to fetch the case, and pay 11s. 9d. The case was full of rubbish. The person from whom the money was obtained did not see the box at all. It was considered, that "11s. 9d. to pay" did not show that the box was necessarily of value, for the money might be payable nevertheless. And if the money were to be payable at Brighton, the pretence would be future.⁵ However, in *R. v. Christance*, it seems that if money be obtained upon a promise to do a future thing, it is (the intent being fraudulent) an offence cognizable by law.⁶ The principle was also recognized in *R. v. Fry*, where the prosecutrix was to have her money back if she would go home with the prisoner.⁷ And in *R. v. West*, where the prisoner promised to sell some skins which he falsely alleged

¹ *R. v. Oates*, Dears. 459; 24 L. J. M. C. 123.

² *R. v. Butcher*, 28 L. J. M. C. 14; Bell, 6.

³ *R. v. Jessup*, 25 L. J. M. C. 54. *R. v. Jussup*, Dears. 619, S. C.

⁴ *R. v. Wakley*, 2 Cox, 484. But nothing appears to have been done.

⁵ *R. v. Partridge*, 6 Cox, 182.

⁶ 1 Cox, C. C. 1. This was a false sight entry in the customs. The duty due was 42l., and the duty paid was 31l. 8s. 2d.

⁷ *R. v. Fry*, ante, p. 522.

he had bought, if the prosecutrix would let him have a loan of money.¹

It may likewise be a question how far the tender of notes, illegal, useless, or absurd on the face of them, can be called an offence within this Act. Certainly, where the instrument is rightly executed, although it be such as a plaintiff could not sue upon, or one in respect of which a penalty might accrue, it is a false pretence to utter and obtain money upon the faith of it.² The defendant was apprehended for offering notes of the Oundle bank, that bank having failed some years since. The prosecutor parted with a horse upon the faith of the prisoner's assurance that the notes were good, but he did not present them at Oundle, nor in London, where they were made payable. The notes had been exhibited under a commission of bankrupt against the firm; the words importing the memorandum of exhibit had been attempted to be obliterated, but the names of the commissioners remained on each of the notes. The jury found the notes to be of no value, and that the prisoner meant to cheat the prosecutor of his horse. But the judges held, that sufficient evidence had not been given of the badness of the notes, and the conviction was set aside. Upon the point, whether the offence had been indictable had the evidence been sufficient, they gave no opinion.³ The prisoner knowingly tendered a note as a good note belonging to a bank which had stopped. It turned out that the firm of the bank consisted of three persons, and that two only had become bankrupts, upon which Gaselee, J., directed an acquittal, because the third partner might pay the amount of the note on application.⁴

After the stoppage of a bank the prisoner stated, that the note he offered was good. The bank had stopped six years since. Martin, B., directed an acquittal. The note might by possibility become of value.⁵ Charlotte Evans tendered a 5*l.* note of a bank which had failed, and which she must have known to have been the note of an insolvent firm. But the chairman, instead of leaving the question of knowledge to the jury, said he thought there was some evidence from which the jury might infer that the note was of *no value*. The court could not consider that there was such evidence in the case. The note "might be of some value." Therefore the conviction was quashed.⁶ Again, a defendant was charged with attempting to obtain money under false pretences, under colour of a promissory note, which was as follows:—

"£100.

Worcester, July 23rd, 1805.

"Three months after date pay to Mr. Thomas Darrell, Esq., or

¹ *R. v. West*, ante, p. 522.

² *R. v. Freeth*, ante, p. 518.

³ *R. v. Flint*, 2 Russ. & Ry. 460.

The bank might have resumed its payments, and its notes, if presented, might have been paid.

⁴ *R. v. Spencer*, 3 C. & P. 420.

R. v. Clark, 2 Russ. C. M. 296.

⁵ *R. v. Evans*, Bell, 187.

⁶ *Id.*

order, the sum of one hundred pounds, value received of Mrs. Mary May.

"And your obedient servant,

"JOSEPH ELLIS,

"No. 11, Stewart Street, Spitalfields,
"London.

"Indorsed, Thomas Darrell.

"Mr. Philip Gresly, Esq., Salworth."

The trick was discovered before any money was paid. And it being deemed impossible to support a charge for forgery or uttering upon an instrument so imperfect, either as a draft or bill of exchange,¹ the prisoner was convicted upon an indictment for a false pretence. But the judges took notice, that the indictment stated the note to purport to be an order for money, which was not the case, and they held the conviction wrong.² It was deemed no defence to urge that a bill was due on the day after the date, which allegation had been made by the prisoner, in order to obtain money upon it the more easily.³ But an unstamped order for the payment of money is not a *valuable* security within 7 & 8 Geo. 4, c. 29, the obtaining of which would make a person liable to an indictment under that statute, inasmuch as the banker, who was the drawee, would have rendered himself liable to a penalty of 50*l.* by paying it.⁴ The distinction is quite evident between an apparently good note which deceives an ordinary eye, and an instrument which must satisfy the word "valuable" in an Act of parliament. As in the instance of the flash note of the bank of elegance. The prosecutor could scarcely read, and was unable to make out the note in court. This was a false pretence.⁵ The same rule prevails as to goods. A man offered a chain as gold, which was only metal, and worth 10*s.* This act was included within the cases of false pretence, from respect to the authorities.⁶ The pretence was, "Eight ounces each, ingots of silver at 4*s.* an ounce, same as before." The prosecutor did not test them, but advanced money. The same law prevailed.⁷ The distinction is, where the quality is

¹ A note was made upon the case by Le Blanc, J., whether this paper, if presented to a banker with whom the person appearing as the drawer kept cash, for the purpose of getting payment of it as a draft, would not have fallen within the description of a bill of exchange, or order for the payment of money, so as to subject the utterer to a capital conviction. Russ. & Ry. 107, note (b).

² *R. v. Cartwright*, Russ. & Ry. 106. See *R. v. Inder*, Den. 325. Independently of this question, there was another which was not decided, and which, indeed, was the principal question intended for

the judges—whether an attempt to commit a statutable misdemeanor were punishable as an attempt to commit a common law misdemeanor. See *post*, *R. v. Roderick*.

³ *R. v. Hughes*, 1 Fost. & F. 355.

⁴ *R. v. Yates*, 1 Moo. C. C. 170.

⁵ *R. v. Coulson and another*, 19 L. J. M. C. 182; Den. 592. *R. v. Matthews*, Dears. & B. 236, cited. *R. v. Wells*, Id. *R. v. Pinder*, Id.

⁶ *R. v. Roebuck*, 25 L. J. M. C. 101; Dears. & B. 24.

⁷ *R. v. Stevens*, 1 Cox, 83.

inferior, but the article belongs to the same species. As in the case of "Elkington's A." The prisoner got an advance on the faith of some spoons being of that stamp, and so defrauded the lender. The judges quashed the conviction.¹ A mattress was to be stuffed with wool. There were in it when delivered 20 lbs. of wool and 70 lbs. of flock, an inferior material. Martin, B., doubted whether this was more than a breach of warranty.² So as to the profits of a business. A false representation would be insufficient, especially where the prosecutor and prisoner became partners in a concern, although the prisoner admitted that he had duped his partner.³ And it is observable, that it is no offence to obtain by false pretences that which is not larceny at common law. Therefore, a dog is not within the Act.⁴

A diversity has been established between a false pretence and a mere excuse to avoid trouble or work of any kind. As, where a pauper informed the overseer, who bade him go to work to maintain his family, that he had no shoes, when, in fact, he had two new pairs, and thus induced the overseer to give him a pair. The judges held, that this was rather a false excuse for not working, than a false pretence to obtain goods, and they set aside the conviction.⁵ If there be two pretences, by virtue of which property has been obtained, they must be taken together. As, where the defendant represented himself as being a captain, and as holding a valuable security for 21*l*. There was no proof that the defendant knew this note to be of no value, or, indeed, that it was not his own promissory note; so that the false pretence in that respect was not proved. And, although it was shown that he was not a captain, yet, as the pretences ought to have been taken in concert, the judgment against him was reversed upon error.⁶ Lord Denman, however, in this case arraigned the idea that the fraud must be such an artful device as to impose upon a man of ordinary caution, and when *R. v. Jones*⁷ was mentioned, he said, "The

¹ *R. v. Bryan*, Dears. & B. 265; 26 L. J. M. C. 84. The representation was of a gold chain. It was composed of brass, silver, and gold, but the gold minute in quantity. This was not a pretence within the Act. *R. v. Lee*, 8 Cox, 233. Willes, J., *diss.*; Bramwell, B. *dub.* In *R. v. Roebuck*; *R. v. Tabram*, cor. Adams, Serjt. was cited. Dears. & B. 31. But it was overruled by *R. v. Ball*, Car. & M. 249. In *R. v. Tabram*, there was a representation that the article produced was ribbon gold or gold shuff. If so, it was worth 3*l*. 18*s*. the ounce, but that offered was worth only 18*s*. Still, it was of the same nature,

whereas in *R. v. Ball* the thimbles were not silver at all.

² *R. v. Pratt*, 8 Cox, 334. Verdict, Not guilty, else the point would have been reserved.

³ *R. v. Watson*, 27 L. J. M. C. 18; Dears. & B. 348.

⁴ *R. v. Robinson*, 28 L. J. M. C. 58; Bell, 34.

⁵ *R. v. Wakeling*, Russ. & Ry. 504.

⁶ *Wickham v. The Queen* (in error), 2 Per. & D. 333; 10 Ad. & El. 34. The indictment should have shown how the note was of no value, and should have described the note.

⁷ 2 Ld. Raym. 1013. A. pre-

point is sometimes put as if a lie was something laudable. Who is to give the measure?"

One or two principles remain to be mentioned. An attempt must be made to gain something, whether money, goods, or a valuable security. Credit in account will not do. The prisoner overdrew his bankers, with their consent, pretending that he had good bills which would exceed the debt. He actually sent one good bill to them, but another bill was not accepted, and as the bankers suspected that the prisoner knew he had no title to draw upon the party mentioned in this last bill, they prosecuted him for the supposed fraud, after paying his cheques upon the faith of the bill so dishonoured. The jury found him guilty. But by Lord Tenterden, "He only obtains credit in account, somebody else receives the money." The judges were of opinion, that the prisoner could not be said to have obtained any specific sum on the bill; all that was obtained was credit in account, and they held the conviction wrong.¹ Again, the prisoner had a circular note of credit for 210*l.* from a bank at New York, authorizing him to draw for that sum on the Union Bank of London, in favour of certain named correspondents in foreign countries. The prisoner went to St. Petersburg, and there altered 210*l.* to 5,210*l.*, presented it so altered to W. & Co., of St. Petersburg (one of the specified correspondents), and drew in their favour on the Union Bank a cheque for 1,200*l.* W. & Co. cashed the cheque, and sent it to London, but the fraud was then discovered, and payment refused. The conviction was quashed. For if W. & Co. had obtained payment, it would not have been in pursuance of the prisoner's wish. They would have obtained the money for their own, not for the prisoner's use, and, therefore, there would not have been any obtaining of money by him.²

Another principle equally plain is, that the property must be surrendered under the influence of the false pretence. So, that where a man, professing to sell an interest in an estate, received the purchase money, and gave the usual covenant for title, having previously sold his interest to a third person, it was held, that as the purchaser had accepted the covenant for his security, the false pretence was gone. Had the prosecutor advanced his money upon the defendant's verbal pretence alone, the case would have been different.³ And so it was where the defendant sold to A., and then sold the same property conditionally to B., and did not return B.'s

tended that he was sent by B. to receive 20*l.* By Holt, C. J., "It is no crime unless he came with false tokens. Shall we indict one man for making a fool of another? Let him bring his action."

¹ *R. v. Wavell*, 1 Moo. C. C. 224. *R. v. Crosby*, 1 Cox, 20. "Working by thirds." Sum al-

lowed in account, but no money received. Maule, J.

² *R. v. Garrett*, Dears. 232; 23 L. J. M. C. 20.

³ *R. v. Codrington*, 1 C. & P. 661. There was ground for a civil action, but the act was not a misdemeanor. See *R. v. Dale*, 7 C. & P. 352.

money, it was held not to be a false pretence.¹ It is true, that it seems to have been held in *Ady's case*, that it was no answer to an indictment for the misdemeanor to say that the prosecutor had laid a trap to ensnare the defendant into the commission of the offence.² But, as it is well observed in a note to a publication of some value, the prosecutor could hardly be said to have parted with his money through the inducement of the false pretence,³ and the Act is express that the property shall be so obtained.⁴ Such a trap was laid, and the prosecutor paid money, knowing of the fraud. The court quashed the conviction.⁵

The last principle we have to mention is, that there must be an intent to defraud. A. owed B. some money. C., the servant, obtained a sack of malt from A. under a pretence that B. had bought it. There being no intent to defraud, but rather to get an equivalent for the debt, this was held not to be a false pretence within the statute.⁶

However, notwithstanding the statute of Geo. 4, the law remained very imperfect. For one Danger went to the prosecutor, and falsely represented to him that C. was baling up for him, the prisoner, a quantity of leather, which the prisoner expected on that afternoon. On this the prosecutor agreed to buy the leather, and to accept a bill for the purchase money. The prisoner produced a bill duly stamped, signed by himself as drawer, addressed to the prosecutor, and made payable to the prisoner's own order. The prosecutor accepted the bill, and returned it to the prisoner, and the latter indorsed and negotiated it, and appropriated the proceeds. His conviction for false pretences was quashed, for the bill in the hands of the prosecutor was of no value to him, nor to any one else, except the prisoner. The prosecutor never had any property in the bill, nor in the paper on which it was written.⁷ The prisoner was guilty of a gross fraud, but not one contemplated by the Act.⁸ Whereupon the Act 21 & 22 Vict. c. 47, was passed to remedy the grievance, and, being repealed,⁹ was much extended by 24 & 25 Vict. c. 96, s. 90.

By 8 & 9 Vict. c. 109, s. 17, every person who shall, by any fraud or unlawful device or ill practice, in playing at or with cards, dice tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do

¹ Anon. Lofft. 271.

² *R. v. Ady*, 7 C. & P. 140.

³ Law Magazine, v. xv. p. 423.

⁴ In *R. v. Dannelly and Vaughan*, Russ. & Ry. 310, the knowledge on the part of the prosecutor that he was to be plundered on that night, did not lessen the offence, nor make his loss attributable to any other circumstance than the robbery. And in *R. v. Norden*, East, P. C. 666, the person who went out to meet the robber did not intend to part with his money if he could help it. But in *R. v. Ady* the money was obtained with the knowledge that the pretence

was false, and, consequently, could hardly be said to have been given up through the influence of it.

⁵ *R. v. Mills*, Dears. & B. 205; 26 L. J. M. C. 79.

⁶ *R. v. Williams*, 7 C. & P. 354.

⁷ *R. v. Danger*, Dears. & B. 307.

⁸ Lord Campbell, Id. 324. As to fraudulent confessions of desertion, whereby money shall have been obtained, and false representations by a recruit before a justice, whereby money is gained, see the Mutiny Acts, 24 & 25 Vict. c. 7, ss. 37, 48; 24 & 25 Vict. c. 8, ss. 54, 66.

⁹ By 24 & 25 Vict. c. 95.

play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself, or any other, any sum of money or valuable thing, shall be deemed guilty of obtaining such money, &c., by a *false pretence*, with intent to cheat or defraud such person of the same. Whatever may be the rule upon other indictments, and however necessary it may sometimes be, that more should be stated in the indictment than is found in the statute, it has been determined upon this clause, that it is not incumbent to state that the money won was the property of any person.¹

Indictment.] The indictment states that A. unlawfully, knowingly, and designedly, did falsely pretend to B. that he was A. B., [and then describe the fraud committed in the character of A. B.,] or that he had certain property to dispose of, &c., by which false pretence² A. then unlawfully did obtain from the said B. the goods or money or valuable security,³ which respectively may be the subject of the indictment, with intent to defraud B., &c. Whereas, in fact, [negative the pretences] as the said A. did then falsely pretend, and the said A. at the time he so falsely pretended to B., knew the said pretence to be false. By mistake after "unlawfully, knowingly, and designedly," the words "did feloniously pretend," crept in upon one occasion, and were held to vitiate the charge.⁴ But the words "knowingly and designedly did obtain," are the chief terms. Where, by accident, the indictment ran thus: "knowingly and designedly did pretend," and "knowingly and designedly did obtain," it was held that the gist of the expressions lay in the allegation of a guilty acquisition.⁵ And by Best, J., "All that was necessary was to show the false pretences used, and that by means of those false pretences, the defendant knowingly and designedly obtained the goods in question, negating also the pretences."⁶ It had been, indeed, previously determined, that the omission of the word "falsely," where it was said that the defendant pretended, &c., was not material, there being averments that the pretences were false.⁷ Upon one occasion the words "unlawfully and fraudulently did falsely pretend" were held insufficient for want of

¹ *R. v. Moss*, 26 L. J. M. C. 9; Dears. & B. 104.

² This averment is important. *R. v. Hunt*, 8 Cox, 495.

³ This is the proper way of stating the pretence. It would be dangerous to allege that A. "would" or "could" do such an act. Very recently, there were three false representations:—1. That the prisoner was an unmarried man, and would marry her. 2. That he would furnish a house with the sum of 8*l.* which she was to give him for the purpose. 3. That he would return and marry her. The prisoner obtained the money and never returned. This conviction was held right. The statement that he was unmarried was the essential false

fact, and it mattered not that it was united with false promises which could not sustain the indictment. *R. v. Jennison*, 6 L. T. (N. S.), 256; 10 W. R. 488.

⁴ *R. v. Walker*, 6 C. & P. 657.

⁵ *R. v. Howarth*, 3 Stark. 26.

⁶ *Id.* 27. See also to the same effect, *R. v. Tomkins*, 8 East, 180.

⁷ East, P. C. 838; *R. v. Airey*, S. C. 2 East, 30, where the case is reported at length, and some of the judges were inclined to think, that an allegation of the falsehood of the pretences would suffice without the expressions "falsely," or obtaining by "*false pretences*." See 2 East, 35. And see *Matthews v. Biddulph*, 4 Sc. 54; 1 Dowl. (N. S.), 216.

“knowingly,” or an expression to that effect.¹ But the authority of this case is shaken. At all events, it can apply only when the objection is taken on demurrer. After verdict, it is immaterial.² [“From the said B.”] The prisoner presented a certificate to A., the secretary of a lodge, and then went to B., the treasurer, who paid the money. It was held, that the money was, nevertheless, obtained from A.³ The necessity for setting out the pretences is so clear, that the indictment is absolutely defective without it. Therefore, where the charge was, that Thomas Mason obtained from Robert Schofield two guineas, by *false pretences*, with intent then and there to cheat and defraud Schofield, the court reversed the judgment, upon error brought, and Buller, J., observed, that the precedents were quite the other way.⁴ The court must see what the pretences are, in order to judge whether they come within the statute.⁵ And there must be a complete statement.⁶ Yet, it might be demurrable to charge in the same indictment the obtaining of money from different persons and under different pretences, although under several counts.⁷ The instrument used as the false pretence need not be set out, unless it is material for the court to see whether it is, in legal construction, one of the character alleged. A flash note, as “Bank of Elegance,” need not be so set out.⁸ Where the prisoner, through a false pretence, obtained money from a benefit society (not enrolled), it was held, that the indictment might lay the pretence as having been made to A., and the money obtained as having been the property of B. and others, B. and the others having access to the money by a key common to all.⁹ Again, the indictment need not show that the false pretence was made in order to obtain a particular security, *ex. gr.* an order for the payment of 500*l.* An indictment stated, that A. did falsely pretend that — *then* was a captain in the guards, &c. The word “then” was deemed to refer to the time of making the pretence.¹⁰ The indictment called the security “a certain valuable security, to wit, an order for the payment of 500*l.*, of the value of 500*l.*” This was held a sufficient statement that the security was of value, at least after verdict, by virtue of 7 Geo. 4, c. 64, s. 21.¹¹

¹ *R. v. Henderson*, 2 Moo. C. C. 192.

² *R. v. Bowen*, 19 L. J. M. C. 65.

³ *R. v. Rouse*, 4 Cox, 7. So is *R. v. Brown*, 2 Cox, 348.

⁴ *R. v. Mason*, 2 T. R. 581, 586; Leach, 487; on 30 Geo. 2, c. 24. S. P. by Lord Ellenborough, 1 Campb. 496. See 1 Campb. 213, 495, and *post*, “Evidence.” So, under 33 Hen. 8, in *R. v. Munoz*, Str. 1127, and 7 Mod. 315, the same holding prevailed where the false tokens were not set forth. *R. v. Eddy*, East, P. C. 837.

⁵ By Grose, J., in *R. v. Fuller*, East, P. C. 837. See also *R. v. Fully*, 9 C. & P. 227.

⁶ *Matthews v. Biddulph*, 4 Sc. N. R. 54; 1 Dowl. (N. S.), 216.

⁷ *R. v. Bassett*, 1 Cox, 51. *R. v. Brown and others*, 2 Cox, 348.

⁸ *R. v. Coulson*, 19 L. J. M. C. 182; Den. 592.

⁹ *R. v. Dent*, 1 Car. & K. 249.

¹⁰ By Patteson, J., 1 Cox, 244.

¹¹ *R. v. Hamilton*, *Hamilton v. Reg.* (in error), 16 L. J. M. C. 9. 9 Q. B. 271.

And, again, the objection was cured after verdict by the same section, because the indictment pursued the words of the statute.¹ Where money was obtained from the prosecutor by means of a false summons, it was held unnecessary to set out the summons in the indictment.² A master gave his servant a cheque, according to account, to pay his workmen. This account, which amounted to 14*l.* was false as to 7*s.* The servant kept the 7*s.*, and the indictment stated the intent to have been to defraud the prosecutor of the cheque. But it was objected, that the intent was only to defraud him of a part. The judges, however, held the conviction right.³ But it does not appear necessary to describe the pretence more particularly than it was shown or described to the party at the time, and in consequence of which he was imposed upon.⁴ And, although it is usual to allege the pretences to be false, yet, it seems, that if the thing, or expression, or matter be alleged to be false, it would be sufficient without any further statement of its falsehood.⁵ Some care must be shown in setting out the property obtained. "Divers sums of money,—that is to say, the sum of two guineas,"—would probably be deemed too uncertain, and, perhaps, repugnant.⁶

[Of the monies of B. Of the goods and chattels of B.]

If the charge be for defrauding a particular individual of goods, the indictment must not only state from whom the goods were obtained, but likewise whose property they were, and the defect has been held fatal, even after verdict.⁷ And this allegation is deemed to be the more indispensable under the Act 7 & 8 Geo. 4, c. 29, because the offence being made larceny by the proviso, the indictment must contain the requisites of a count for larceny, and an acquittal could not be pleaded in bar to a subsequent indictment for larceny, if the statement in question be omitted.⁸ The words "of the monies of B.," as in the case of a cheque, show that the cheque was B.'s property.⁹ The ownership of the property should be set forth.¹⁰ So as to bills of exchange. And the 14 & 15 Vict. c. 100, s. 5, did not help the mistake.¹¹ And

¹ By Patteson, J.

² *R. v. Woolley*, 19 L. J. M. C. 165; Den. 559.

³ *R. v. Leonard*, Den. 304; 2 Car. & K. 514. There were four counts. The judges held the first proved, and, as there was a general verdict, they recommended a separate sentence on the other counts. See *R. v. Bullock*, 25 L. J. M. C. 92.

⁴ East, P. C. 837. Therefore, in a case upon a false wager with a colonel at Bath, it was held unnecessary to specify the name of the colonel. "Perhaps his name was not mentioned." *Young v. The*

King (in error), 3 T. R. 98, 100, 102.

⁵ *R. v. Terrey*, Cro. Car. 564.

⁶ See *R. v. Mason*, 2 T. R. 581; Id. 586, Buller, J.

⁷ *Martin v. Regina* (in error), 3 Nev. & P. 472; 8 Ad. & El. 481. *R. v. Norton*, 8 C. & P. 196.

⁸ *R. v. Norton*, 8 C. & P. 196. *R. v. Scott*, cited, 2 Moo. C. C. 7.

⁹ *R. v. Godfrey*, 27 L. J. M. C. 151; Dears. & B. 426.

¹⁰ *R. v. Kendrick*, Dav. & M. 200; 5 Q. B. 49.

¹¹ *Sill v. Reg.*, Dears. & B. 132; 22 L. J. M. C. 41; 1 El. & Bl. 553.

the following count was sustained: That A. &c., by divers false and fraudulent pretences, unlawfully, knowingly, and designedly, did attempt and endeavour feloniously to steal, &c., of and from B., a large sum of money, to wit, &c., of the monies of the said B.¹ But where the indictment stated, that the prisoner did "unlawfully attempt and endeavour fraudulently, falsely, and unlawfully, to obtain from the A. C. Insurance Company, a large sum of money, to wit, &c., with intent thereby then and there to cheat and defraud the said company," the judges yielded to both the objections which were made. 1. The nature of the attempt was not sufficiently specified. 2. The averment of the attempt to obtain did not lay the money as the property of any one.²

It has been said that it was immaterial to affirm the falsely pretending, provided the obtaining by the false pretence was stated, and the truth of the pretence negatived. The latter proposition must not be overlooked. An indictment charged the defendant with obtaining 6*l.* from Eliza Bullen, under the pretext of his having sufficient interest with the lords of the admiralty to secure her husband from impressment by means of a protection, and he was convicted, but error was assigned for want of some averment to falsify the matters of the several pretences, or one of them. And the court held, that the judgment must be reversed by reason of this omission. And they likened the prosecution in this respect to a charge of perjury, where it is essentially required that proper averments should be introduced to falsify the matters sworn to. And it was in vain endeavoured by the counsel for the crown to distinguish the case of perjury. The defendant was not apprized sufficiently of the accusation intended to be preferred against him, and as the word "falsely" would not impute that the whole of the allegation was untrue, it should have been pointed out what was untrue.³ Thus, if the pretence is that A. was possessed of so much money, there should be an averment that the defendant knew it to be untrue.⁴ So, that the defendant knew the note in question to be a false note.⁵

["With intent to defraud B."] A representation to one partner is, probably, a representation to all. So, that a person who pretended to A. only, must not be acquitted because the indictment contains the words "A. and others." At all events, "and others" is surplusage.⁶

Joinder.] In *Young v. The King* (in error),⁷ it was held, that several persons might be joined in the same indictment for the same cheat. If the evidence be complicated, it may be separated

¹ *R. v. Bullock*, 25 L. J. M. C. 92. There was a general verdict, but separate sentences.

² *R. v. Marsh*, Den. 505; 19 L. J. M. C. 12. And *R. v. Martin*, and *R. v. Morton* were cited.

³ *R. v. Perrott*, 2 M. & S. 379.

⁴ *R. v. Henderson*, ut supra, Car. & M. 328.

⁵ *R. v. Philpotts*, 1 Car. & K. 112. *R. v. Gruby*, 1 Cox, 249.

⁶ *R. v. Kealey*, Den. & P. 68; 20 L. J. M. C. 57.

⁷ 3 T. R. 98.

for each particular defendant.¹ And by Buller, J., "This is not like the case of a conspiracy, where the whole story must be taken up in detached pieces at different times to charge the different actors. If, however," continued the learned judge, "any authority were necessary, a case happened about a year ago, which is stronger than the present. Three persons were indicted on the Black Act for shooting at the prosecutor; they were all charged with the single act, and the indictment was held by all the judges of England to be sufficient."² And in the same case, a joinder of different cheats in the same indictment was likewise held to be proper. And by Grose, J., "It is no objection in the case of felonies, still less is it so in misdemeanors."³

Evidence.] The evidence chiefly applicable to an indictment for false pretences is:—1st, that the prisoner made a pretence; 2ndly, that in consequence of such pretence he obtained the property mentioned in the indictment. Mr. Justice Taunton appears to have laid down the law in a case at Hereford, which, correct as it may be, savours much of an encouragement to dishonesty. The prisoner pretended he had been sent by his master to B. for 2*l.* or 3*l.* to pay for wheat. B. said he had no small money, but he would let him have a 10*l.* note. Taunton, J.: "The prisoner asks for one thing and obtains another. He did not obtain the 10*l.* note by means of the pretence,⁴ but through the imprudence of the prosecutor. I think that is not sufficient."⁵ And 3rdly. That the pretence so put forth was false.

If part only of the pretences be proved, such part being the cause of the successful deceit, it will suffice. This point was determined by the judges in a case where several pretences were laid in different counts, and some were satisfactorily brought before the jury, whilst others failed in proof. This alternation took place in a majority of the counts respectively, of which there were six, and there was a general verdict of guilty. The conviction was affirmed.⁶ The same doctrine has likewise been maintained in a more recent case.⁷ The defendant pretended that a certain vessel was in Penarth, H., master, B., mate, and that 3*l.* were wanted to pay pilotage. This evidence was deemed sufficient.⁸ The defendant came to a grocer, and said he had received an order for his quarter's salary. He then showed a kind of receipt, and asked for 15*l.*, which he obtained, and gave a receipt affirming the payment of the salary. It was said, that as the indictment only charged the receipt of an order, it was insufficient, as other pretences had been proved. It was left to the jury,—1st, whether the pretence laid was used by the defendant; 2nd, whether the money was paid

¹ 3 T. R. 103, by Lord Kenyon.

² Id. 105.

³ Id. 107.

⁴ *Query*, "If the pretence had not been used, the prisoner would not have obtained the note." Id.

⁵ *R. v. G. Smith*, 2 Russ. C. M. 312.

⁶ *R. v. Hill*, Russ. & Ry. 190.

⁷ *R. v. Dale*, 7 C. & P. 352.

⁸ *R. v. Barvisse*, 5 Cox, 55.

on the strength of it; 3rd, whether false; 4th, and with intent to defraud. The court held the direction right, and that there was no variance.¹ A second attempt to receive a sum of money upon a false pretence of authority was held insufficient to prove a false pretence of a previous kind charged in the indictment.² But although it thus appears unnecessary to show all the pretences specifically as laid, it is absolutely requisite to be correct in such as are relied upon. Thus the defendant was charged with defrauding M. B. of 106*l.*, by means of a pretence, that he, the defendant, had paid a certain sum of money into the Bank of England. The prosecutor, however, when called, proved that the defendant said to him, "the money has been paid at the bank," not that the defendant had paid it. And Lord Ellenborough directed an acquittal, upon the ground of the variance.³ So, if a statute mention a particular thing, as a basket, and the indictment describe it as a parcel, the variance will be fatal in an indictment upon that statute.⁴ The defendant was charged with having defrauded the countess of Ilchester under the pretence of a counterfeit ticket for the carriage and portage of a certain parcel. The servant of the countess paid the sum said to have been fraudulently obtained, and it was objected, that the servant, and not the countess, had been cheated, for although the countess had subsequently repaid her servant, yet at the time of the fraud this money was the sole property of the servant. However, the servant swore that he had upwards of 9*s.* 10*d.*, the sum demanded, at that time in his possession on account of his mistress, and Lord Ellenborough then said, that the averment was sustained. The defendant was convicted.⁵ So where part of the pretence was that a family lived at Stratford-on-Avon, whereas they lived two miles from it. This was a variance.⁶ Evidence that cash could not be obtained for certain notes alleged to be good is sufficient. Bankruptcy need not be proved. It is enough to show the stoppage of the bank, *and the scienter*.⁷ Where P. pretended to a benefit society, that his wife was dead, and then upon demand of the stewards, produced a false certificate,—it was held, that the real pretence was the death, and that the objection, that the pretence was not charged to be by the false certificate, was invalid.⁸ Evidence of having obtained another sum of money than that charged within a week from the time of the offence, was held not admissible.⁹

Parole evidence may be given of a lost letter which contained the false pretence in question.¹⁰ And parole evidence may be given of the false pretences, although the prosecutor makes use of a deed as part of the case. As, where the prosecutor advanced 200*l.* upon

¹ *R. v. Hewgill*, Dears. 315.

² *R. v. Holt*, 30 L. J. M. C. 11; Bell, 280.

³ *R. v. Plestow*, 1 Campb. 494.

⁴ *R. v. Douglass*, Id. 212.

⁵ *R. v. Douglass*, Id. 213.

⁶ *R. v. Henry and another*, 1 Cox, 101.

⁷ *R. v. Smith*, 6 Cox, 314.

⁸ *R. v. Dent*, 1 Cox, 15; 1 Car. & K. 249.

⁹ *R. v. Holt*, 30 L. J. M. C. 11; Bell, 280.

¹⁰ *R. v. Chadwick*, 6 C. & P.

181.

the faith of receiving certain annual proceeds from an office, but there was, moreover, a deed of partnership, the consideration for which between the prosecutor and the prisoner was stated to be 200*l.*, to be paid by the prosecutor, and which deed was adduced in evidence. It was objected, that as the deed was silent with regard to the pretences charged, but, on the contrary, that it represented the 200*l.* as to be given in consideration of a general partnership, the parole evidence must be rejected, and an acquittal directed. The recorder, however, proceeded, and the conviction was held right.¹ Two conversations at separate times may be connected so as to constitute a charge of false pretence. The jury are to decide.² A plea of infancy is not receivable against a minor who pretended that he was of full age. The plea might have been put in without his knowledge.³

Trial.] It will be observed, that the Act makes the receiving by virtue of the false pretence the substantive crime, and therefore, where the pretence was set on foot in Herefordshire, but the cheat took effect in Monmouthshire, it was held, that the trial ought not to have been in Herefordshire.⁴ A post-office order was, at the prisoner's request, posted in Middlesex. The prisoner received it in Kent. He had, however, constituted the postmaster in Middlesex his agent, and, therefore, he was rightly convicted in Middlesex. Perhaps, he might have been tried in Kent likewise.⁵ So, where the false pretence was made in the borough, by the delivery of a letter written in the county, it was held that the prisoner might be tried in the borough, under 7 Geo. 4, c. 64, s. 12, for the postmaster was his agent.⁶ It is necessary to state in a case reserved, what the direction to the jury was, otherwise it may be that the only point upon which a conviction could be sustained, was not submitted to their notice.⁷

Restitution.] There was no restitution in the case of a conviction for a fraudulent taking as the law formerly stood. But the statute 24 & 25 Vict. c. 96, s. 100, permits restitution in cases of any felony or misdemeanor under that Act, in stealing, &c., any chattel, money, &c., unless any valuable security shall have been paid or discharged *bonâ fide*, or, being a negotiable instrument, shall have been *bonâ fide* taken or received by transfer or delivery for a just and valuable consideration, without notice, or reasonable cause to suspect that it had been improperly obtained. Prosecutions against bankers, trustees, &c., intrusted with the possession of goods or documents of title to goods, are excepted.

¹ *R. v. Adamson*, 2 Moo. C. C. 286; 1 Car. & K. 192.

² *R. v. Welman*, 21 L. J. M. C. 118; Dears. 188.

³ *R. v. Walker*, 1 Cox, 99. Whether the statement made by him be admissible, qu.? *R. v. Simmonds*, 4 Cox, 277.

⁴ *R. v. Buttery*, cited, 4 B. & A. 179.

⁵ *R. v. Jones*, Den. 551; 19 L. J. M. C. 162; 3 Car. & K. 346.

⁶ *R. v. Leech*, 25 L. J. M. C. 77.

⁷ *R. v. Keighley*, Dears. & B. 145.

CHAPTER XXVII.

OF FELONIES RELATING TO THE RECEIPT OF STOLEN GOODS.

OUR inquiries in this place, with respect to receivers of stolen goods, will be principally directed to offences of that nature which are made felonies by statute, inasmuch as the receiver, although an offender at common law, is only liable to be prosecuted in that respect for a misdemeanor; and, we may add, that he is only triable for a misdemeanor under some provisions even of the statute law. The principal enactment,¹ with reference to the general receiver of stolen goods, was the 7 & 8 Geo. 4, c. 29, s. 54; and now, by 24 & 25 Vict. c. 96, s. 91, whosoever shall receive any chattel, money, valuable security,² or other property,³ the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof shall amount to a felony, either at common law or by virtue of this Act, knowing the same to have been feloniously stolen, &c., shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable to penal servitude not exceeding fourteen nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen years, with or without whipping. Provided, that no person, howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence.

And by sect. 95, whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, converting, or disposing whereof is made a misdemeanor by this Act, knowing the same to have been unlawfully stolen, taken, obtained, converted, or disposed of, shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver shall be liable to

¹ The following Acts were repealed by 24 & 25 Vict. c. 101: 21 Geo. 3, c. 69 [receivers of stolen pewter]; 22 Geo. 3, c. 58 [buyers and receivers of stolen goods].

² See sect. 1. *R. v. Gill*, Russ. & Ry. 384.

³ See *R. v. Davison*, 6 C. & P. 177. No matter whether for profit, or merely to aid the principal, *Gurney, B.*

penal servitude not exceeding seven nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen years, with or without whipping.

There may be three modes of proceeding against a receiver. 1st,—as a substantive felon, whether the principal has or has not been convicted, or is amenable to justice. 2nd,—as an accessory after the fact when the principal felon has been previously convicted, or been amenable to justice. 3rd,—jointly with the principal in the same indictment. There was formerly considerable difficulty in determining whether the offence of the receiver amounted to felony or misdemeanor, where there had been no conviction of the principal, the majority of the judges having, upon one occasion, been of opinion that it was only a misdemeanor;¹ but upon another, by nine to six, that it was a felony.² There were three counts. Two charged A. and B. with stealing, the third, B. with receiving; A. was acquitted, and appeared against B. His evidence showed B. to have been both accessory before the fact and receiver. There was a general verdict of guilty against B., and the conviction was affirmed. Since 11 & 12 Vict. c. 46, s. 1,³ the accessory before the fact is a substantive felon, and there was no inconsistency in the general verdict against B. as accessory and receiver.⁴

Summary conviction.] By 24 & 25 Vict. c. 96, s. 97, (which succeeds 7 & 8 Geo. 4, c. 29, s. 60,) where the stealing or taking of any property whatsoever is by this Act punishable on summary conviction, either for every offence, or for the first and second offence only, or for the first offence only, any person who shall receive any such property, knowing the same to be unlawfully come by, shall, on conviction thereof before a justice, be liable, for every first, second, or subsequent offence of receiving, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property is by this Act made liable.

An instance of summary conviction is when a dealer in old metals is found in possession, without lawful excuse, of stolen property. But, in this case, the dealer may be indicted for a felonious receipt, notwithstanding the Act, provided that he be not proceeded against in both ways.⁵

Who a receiver.] It has been said that the distinction between a principal and an accomplice is sometimes so nice as to be scarcely distinguishable; and, in the case of receivers, the line has occa-

¹ *R. v. Cale*, 1 Moo. C. C. 11.

² *R. v. Solomon*, 1 Moo. C. C. 292, overruling *R. v. Cale*. And see 3 Wm. & M. c. 9, s. 4; 10 Geo. 3, c. 48; 3 Geo. 4, c. 24; all which are, however, repealed; and, for

the cases under the old law, see 1 Ch. Burn. 36.

³ Now 24 & 25 Vict. c. 94, s. 2.

⁴ *R. v. Hughes*, Bell, 242; 8 Cox, 278.

⁵ 24 & 25 Vict. c. 110, s. 4.

sionally been drawn with some difficulty. The rule seems to be that, if there be one continuing transaction, all parties are principals. The master of a boat was employed for the purpose of bringing barilla on shore. Some of his servants, without his privity, removed a part of this barilla, and concealed it in another part of the boat; but the master afterwards helped in removing this parcel of the barilla from the boat for the purpose of carrying it off. Here the master was held to be a principal, according to the charge against him in the indictment, and not a receiver nor an accessory.¹ It was determined to steal the remainder of this barilla, and, accordingly, certain persons, who had agreed to purchase it, assisted in removing it from the warehouse, where it had arrived from the boat, for the purpose of theft. These persons were held to be principals also, on the ground of the whole being one continuing transaction.² And so it was where a lodger threw out the goods from a window to an accomplice waiting outside, for there was no break in the transaction, and, accordingly, the conviction of the accomplice as a receiver was held wrong.³ Nevertheless, as soon as the asportation is complete, the larceny is at an end. Therefore, where certain butter and cheese were stolen, and put into the street, and then the prisoner was fetched, who helped to carry them away, the judges held that he could not be considered as a principal, and that the conviction was wrong.⁴ So where a waggoner handed his master's hay to the ostler, the ostler was held rightly charged as a receiver, because the asportation of the hay was complete as soon as it had been removed from the waggon by the waggoner.⁵ But where A. went into the warehouse and fetched a piece of pork, which he gave to the prisoner outside, and who could not see A. when he took the pork, but might have rendered him aid, the court said he was a principal in the second degree, and could not be convicted as a receiver.⁶

Goods received.] The receiving must be of the same property which was stolen. Therefore, when the prisoner was charged with receiving six notes for 100*l.* each, and it turned out that the thief had changed these notes into notes of 20*l.*, some of which the prisoner received, the learned judge directed an acquittal as to *him*. The indictment charged the prisoner with receiving the said promissory notes.⁷ But if the common description of the property stolen should be altered between the larceny and the receiving, the usual description will suffice, and the offence is complete. As where C. was charged with stealing a sheep, and

¹ *R. v. Dyer and another*, East, P. C. 767. in the case of some horses. And *R. v. King* was relied on.

² *R. v. Atwell and others*, East, P. C. 768. ⁵ *R. v. Gruncell*, 9 C. & P. 365.

³ *R. v. Owen*, 1 Moo. C. C. 96. ⁶ *R. v. Perkins*, Den. & P. 459;

⁴ *R. v. King*, Russ. & Ry. 332. S. P. *R. v. Makin and another*, Id. 333, *n.* *R. v. Kelly*, Id. 421, 21 L. J. M. C. 152. There was no count against the prisoner for stealing.

⁷ *R. v. Walkley*, 4 C. & P. 132.

G. with receiving 20lbs. of mutton. The judges held the conviction proper.¹ Again, the first count of an indictment charged the killing of a sheep with intent to steal, the second charged the receiving of mutton so stolen as aforesaid, the third charged the receiving of mutton from an evil-disposed person with a guilty knowledge. And after some consideration, the prisoners were convicted upon this indictment and sentenced.² So where it was alleged, that a certain evil-disposed person stole a quantity of gold dust and that the prisoners feloniously received the same, the conviction was holden good against the receivers, after much debate and consideration.³

What a receiving.] An act of collusion between the party robbed and the thief in order to implicate a receiver was held in one case sufficient to convict the latter. As where a lad, being connected with the prisoner, a receiver, stole a brass weight from his master. The brass weight was taken from the lad in the presence of his master, but returned to him with the consent of the master in order that it might be sold by the lad to the prisoner. The weight was sold, and the man being indicted for receiving it from an evil-disposed person, well knowing it to have been stolen, was convicted and sentenced.⁴ But this case was overruled upon a similar occasion, for the master had resumed possession of the goods, and the seller was his agent, and the bargain valid.⁵ Whether this receiving may be against the will of the original taker remains to be decided. One W. stole a watch. He was taken with the prisoner. Whilst these persons were in custody, W. gave information to the prisoner as to where the watch was. The prisoner was discharged, and he immediately went to the place pointed out, and took the watch, and sent his wife to pawn it. Being indicted for receiving, it was held, that if the prisoner took the watch in consequence of W.'s information, he might be convicted, but on the contrary, if the taking was against W.'s will, it might be a question whether the charge for receiving could be maintained.⁶ It is not, however, necessary that a person should be indicted for receiving, because he happens to show the spoil which another has taken in his absence, if he himself be privy to and engaged in the dishonest transaction. As where two persons combined to rob the prosecutor. One took some oats, and hid them with the knowledge of the other; the other person immediately came up, and removed the oats from the hiding place, his confident being a few yards off. Both were held to be principals in the larceny. There was no receiving.⁷ But there must, of course, be a guilty knowledge.

¹ *R. v. Cowell and another*, East, P. C. 617. See *R. v. Hartall and others*, 7 C. & P. 475.

² *R. v. Wheeler and others*, 7 C. & P. 170.

³ *R. v. Caspar and others*, 2 Moo. C. C. 101; 9 C. & P. 289.

⁴ *R. v. Lyons*, Car. & M. 217.

⁵ *R. v. Dolan*, Dears. 436; 24 L. J. M. C. 59.

⁶ *R. v. Wade*, 1 Car. & K. 739.

⁷ *R. v. M'Carthy*, 2 Car. & K. 379.

As where the receiver was charged with a fraudulent knowledge that certain goods had been obtained under false pretences: here the jury were not satisfied as to the knowledge.¹ So, in larceny, a general knowledge of the circumstances without some proof of knowledge of the stealing will scarcely suffice.² Belief, without actual knowledge, is said to be sufficient.³ There must also be a receipt. A. the wife of B. was apprehended in the act of claiming a hamper of stolen goods, but she did not get possession of them. The conviction was wrong.⁴ It was once endeavoured to be argued, that recent possession might be evidence of receiving, but Little-dale, J., laid it down as a rule, that the property must be shown to have been in the hands of some one else before it came to the prisoner.⁵ This point came afterwards to be much considered in a case where the idea of manual possession was chiefly in question in contradistinction to a receipt *malo animo*. Eight judges thought that there must be, not perhaps a *manual* possession in so receiving stolen property, but a dominion over the property. Four relied upon the simple fact of *malus animus*. Two men stole fowls, put them into a sack, and brought them into the house of the prisoner's father, in order to sell them to the prisoner. All three went into the stable, the thieves carrying the sack, and the prisoner the candle. But the prisoner had no hold of the sack, nor did he touch the fowls. The door of the stable was shut, and the men were bargaining for the fowls when the police came in. The conviction was held bad as to the receiver.⁶ Accordingly, where the prisoner appeared to have a dominion over the property stolen, and the jury found that the watch, the article taken, was under the prisoner's control, though not in his manual possession, the conviction was sustained.⁷ But it is not necessary that the prisoner should have had any interest or profit with respect to the property charged to have been feloniously received. It is sufficient if the receiving be for concealment or to assist the thief.⁸

Principals and accessories.] By 24 & 25 Vict. c. 96, s. 98, in case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except only a receiver of

¹ *R. v. Rymes*, 3 Car. & K. 327.

² *R. v. Adams*, 1 Fost. & F. 86. Or it may be said of some illegal taking, for the prisoner, surely, needs not to have all the incidents of larceny in his mind.

³ *R. v. White*, 1 Fost. & F. 665.

⁴ *R. v. Hill and others*, Den. 453. Whether the feme covert ought not to have been acquitted by reason of the coercion, the stolen goods having been sent to her by

her husband, qu.? See Id. 456; 18 L. J. M. C. 199; 2 Car. & K. 978.

⁵ *R. v. Cordy*, 2 Russ. C. M. 248. *R. v. Densley*, 6 C. & P. 399, Patteson, J.

⁶ *R. v. Wiley*, 20 L. J. M. C. 4; Den. & P. 37.

⁷ *R. v. Smith*, 24 L. J. M. C. 135; Dears. 494.

⁸ *R. v. Richardson*, 6 C. & P. 335. *R. v. Davis*, 6 C. & P. 177.

stolen property) shall be liable to imprisonment not exceeding two years, with or without hard labour, and solitary confinement; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act shall be liable to be indicted and punished as a principal offender.¹

And by sect. 99, whosoever shall aid, abet, counsel, or procure the commission of any offence which is by this Act punishable on summary conviction, either for every time of its commission, or for the first and second time only, or for the first time only, shall, on conviction before a justice, be liable for every first, second, or subsequent offence of aiding, abetting, counselling, or procuring, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence as a principal offender is by this Act made liable.

The counts for receiving are not restricted. There may be as many as for stealing.²

Indictment.] By 24 & 25 Vict. c. 96, s. 92, in any indictment containing a charge of feloniously stealing any property it shall be lawful to add a count or several counts for feloniously receiving the same, or any part or parts thereof, knowing the same to have been stolen, and in any indictment for feloniously receiving any property knowing it to have been stolen, it shall be lawful to add a count for feloniously stealing the same; and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty, either of stealing the property, or of receiving the same, or any part or parts thereof, knowing the same to have been stolen; and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty, either of stealing the property or of receiving the same, or any part or parts thereof, knowing the same to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same, or any part or parts thereof, knowing the same to have been stolen.

By sect. 93, whenever any property whatsoever shall have been stolen, taken, extorted, obtained, embezzled, or otherwise disposed of in such a manner as to amount to a felony, either at common law or by virtue of this Act, any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding that the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.

¹ See 24 & c. 25 Vict. 94, as to accessories, *passim*. This clause has the words "*principal in the first degree*," otherwise the two Acts seem much the same.

² *R. v. Beeton*, Den. 414. *Per cur.* without argument; 18 L. J. M. C. 117; 2 Car. & K. 960.

By sect. 94, if upon the trial of any two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict, upon such indictment, such of the said persons as shall be proved to have received any part or parts of such property.

The indictment states, that one A., on, &c., feloniously did steal, &c. [the property] of the goods and chattels of one B., and that C., on, &c., did feloniously receive the goods [the chattels above mentioned] so as aforesaid feloniously stolen, against the form, &c. This indictment is against the principal and the receiver. Here it is worthy of remark, that in order to make a conviction sensible, the words "so as aforesaid feloniously stolen" may be rejected. As where A. was indicted for stealing in one count, and in another for receiving the goods "so as aforesaid," &c. The jury acquitted A. of stealing, but found him guilty of receiving. It became necessary to reject the "so as aforesaid," &c., by reason of the acquittal for stealing.¹ The indictment for simple receiving states, that A. feloniously did receive [the property] of the goods and chattels of B., then lately before stolen by a certain evil-disposed person, the said A. then well knowing the said goods and chattels to have been feloniously stolen, against the form, &c. There may also be a joint indictment for stealing and receiving. The indictment under sect. 95 charges, that A. unlawfully did receive [the property] of the goods and chattels of B. by one C., or by a certain evil-disposed person then lately before [state the misdemeanor], the said A. well knowing, &c., against the form, &c.

If a receiver be indicted in one count as an accessory, and in another as a substantive felon, it is no longer in the discretion of the judge to quash the indictment. And, before this, where there appeared to be but one offence, and, consequently, there could be no prejudice to the prisoner, the judge would not entertain the objection, and the defect, if any, must be taken advantage of, upon demurrer; nor can it afford a ground, as of right, for quashing the indictment.² The substantive offence might have been always joined with a count for merely receiving. And where two were charged with separate and distinct acts of receiving, it was held to be too late to object after verdict.³ Three were charged with larceny, and two others as receivers, for receiving separately. Two counts charged the receivers with substantive felonies separately. The principal being acquitted, it was held that the receivers might be convicted upon the last two counts.⁴ A person knew that certain goods had been stolen. He directed his servant to take

¹ *R. v. Huntley*, 29 L. J. M. C. 170, Bell, 238; *R. v. Craddock*, 4 Cox, 409. In *R. v. Craddock*, the charge was for receiving goods as aforesaid so feloniously stolen as aforesaid. It was urged that "so as aforesaid," meant "so as afore-

said stolen" by the prisoner; but the court affirmed the conviction.

² *R. v. Austin*, 7 C. & P. 796.

³ *R. v. Hayes*, 2 Moo. & Rob. 156.

⁴ *R. v. Pulham*, 9 C. & P. 280.

them into his (A.'s) premises. The servant did so, but in A.'s absence. It was held, that both might be jointly indicted as receivers.¹ B., C.'s servant, delivered stolen goods to A. with A.'s knowledge. It was held, that there might be an indictment against both for larceny.² Again, we have adverted in a former page³ to some cases, where the words "to the jurors unknown," in indictments, have been found deserving of consideration. This point applies occasionally to receivers, because the theft may have been accomplished by an unknown individual, and yet the felonious act may be clearly traced to the receiver. And it was accordingly deemed right so to allege the felony where the principal was unknown.⁴ But if the party should happen to be known to one of the witnesses, upon an indictment containing the words "to the jurors unknown," so that such persons might have gone before the grand jury, a new indictment will be necessary;⁵ and, on the other hand, if the charge fail as to the party named, it will be no defence to a fresh indictment, alleging a stealing by a person unknown, that an acquittal has taken place upon the other. The indictment may allege, either that the property was taken by a person unknown, or by some other than the party originally named.⁶ On the other hand, where the receipt was charged upon A. as having received from a person unknown, and the proof was that the thief handed the property to B., and that B. gave it to A., the judge said that the proof should have been of the receipt from the person who actually stole it, and he stopped the case.⁷ And it is no objection that the same grand jury, who have found a bill charging a felony by some person "to the said jurors unknown," have also found another bill which imputes the crime to a person by name. Upon such an occasion,⁸ the judges were of opinion that the record, stating the felon to be unknown, was not negatived by the other record. Nevertheless, the modern doctrine is that, to allege the stealing to have been done by an evil-disposed person is sufficient, and that it needs not to be mentioned that the principal felon is unknown; and likewise that his name, known, need not be given.⁹ Time and place need not be stated in the allegation of the principal offence. It is sufficient to mention it in charging the receiver.¹⁰ But the nature of the offence itself should appear; and, consequently, an indictment which stated that the prisoner received certain goods, knowing the same to have been "unlawfully obtained, taken, and carried away," was held insufficient, for want of adding that the goods had been obtained by false pretences, that being the charge intended.¹¹ The indict-

¹ *R. v. Parr*, 2 Moo. & Rob. 46.

² *R. v. Hornby*, 1 Car. & K. 305.

³ *Ante*.

⁴ *R. v. Thomas*, East, P. C. 781.

⁵ See East, P. C. 651.

⁶ *R. v. Woolford*, 1 Moo. & Rob. 384.

⁷ *R. v. Elsworthy*, 1 Lew. 117; 20 L. J. M. C. 32.

⁸ *R. v. Bush*, Russ. & Ry. 372.

⁹ *R. v. Stott*, East, P. C. 780.

¹⁰ *R. v. Jervis*, 6 C. & P. 156.

¹¹ *R. v. Wilson*, 2 Moo. C. C. 52.

ment for a substantive felony is now the most safe and expedient mode of proceeding. There needs no averment that the principal has not been convicted,¹ because the offence is the same, whether such conviction shall have taken place or not. But if the indictment be framed against the prisoner, as an accessory after the fact, and the principal has been convicted, the record of that conviction should be set out and proved. And as an erroneous attainder, unreversed, stands good against an accessory, it is no objection to say that the record of conviction is full of errors. As that the prisoner was amerced; that no issue appeared to have been joined, &c.² It is sufficient to state that the principal was duly convicted, without adding that judgment was passed upon him.³ The word "been" was once, oddly enough, left out in the sentence, "knowing the same to have [been] feloniously stolen," so that the words stood, "to have feloniously stolen." The judges thought that, as the guilty knowledge was the gist of the offence, the mistake was fatal; but afterwards they took time to consider.⁴

Witness.] It has already been noticed that the principal felon may be a witness against the receiver, and likewise that a receiver may controvert the guilt of his principal. With regard to the evidence of a joint receiving, it should be remarked that the combination should be accurately borne out in proof. Two prisoners, mother and son, were charged with receiving pork; but it turned out upon their voluntary statement, that the receiving did not take place at the same time. The mother, in fact, took possession of the pork, which was found in her house, and which she declared to be her son's meat. The question was, whether she had been rightly convicted:—1st. Because the offence was complete when the woman received the pork; 2ndly. Because, if there was a receipt at all, it was from her son. The indictment, therefore, would be wrong in saying she had received it from a person unknown. And, as to her, the judges held, that it was necessary to have proved a joint receipt upon the joint charge; that, in this case, the receipt was separate, and so, that, as to the mother, the conviction was wrong.⁵

Judgment should be passed upon him who appears to have committed the first felony in point of time, and a verdict of acquittal should be taken for the other.

There was a search warrant against a prisoner in respect of some

¹ See *R. v. Baxter*, Leach, 578; 5 T. R. 83. *R. v. Pollard*, Leach, 580, cited from 2 Ld. Raym. 1370; 8 Mod. 264.

² *R. v. Baldwin*, 3 Camp. 265; Russ. & Ry. 241.

³ *R. v. Hyman*, Leach, 925.

⁴ *R. v. Kernon*, 2 Russ. C. M. 251.

⁵ *R. v. M. and J. Massingham*,

1 Moo. C. C. 257. *R. v. Dovey and another*, 20 L. J. M. C. 105; Den. & P. 86. The reporter adds a qu. ? whether upon a charge of receiving from T.S., the receiving from T.S. must be proved, the statute making it criminal to receive without regard to the person from whom received. 1 Moo. C. C. *ut supra*.

stolen iron. He was indicted for receiving 25lbs. weight of tin ; but there was a separate indictment for stealing the iron.¹ It was held, that evidence of his conduct and declaration upon the occasion of the search warrant, and likewise with reference to some brass found upon the premises at the same time, were admissible against him, the whole being one entire transaction. There was a third indictment against him for receiving the brass. Yet his endeavour to conceal the brass was allowed in evidence against him upon the trial of the indictment for receiving the tin ; and his wife's behaviour in carrying away some tin under her cloak from a warehouse on the premises after the husband's removal in custody, was likewise received.² Where persons were charged as principals, and there was a doubt whether one of them had not been the receiver, the matter was considered proper for the consideration of the jury.³ The court will not sanction evidence of the prisoner's having had goods in possession belonging to another person than the prosecutor, and that those goods were stolen. The rule respecting uttering notes has gone far enough. Under such circumstances a conviction was quashed.⁴ And Alderson, B. cited a case to the same effect tried before Talfourd, J., and himself at Liverpool, when they rejected similar evidence, of which Lord Campbell approved in the case before him.⁵

At one time the principal had been authorized to sell goods to the prisoner. It should be proved that the prisoner had knowledge that the authority to sell had been withdrawn, and, in the absence of such proof, he ought to be acquitted.⁶

Trial.] By 24 & 25 Vict. c. 96, s. 96, whosoever shall receive any chattel, money, valuable security,⁷ or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, converted, or disposed of, may, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, be dealt with, indicted, tried, and punished in any county or place in which he shall have had any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, &c., in the county or place where he actually received such property.

The trial, therefore, may be had—1st. Where the receipt took place. 2nd. Where the stolen property is found on the receiver ;

¹ *R. v. Dovey*, ut supra.

² *R. v. Mansfield*, Car. & M. 140 ; 5 Jur. 661.

³ *R. v. Butteris*, 6 C. & P. 147.

⁴ *R. v. Oddy*, 20 L. J. M. C. 198. See *R. v. Nicholl*, 1 Fost. & F. 51. But the judges still adhere to the rule in utterings. *R. v. Green*, 3 Car. & K. 209.

⁵ That case was *R. v. Sirrell*, cited, Den. & P. 267, 273. See a case of evidence sufficient to go to the jury, *R. v. Robson*, Dears. 400.

⁶ *R. v. Wood*, 1 Fost. & F. 497.

⁷ See sect. 1.

3rd. Where the principal himself may be tried. If the larceny be in the county of A. and the goods be received in B., yet the trial as to both may be in A., and the indictment may allege the respective offences of stealing and receiving to have been in the county of A.¹ The prisoner received a bank note *out of* Wilts, knowing it to have been stolen, and sent it to bankers in Wilts requesting them to cash it. The post-office authorities were, in this case, agents for the prisoner, and he was held to have been rightly convicted in Wilts.²

Verdict.] A verdict of acquittal on two counts for larceny will not vitiate a verdict of guilty on the third count for receiving, although the third count contains the words "so as aforesaid feloniously stolen." It was urged for the prisoner that the verdict negatived his having stolen the goods, and that the words should have been "before then feloniously stolen." But the court were of another opinion; and, by Pollock, C.B., some of the court think that the words "so as aforesaid," do not import into that count the words "stolen by Henry Craddock." The others held, that supposing these words to have been imported, the finding on that count was, nevertheless, perfectly valid.³ A. was found guilty of embezzlement and B. of receiving. B.'s conviction was right, for, by 7 & 8 Geo. 4, c. 29, s. 47, every person guilty of embezzlement shall be deemed to have stolen the property in question.⁴ The prisoner may appear to have been a principal in the second degree in the stealing, and yet may be found guilty upon a count for receiving.⁵

¹ *R. v. Hinley*, 2 Moo. & Rob. 524. for the prisoner, but distinguished by the court. 20 L. J. M. C. 32.

² *R. v. Cryer*, 26 L. J. M. C. 192; Dears. & B. 324. See *R. v. Frampton*, 27 L. J. M. C. 229; 8 Cox, 16.

³ *R. v. Craddock*, 20 L. J. M. C. 31; Den. & P. 31. *R. v. Wool-* ⁴ *R. v. Frampton*, ut supra.

ford, 1 Moo. & Rob. 384, was cited ⁵ *R. v. Hilton and another*, Bell, 20; 28 L. J. M. C. 28.

CHAPTER XXVIII.

OF PIRACY.

Piracy.] Piracy is a marine robbery.¹ But at common law it was not a felony, being an offence of a special nature, for which the criminal was responsible, upon the principle that one who was considered to be *hostis humani generis* ought to be liable for such acts of depredation on the high seas, as if committed on land, for they would be felonious there. However, the statutes which were passed for the purpose of repressing piratical outrages created the offences felonies which came within their purview. As the 11 & 12 Will. 3, c. 7, s. 8,² with respect to piracy and robbery committed by a subject or denizen, because it is not piracy for one enemy to plunder another. The motive of laying hands upon a captain and carrying away the ship is well explained by the conduct of the crew afterwards. And evidence that the prisoner only desired a redress of grievances will not alter the character of the offence. The indictment against two persons for piracy charged them with betraying their trust by attempting to corrupt another person to run away with the ship, and with making a revolt, and endeavouring so to do. They were convicted upon the two latter counts. But as there was some evidence of ill usage, although there was also proof of an ulterior object, it occurred to the prisoners' counsel, that in order to satisfy the law, the object must have been to run away with the ship, or to enable the crew to commit an act of piracy, and that a disturbance for the sake of redressing grievances could not be within the Act, 11 & 12 Will. 3. But the judges affirmed the conviction.³ Great stress is laid upon the fact of the object being to deprive the captain of his command. This was making a revolt under the above statute, and no allegation of grievances can alter

¹ 1 Hawk. c. 37, s. 4. Making no lawful impediment, &c. 12 & 13 Vict. c. 106, s. 251. *R. v. Swan*, 4 Cox, 108.

² Which repealed in this respect the stat. 5 & 6 Vict. c. 122. Acts done against this latter statute would now be prosecuted under 12 & 13 Vict. c. 106. But there is

an exception of the recovery and application of penalties arising from summary proceedings. The repeal of 6 Geo. 4, c. 16, revived 5 Geo. 4, c. 98. But the schedule of repeal in 12 & 13 Vict. c. 106, destroyed the 5 Geo. 4, c. 98.

³ *R. v. Hastings and another*, 1 Moo. C. C. 82.

the case.¹ Unreasonable and vexatious conduct on the part of the captain, or unjust orders, are not ground of defence, but proof that the crew would have been in danger of their lives had they not imprisoned him, was an answer to the charge under 11 & 12 Will. 3, c. 7, s. 9.²

The words, "to be tried as pirates," under 18 Geo. 2, c. 30,³ meant that the parties should substantially be deemed pirates. They were charged with adhering to the king's enemies, and cruising in a hostile manner, and they might have been tried for high treason, under sect. 3 of that Act.⁴ An attempt to defraud underwriters, although a criminal offence, has never been considered piracy. As where the master of a vessel ran certain goods on shore in England, and having burned the ship, protested both ship and cargo, with a dishonest intent. This was held to be a breach of trust, but no felony, and an acquittal was directed.⁵ It could not be piracy to convert the goods in a fraudulent manner, until the determination of the special trust.⁶ Subsequent statutes, however, have made these acts felonies, though not piracies. It is presumed that the 32 Geo. 2, c. 25, concerning the illegal ransom of neutral vessels made prizes, was superseded by subsequent statutes. Indeed, all such acts are said to have expired with the French war, which was at that time in progress.⁷

The carrying away of slaves is not confined to places within the British dominions.⁸ Nor needs it to be proved that the ship chartered with goods on the outward voyage, but intended for slave dealing, was engaged to bring back slaves in return. The existence of a slave adventure and the fact of being engaged in it is sufficient.⁹ The reader is referred to the case of *R. v. Serva and others*,¹⁰ for further information upon the law of piracy. The questions of piracy *jure gentium*, and piracy under treaties, and piracy under municipal laws, are there discussed in some degree. This case will be found at large in a future page, where the subject of slave dealing is considered.

By 7 & 8 Vict. c. 112, s. 2, no seaman is to be taken to sea without a written agreement, which must be read over and explained to him. A seaman being charged with piracy under 11 & 12 Will. 3, c. 7, was held not to be within that Act, because

¹ *R. v. M'Gregor*, 1 Car. & K. 429.

² *R. v. Rose*, 2 Cox, 329.

³ Repealed as to piracy.

⁴ *R. v. Evans*, East, P. C. 798.

⁵ *R. v. Mason*, 8 Mod. 74; East, P. C. 796.

⁶ East, P. C. 797.

⁷ *Id.* 801, note (a).

⁸ *R. v. Zulueta*, 1 Car. & K. 215.

⁹ *Id.* In this case it was likewise held that the slave-trading papers found upon such a chartered vessel, but not traced in any way to the knowledge of the prisoner, was not admissible in evidence against him.

¹⁰ Den. C. C. 104—157.

he had not signed nor made any written agreement under the Act of Victoria.¹

Indictment.] The indictment for piracy sets out, that A. upon the high seas, on board of a certain ship called —, in and upon B. piratically and feloniously did make an assault, and him the said B. did then piratically and feloniously put in fear and danger of his life, and did piratically, feloniously, and violently steal from the said B. [the property] of the goods and chattels of certain subjects of our Lady the Queen [to the jurors, &c. aforesaid, unknown] and then being in the custody and possession of the said B.

The words "piratically and feloniously" are usual, although "piratically" might, probably, include "feloniously," because piracy is declared to be felony. But an indictment at common law, should such a charge be again preferred, would omit the words "feloniously," inasmuch as piracy is not felony at common law.

The stat. 7 & 8 Vict. c. 2, s. 1 (to which reference has been made in a former part of the work) gave power to the judges of assize and gaol delivery to try all offences committed upon the high seas, and other places within the jurisdiction of the admiralty of England.

And by sect. 2, the venue was to be the same as though the offence had been committed in the county where the trial was had, but all material facts were to be averred to have been done upon the high seas. There was an indictment for larceny, subsequent to the passing of this Act, containing two counts, but neither of them stated that the offence had happened within the *jurisdiction of the admiralty*. The objection being taken, Rolfe, B., inclined in its favour, but the judgment was respited, and the witnesses were bound over to prosecute at the next assizes. The judges, however, held the conviction right.²

Trial.] By 4 & 5 Will. 4, c. 36, s. 22, the Central Criminal Court is empowered to try offences within the jurisdiction of the admiralty. And costs may be allowed under the direction of three of the justices and judges appointed as commissioners under that Act. The statutes 28 Hen. 8, c. 15, and 32 Geo. 2, c. 25, s. 20, which fixed the time for holding the admiralty sessions, are thus, with regard to the trial, superseded.³

By 7 Vict. c. 2, s. 3, offenders against the jurisdiction of the admiralty of England shall be tried as if the offence had been

¹ *R. v. Smith and others*, 3 Cox, 443.

² *R. v. Jones and another*, Den. 101. Absent:—Parke, B.; Patteson, J.; Coleridge, J.; Cresswell, J.; Platt, B.

³ As to the trial of piracy in any

of Her Majesty's islands, plantations, &c., which is to be according to the course of the common law. See 11 & 12 Vict. c. 7, s. 1, rep.; 6 Geo. 1, c. 19; 46 Geo. 3, c. 54, rep.; 12 & 13 Vict. c. 96.

committed on land within England, and all due authority shall be exercised by justices, and all proceedings had in accordance therewith, as if the offences had been committed within the county, &c. where the court is holden.¹ Hence it is important to ascertain whether the offence has happened within the admiralty jurisdiction, because, if beyond, it is not a piracy. And if the word "piratically" be found in the indictment, it cannot be rejected as surplusage.² With reference to the jurisdiction of the admiralty, as distinguished from the common law, it is not, after the new statutes, of very great importance in criminal cases. There is an alternate jurisdiction upon the opposite shore between high and low water mark. When the sea is full, the admiral has jurisdiction as long as the sea flows.³ But there has sometimes been a difficulty in determining how the dominion should be ascribed in harbours, or below the bridges in great rivers. Where the arm of the sea is not so broad but that a man may see from one side to the other,⁴ or "reasonably discern between shore and shore,"⁵ or, according to other authorities, when a person standing on one side of the land may see what is done on the other,⁶ the common-law jurisdiction is preferable, although the admiralty may even in some of these cases have a concurrent power, especially at the mouth of great rivers, or near to the sea. And as soon as we descend below the *fauces terræ*, and the great bridges, into the sea itself, where, however, there is still such an enclosure as to circumscribe the place within the body of a county, the jurisdiction is concurrent, and so it was decided in *R. v. Bruce* for murder.⁷ And Lord Coke's narrower construction of the limits of the body of a county,⁸ was, in this case, deemed erroneous by the judges.⁹ It appeared to them that the 28 Hen. 8, c. 15, "applied to all great waters frequented by ships, that in such waters the admiral in the time of Henry the 8th pretended jurisdiction, that by havens, &c., havens in England were meant to be included, though they are all within the body of some county, and the mischief from the witnesses being all seafaring men, was likely to apply to all places frequented by ships."¹⁰ It has been said, that if a larceny be committed below the bridges or in harbours, and yet within the body of a county, the admiralty has no jurisdiction.¹¹ Whilst, on the other hand, where goods were taken at sea within the body of a county, and were then carried upon the shore, the common law had no jurisdiction, because the original taking was not within its cognizance.¹² These difficulties were not helped by

¹ See 7 Geo. 4, c. 38.

² East, P. C. 805.

³ 3 Inst. 113.

⁴ See 2 Hawk. c. 9, s. 14.

⁵ East, P. C. 804, citing Hale, "De Jure Maris."

⁶ 2 Hawk. c. 9, s. 14.

⁷ Russ. & Ry. 243; Leach, 1093. See *R. v. Jemet*, Cr. Circ. Com-

panion, by Ryland. *R. v. Soleguard and another*, Andr. 231.

⁸ 3 Inst. 113. ⁴ Inst. 134, 135.

⁹ Russ. & Ry. 243, (note *b.*)

¹⁰ 1 Russ. C. M. 100, 101, citing M. S., Bayley, J.

¹¹ East, P. C. 805.

¹² Id.

the statute 39 Geo. 3, c. 37, which extended the admiralty jurisdiction to offences generally, because it speaks only of offences committed on the *high seas*, and out of the body of any county. But later statutes have amended the first of these faults where the jurisdiction is concurrent, because they ordain, that where the offences within their purviews shall be committed within the *jurisdiction of the admiralty*, they may be tried in like manner as any other felony within that jurisdiction.¹ Consequently, if the admiralty has jurisdiction within the body of a county,² as where there is much sea room, the later Acts apply. And now since the Central Criminal Court Act, 4 & 5 Will. 4, c. 36, and the statute 7 Vict. c. 2 above mentioned, the difficulties, if not altogether removed, seem to have been shaken in a considerable degree. It is likewise material to refer again to the decision of the judges in *R. v. Jones and another*,³ because it was there held, that it is not necessary in an indictment to allege that the offence has been committed within the jurisdiction of the admiralty.

Punishment.] By 7 Will. 4 and 1 Vict. c. 88, s. 1, the Acts relating to the punishment of piracy are, in that respect, repealed.⁴

By sect. 2, whosoever, with intent to commit or at the time of or immediately before or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault, with intent to murder any person being on board of or belonging to such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act by which the life of such person may be endangered, shall be guilty of felony, and being convicted thereof shall suffer death as a felon.

By sect. 3, whosoever shall be convicted of any offence which by any of the Acts hereinbefore referred to amounts to the crime of piracy, and is thereby made punishable with death, shall be liable to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years,⁵ or to be imprisoned for any term not exceeding three years.

By sect. 4, in the case of every felony punishable under this Act every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact

¹ See 1 Vict. c. 85, s. 10; c. 86, s. 10., &c.

² See *R. v. Curling and others*, Russ. & Ry. 123. *R. v. Bruce*, Id. 243.

³ Den. 101, *ante*, p. 550.

⁴ 28 Hen. 8, c. 15; 11 & 12 Will. 3, c. 7; 4 Geo. 1, c. 11, s. 7; 8 Geo. 1, c. 24; 18 Geo. 2, c. 30.

⁵ Penal servitude: 20 & 21 Vict. c. 3, s. 2.

to any felony punishable under this Act shall, on conviction, be liable to be imprisoned for any term not exceeding two years.

By sect. 5, where any person shall be convicted of any offence punishable under this Act for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

By sect. 6, that nothing in this Act contained shall be construed to extend to the alteration or repeal of any of the powers, provisions, or regulations of 5 & 6 Will. 4, or 4 Geo. 4, c. 64.¹

¹ The Act to commence Oct. 1, 1857, sect. 7.

PART IV.

*Of Malicious Injuries to Property.*¹

CHAPTER I.

OF ARSON AND MALICIOUS BURNING.

Arson.] It may be observed, upon introducing this subject, that arson is a fruitful source of the mischief with which we have to deal. Arson, at common law, means the "malicious and voluntary burning of the house of another."² It may likewise be remarked that a prisoner shall not be allowed to plead as a defence that he had the original intention of committing another crime than that charged in the indictment, if he has been guilty of the latter also. Therefore, when the accused person was proved to have set fire to a stack which communicated with a barn, and the barn also, the subject of the indictment, was burned in consequence, it was held, that although the intent might have been to burn the stack, the charge for firing the barn was fully sustained.³ So, again, Parke, J., left it to the jury to say, upon one occasion, whether by firing some haulm the prisoner intended to fire a building; for if so, a count for firing the building would in his opinion, be supported. This direction was approved of by the judges.⁴ So, likewise, if in an attempt to burn the house of B. that of C. should be set on fire, the offence is complete, whether it be that of principal or procurer;⁵ and, as in the case of *R. v. Smithers*, if life should be sacrificed through the act of the incendiary, he is not the less amenable to a charge of murder because his design had been to commit arson. Again, it had been held for law before the passing of 1 Vict. c. 89, on 7 & 8 Geo. 4, c. 30, that malice against the owner of the property was not necessary to be proved to sustain a charge of this nature under the old statutes.⁶

¹ As to the venue in proceedings against persons acting under this Act, sect. 71. The admiralty, sect. 72. Not to extend to Scotland, sect. 78. To commence Nov. 1, 1861, sect. 79.

² East, P. C. 1015.

³ *R. v. Cooper and another*, 5 C.

& P. 535. See also *R. v. Haughton*, Id. 559.

⁴ *R. v. Turner and another*, 1 Lew. C. C. 9; 1 Moo. C. C. 241.

⁵ 2 Hawk. c. 29, s. 18; see sect. 21.

⁶ *R. v. Salmon*, Russ. & Ry. 26. *R. v. Farrington*, Id. 207.

No excuse will avail, except actual insanity, or utter unconsciousness of the injurious effect.¹ So where the object was to claim a reward for giving notice of a fire, the prisoner was held to be rightly convicted of the offence.²

We now come to the statute 24 & 25 Vict. c. 97, which supersedes the old Acts relating to arson.³

By 24 & 25 Vict. c. 97, s. 1, whosoever shall unlawfully and maliciously set fire to any church, chapel, meeting house, or other place of divine worship, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male of sixteen years, with or without whipping.

By sect. 2, whosoever shall unlawfully and maliciously set fire to any dwelling house, any person being therein, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen years, with or without whipping.

It will be at once observed that the capital felony is abolished. This may be the more easily understood when it is considered that if death ensues from such a fire, the offence becomes murder. Execution has followed under such circumstances.

By sect. 3, the like punishments are awarded against such as shall unlawfully and maliciously set fire to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, storehouse, granary, hovel, shed, or fold, or to any farm building, or to any building or erection used in farming land, or in carrying on any trade or manufacture or any branch thereof, whether the same shall then be in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person.

So it is, again, by sect. 4: whosoever shall unlawfully and maliciously set fire to any station, engine house, warehouse, or other building belonging or appertaining to any railway, port, dock, or harbour, or to any canal or other navigation, shall be guilty of felony, and liable to the same punishments, excepting solitary confinement.

And under sect. 5, for unlawfully and maliciously setting fire to any building other than such as are in this Act before mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor law union, parish, or place, or belonging to any university or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, the same punishments are enacted, excepting solitary confinement.

By sect. 6, whosoever shall unlawfully and maliciously set fire

¹ *R. v. Davies*, 1 Fost. & F. 69. Geo. 4, c. 30. 7 & 8 Vict. c. 62; 9

² *R. v. Regan*, 4 Cox, 335. & 10 Vict. c. 25, to which the

³ 1 Vict. c. 89, which repealed stat. 14 & 15 Vict. c. 19, s. 8, may some of the provisions of 7 & 8 be added.

to any building other than such as are in this Act before mentioned, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and, if a male under sixteen years, with or without whipping.¹

By sect. 7, whosoever shall unlawfully and maliciously set fire to any matter or thing, being in, against, or under any building, under such circumstances that if the building were thereby set fire to the offence would amount to felony, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and, if a male under sixteen years, with or without whipping.²

And by sect. 8, whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any building, or any matter or thing in the last preceding section mentioned, under such circumstances that if the same were thereby set fire to the offender would be guilty of felony, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen years, with or without whipping.

At common law there must have been an actual burning, whereas the subsequent statutes used the words “set fire to,” and the 9 & 10 Vict. c. 25, mentioned the mere attempt, although the buildings, &c., were not ignited. The act, therefore, of applying fire with a felonious intent so as to produce combustion, completed the offence under 1 Vict. c. 89, and the attempt to fire brought the offender within 9 & 10 Vict. c. 25, although no combustion ensued. Even the old cases went the length of showing that any appearance of having caught fire was enough, such as smoke, sparks, and burnt ashes, without flame.³ So blowing coals with bellows, which produced ignition.⁴ Although if there had been really no setting fire, the case could not have been sustained under 1 Vict. c. 89.⁵

The chief questions which occur under these sections are, 1st, the nature of the mischief; 2nd, the buildings which are the subjects of their protection; 3rdly, the possession which should be alleged in the indictment in respect of them. The prisoner may be convicted of the arson, or of the attempt, upon the same indictment. It may be inquired, therefore, what is a setting fire so as to incur the higher penalty? Smoke was seen to issue from the bottom of the roof of an outhouse; there was a good deal of smoke in this straw roof; there were sparks in the straw when pulled out and put on the ground, but no sparks were seen in the straw upon the roof. No flame was seen, but smoke and sparks were visible in a linen ball which was also pulled out, and the ball

¹ No solitary confinement.

² *Id.*

³ *R. v. Stallion*, 1 Moo. C. C. P. C. 1020.

⁴ *R. v. Salmon*, Russ. & Ry. 26.

⁵ *R. v. Taylor*, Leach, 49; East,

was burnt right through on one side. This was held to be a setting on fire.¹ Again, the floor near a hearth was scorched; it had been at a red heat, but never in a blaze; it was a little charred. This was held to be a burning.² On the other hand, when a small faggot was set on fire on a boarded floor, which caused the floor to be scorched black but not to be burnt, and no part of the wooden floor was consumed, it was held an insufficient burning to constitute arson;³ but here the 8th section would apply to the case. Secondly, with reference to the buildings, the words "dwelling house, any person living therein," are worthy of attention. Many of the decisions in burglary respecting inhabitancy apply to the case of arson, although not universally; because a party may be convicted of burglary in a house which the owner has quitted for a time with the full intention of returning, whereas in order to come within the 1 Vict. c. 89, the prisoner must have set fire to a house actually inhabited at the time of the arson,⁴ and arson may be committed by night or by day, which is not so in burglary. Still many of the points in burglary, with reference to the house, will not be found inadmissible. Those cases which decided that although a building might not be parcel of the dwelling house for the purpose of burglary, it might be considered a *distinct mansion* if slept in, are deserving of attention. As where the coachman had certain lofts as his separate domicile, but which were not attached to the messuage.⁵ And the authorities in burglary which govern the question of inhabitancy may be consulted.⁶ So that a mere occupation for a particular purpose, as for watching thieves, &c., would not suffice. Nor could an unfinished house, although intended to be a dwelling house, assume that character in its incomplete state so as to be the subject of arson. And so it was held in a case where the plaintiff sued the hundred for damage occasioned by a felonious setting fire to his premises.⁷ Whilst, however temporary the dwelling might be, like the booth at Weyhill Fair, made of brick and mud,⁸ if it were used *bonâ fide* as a sleeping place, it would be included within this section of 24 & 25 Vict. c. 97. But a *shed* merely used by workmen as an eating place, and not slept in, is not within that protection, because the shed is an outhouse.⁹ We shall likewise see presently that the cases which relate to the correct laying of the property of dwelling houses in indictments for burglary, are not undeserving of notice when it becomes necessary to advert to that point in trying

¹ *R. v. Stallion*, 1 Moo. C.C. 398.

² *R. v. Parker*, 9 C. & P. 45.

³ *R. v. Russell*, Car. & M. 541.

⁴ *R. v. Allison*, 1 Cox, 24. "Suppose a man lives in No. 1 and seised in fee of Nos. 2, 3, 4, &c., could Nos. 2, 3, 4, &c., be properly described as the dwelling house of the landlord?" Mortgagees out of possession. Prisoner acquitted.

⁵ *R. v. Turner*, Leach, 305; East, P. C. 492.

⁶ *R. v. Gibbons and another*, Russ. & Ry. 442.

⁷ *Elsmore v. The Hundred of St. Briavell's*, 8 B. & C. 461.

⁸ *R. v. Smith*, 1 Moo. & Rob. 256.

⁹ *R. v. England and another*, 1 Cox, C. C. 79.

cases of arson. But here it may be inquired how far the curtilage of a dwelling house¹ affects the question of arson under the 2nd section of this Act? Should such a question arise, there seems to be no reason why the decisions under the old statute 7 & 8 Geo. 4, c. 29, s. 13, should not apply. Thus, when the prisoner was taken in the fact of breaking a wash-house which did not communicate internally with the mansion, but was under the same roof, seven judges against five were of opinion that burglary had been committed, and that the case did not come within the 13th section of the statute 7 & 8 Geo. 4, c. 29, respecting the curtilage.² Hence a felonious firing of such a place would be arson within sect. 2.

One North was charged with firing an outhouse. The building in question stood about four or five yards from the dwelling house, but was not joined to it. It was, however, within the curtilage, and it was objected that this could not be an outhouse within 9 Geo. 1, because it was parcel of the dwelling house, and so the subject of arson at common law. But the judges held that although for some purposes, this might be part of the dwelling house, yet it was still, in fact, an outhouse, and the conviction was affirmed.³ And, upon another occasion, an open shed in a farm-yard, adjoining other buildings, and within the same curtilage as the dwelling house, was held to be an outhouse within 7 & 8 Geo. 4, c. 30, s. 2.⁴ From hence it is probably right to conclude that, as the 3rd section of 24 & 25 Vict. c. 97, has the word "outhouse," and more especially as there seems to be a difficulty in holding that a building much detached from the dwelling house is an outhouse;⁵ the better way of satisfying the word in the section is, at all events, to include within it all buildings which answer its description within the curtilage of the dwelling house, and which cannot be included within the dwelling house itself; and, therefore, it will follow that the word "dwelling house," in the 2nd section may be expounded according to the law of inhabitancy recognized in burglary, except that some person must be in the habit of sleeping in the house at the time of the offence; and, likewise, according to the rule which would treat all buildings as outhouses, unless they communicate internally with the dwelling house, or be under the same roof with it.

Nature of the buildings under sects. 2, 3.] We come now to the buildings under the 2nd and 3rd sections. It should be noticed that the dwelling house is separately mentioned under sect. 2, and the "house" under sect. 3; as "house" includes "dwelling house," although not *eo nomine*; and as the punishments are the same, it seems almost idle to proceed upon the 2nd section, as the 3rd embraces the whole *corpus delicti* of the 2nd. For if

¹ See 24 & 25 Vict. c. 96, s. 55.

² *R. v. Burrowes*, 1 Moo. C. C. 274.

³ *R. v. North, East*, P. C. 1021.

⁴ *R. v. Stallion*, 1 Moo. C. C. 398.

⁵ *R. v. Ellison and another*, 1 Moo. C. C. 336. *R. v. Haughton*, 5 C. & P. 558; *R. v. Parrot*, 6 C. & P. 402. See also 3 East, 460.

it should turn out upon an indictment for burning a house, that some person was therein, the prisoner could not be acquitted, so the "house," for that purpose, would be "dwelling house."

It seems that a cellar under a cottage, hired as a lock-up house, and quite independent of the cottage, being six or seven feet below the surface of the ground, would come within the compass of this word "house." Such a place, however, was held, upon one occasion, neither to be the dwelling house of the constable who hired it, nor an outhouse, parcel of the cottage;¹ and, indeed, in the old indictments, it was considered sufficient to say *domum*—that is, a barn, malt-house, or the like, without adding "*mansionalem*."² James Donnavan was charged, under 9 Geo. 1, with burning a gaol. There were four counts, and all described the prison as a house; and the question was, whether it could be considered as such. The judges held that the case was within the meaning of the Act, that the dwelling house must be considered as part of the property, and the prison as the house of the Corporation of Liverpool, where the offence was committed.³

The word "house," in sect. 3, includes an uninhabited building, one intended for domestic purposes, but which is not yet finished, and, therefore, such a house, in which the owner might have deposited stores or agricultural implements.⁴ A tenant took away his goods from a dwelling house and removed his furniture, but only for the purpose of repair. This was considered to be not the less a dwelling house, and *Elsmore v. The Hundred of St. Briavells* was mentioned; but the indictment failed, upon two counts, because the house was laid to be that of the *landlord*, whereas it was the tenant's. The third count laid the house in the tenant. Crompton, J., said that "house," in the statute,⁵ meant dwelling house, and he amended the second count by substituting the name of the tenant for that of the landlord, and proposed to reserve both points; he then left it to the jury to say whether there was an intention on the part of the tenant to return. The verdict, however, was, Not guilty.⁶ So, likewise, those buildings which, under the old law of burglary, could not be called dwellings, as where the owner left his house without the intention of returning, where he placed a person in his premises for the sole purpose of taking care of his furniture, or in order to watch thieves, &c., &c., are entirely protected by the third clause. Workmen took their meals in a building, and dried their clothes in it; it had four walls, a roof, and a door, but no window, and a person slept there with the knowledge, but without the permission, of the owner. This was held not to be a house within the 3rd section of 1 Vict. c. 89, because it had not been erected for

¹ Anon. 1 Lew. C. C. 8. One count laid the cellar to be the constable's dwelling house, and the other an outhouse, parcel of the cottage.

² 3 Inst. 67.

³ *R. v. Donnavan*, Leach, 69;
² Sir Wm. Black. 682.

⁴ *Elsmore v. The Hundred of St. Briavells*, 8 B. & C. 460.

⁵ That is, the old statute.

⁶ *R. v. Kimbrey*, 6 Cox, 464.

the purpose of habitation.¹ But the 9 & 10 Vict. c. 25, had the words, "or any building," and the present Act follows it, the punishment, however, not being so great. Therefore, a "house" is a building free from many of the difficulties which attach to an *actual* dwelling house, having been originally intended for a dwelling, and, if never so intended, the building is still protected by the 3rd section.

Shed, under 7 & 8 Vict. c. 62, repealed.] The following description of a building was held to apply to a *shed*, under 7 & 8 Vict. c. 62, s. 1. The building was 24 or 25 feet square, its sides were of wood, with glass windows, its roof slated, and it was commonly called "the workshop;" it was used as a storehouse for seasoned timber, as a place of deposit for tools, and a place where timber was worked up into its proper form and prepared for use. It was also held, in this case, that the person who supplied the materials and superintended the building of houses on his own estate, with the object of letting or selling the houses, was so far a builder, as that the building burnt might well be described as a building for carrying on the trade of a builder.²

Stable.] Whatever interpretation may be given to any description of building, an "outhouse" for example; it is evident, that where a place is mentioned by name, it will, of course, be within the clause as long as it is applied to the uses which the term imports. Therefore, where there was a doubt whether a hovel in the middle of a field could be called a building within 9 Geo. 1, being used as a shelter for cattle and tools, it was said, that if it had been a stable the case would have been different.³ Supposing, however, that a shed should be used merely for timber, it is not a stable under a count charging the burning of a stable, however it might have been built for and used as such.⁴ But the mere disuse of a stable as such for three years, does not make it the less a stable.⁵

Outhouse.] However, the "outhouse" seems to have been the building which has occasioned the greatest difficulties.⁶ A schoolroom was under the same roof with the dwelling house, but there was a narrow passage, about a yard wide, between the two: upon an objection that this was neither a house nor an outhouse, the judges held unanimously that this was a building under 9 Geo. 1, which speaks of "dwelling house, barn, and outhouse."⁷ But this would probably have been a "house" within 1 Vict. c. 89, s. 3, and it is certainly a building under 9 & 10 Vict. c. 25, and

¹ *R. v. England*, 1 Car. & K. 533.

² *R. v. Amos*, Den. & P. 65.

³ *R. v. Ecclefield*, Deac. Cr. L. 56.

⁴ *R. v. Colley*, 2 Moo. & Rob. 475.

⁵ *R. v. Hammond*, 1 Cox, 60.

⁶ *R. v. Burrowes*, 1 Moo. C. C. 274. See also 9 & 10 Vict. c. 25,

s. 7.

⁷ *R. v. Winter*, Russ. & Ry. 295.

24 & 25 Vict. c. 97. The principle, nevertheless, which applies to the greater number of cases is, whether a building at a distance from, and out of sight of, the dwelling house, shall be said to be an outhouse within this clause. At present the authorities seem to be considerably in favour of the negative of this proposition. But it should not be lost sight of that the 3rd section is general enough to cover any building.¹ The prisoners were charged with firing an open building in a field which had formerly been used as a stable, but latterly as a shelter for cattle to go in and out. It was partly open and partly thatched. It was a furlong from the dwelling house, but in sight; and the question was, whether this would be considered an outhouse, and seven learned judges² held that it was not, whilst six³ were of a contrary opinion, and a pardon was recommended.⁴ So, again, a cart hovel, consisting of a stable roof, supported by uprights, in a field at a distance from other buildings, was deemed not to be an outhouse within the section;⁵ and a building within a hundred yards from any house, built for a brick oven, but subsequently roofed, and in which a cow was kept, was held not to be an outhouse under 7 & 8 Geo. 4, c. 30, s. 2.⁶ In *R. v. Woodward*,⁷ there was a cow-hovel built with bricks; it had four walls, and was a shut-up place; it had a door of wood, with brickwork on each side; in the front wall there was no regular glass, but there were two holes of the size of ordinary windows, and the back had neither wall nor door; the roof consisted of pieces of wood laid longitudinally, each piece of wood resting on end walls—there was another cart-hovel adjoining the cow-hovel and built with brick pillars, and thatched with stubble at the top. One side was open. It was contended for the prisoner, that to constitute an outhouse the building must be appurtenant to, or connected with, or used as, or must be parcel of, the dwelling house. But Littledale, J. (present, Gaselee, J.) did not think it necessary to decide the point, because there was another very material question concerning the burning of a bean stack, and also because another case⁸ was about to be tried, in which the same objection concerning the outhouse would be made. However, Littledale, J., observed that the statute, 9 Geo. 1, c. 22, s. 1, mentions outhouse and hovel, but the 43 Geo. 3, c. 58, and 7 & 8 Geo. 4, c. 30, s. 2, omit the word hovel,⁹ and now, again, hovel is specifically mentioned in section 3 of the present Act. Yet as soon as the building is brought into a nearer connection with the dwelling house, the case is altered. Thus, an open

¹ "Any farm building," "any building, &c.," 24 & 25 Vict. c. 97, s. 3.

² Moo. C. C. 337. Their names are not mentioned.

³ Lord Tenterden, Littledale, Park, JJ.; Bayley, Vaughan, Bolland, Barons. Absent, Lord Lyndhurst and Taunton, J.

⁴ *R. v. Ellison and another*, 1 Moo. C. C. 336.

⁵ *R. v. Parrot*, 6 C. & P. 402.

⁶ *R. v. Haughton*, 5 C. & P. 555.

⁷ 1 Moo. C. C. 323.

⁸ *R. v. Tyers*, mentioned, 1 Moo. C. C. 326.

⁹ *R. v. Newill*, 1 Moo. C. C. 326, Id. 458.

shed in a farmyard, formed by upright posts, with pieces of wood and straw for the roof, was held to be an outhouse within 7 & 8 Geo. 4, c. 30, s. 2.¹ So, again, a building about four or five yards from the dwelling house, but not joined to it, was held to be an outhouse within 9 Geo. 1.² Again, an unfinished cart-shed, boarded on all sides, with a door and lock and the frame of a roof with loose gorse on it, by reason of its not having been thatched, was held to be a building within 7 & 8 Geo. 4, c. 29, s. 44, concerning the stealing of fixtures,³ whence we may conclude in this instance that such a building would be an outhouse within 1 Vict. c. 89, s. 3. So a thatched pigsty, in a yard which the prosecutor occupied, and into which the back door of his house opened, was held to be an outhouse within 1 Vict. c. 89, s. 3. The yard was bounded by fences and other buildings belonging to the prosecutor, and by a cottage and barn, which were let by the prosecutor to a tenant, but which did not open into the yard.⁴ The prisoner was charged with firing a stable, an outhouse, and a stack of haulm. The building was used by the prosecutor in carrying on his trade as a builder. The haulm burnt (for the fire was kindled on the haulm first) had been carted from a field and stacked in the building. This building had once certainly been intended for a stable, but it was afterwards divided into three parts by a wall which reached to the eaves. One part was used as a stable, and the part fired contained the haulm and a lot of tiles. This was not an outhouse, shed, nor stable; but the indictment was good as to the haulm, for that needs not to be out of doors to constitute a stack within the Act.⁵ Lighting a match and going to a stack is an overt act, and evidence of an attempt to fire the stack, but the *intent* is a question for the jury.⁶

Mill.] The names of other buildings follow that of "outhouse" in the 3rd section of 24 & 25 Vict. c. 97. The word "mill," which includes a mill-house, has long been a material term, for it was at one time found impossible to call a mill-house an "outhouse," and the mill was, therefore, in this respect, without protection.⁷ A cotton mill was held upon one occasion to be within the old Act, 9 Geo. 3, c. 29, s. 2.⁸ With respect to a "barn,"⁹ it is not necessary to show that there was either corn or hay in it; but it will suffice to prove the general use of the building for the purposes of a barn.

¹ *R. v. Stallion*, 1 Moo. C. C. 398. Another point was submitted to the judges, *i. e.*, whether the straw was a part of the building. The judges, however, held that the building was an outhouse, and the conviction right. *Id.* 401.

² C. 22, s. 1. *R. v. North, East*, P. C. 1021.

³ *R. v. Worrell*, 7 C. & P. 516.

⁴ *R. v. Jones*, 1 Car. & K. 303; 2 Moo. C. C. 308.

⁵ *R. v. Morrison*, 5 Cox, C. C. 186.

⁶ *R. v. Taylor*, 1 Fost. & F. 511.

⁷ *Hiles v. Hundred of Shrewsbury*, 3 East, 457. *R. v. Taylor*, Leach, 49.

⁸ Stark. Cr. Pl. 442.

⁹ *R. v. Minton*, East, P. C. 1021.

It should be remarked, that the party must, under section 3, be in the house at the time of its taking fire. The prisoner fired an outhouse which was under the same roof with the dwelling house, and the prosecutor was in the dwelling house at the time; but before the fire had reached the dwelling house the prosecutor had left it. The capital charge was then abandoned, because of the prosecutor's absence, and as the indictment contained no count for arson with intent to defraud and injure, the prisoner could not be convicted even on the third count.¹

Possession.] Formerly, considerable discussion arose on the subject of possession. At common law arson was considered to be the burning of the house of another, so that the only way of reaching an offender who burnt his own house, was by the casualty of the fire extending to other property than his own (*ædes alienas*). But it was questioned whether the possession of the tenant, were, for this purpose, the possession of the landlord, and a decision was made at an early period, that under a lease for years a party could not be said to be guilty of felony if he burnt the house of the lessor while it remained in his own possession.² Of this determination, Foster, J., disapproved,³ but it was subsequently maintained in the case of a tenancy made under an agreement for a lease for three years,⁴ and in the case of a tenant from year to year.⁵ And so in the case of a copyhold tenancy, although the copyhold had been surrendered to the use of the mortgagee, the possession still remaining in the prisoner.⁶ Whilst a mere title to dower out of a house of which another person had possession was considered not to be such an interest as would bring the case within the rule laid down in that of Holmes.⁷ And a person who had possession and occupation without paying rent was considered merely as a servant and not as a tenant.⁸ And Foster, J., inclined to hold that a reversioner setting fire to the houses of his tenants might be said to burn "*alienas ædes*" within the rule in *Holmes's case*.⁹ But the statutes 43 Geo. 3, c. 58, followed by 7 & 8 Geo. 4, c. 40, and 1 Vict. c. 89, and 24 & 25 Vict. c. 97, s. 3, have removed these difficulties. The words of 24 & 25 Vict. c. 97, are, "whether the same shall then be in the possession of the offender or of any other person;" so that the question now would rather be whether any possession at all need be stated,¹⁰ although it may be desira-

¹ *R. v. Fletcher*, 2 Car. & K. 215. So it was in the case of a stable, before Alderson, B. *R. v. Warren*, 1 Cox, 68. The prisoner was acquitted.

² *R. v. Holmes*, Cro. Car. 376, by Richardson, C. J., Jones and Berkley, JJ.; Croke, J., *diss.*

³ Cr. L. 115, in *R. v. Harris*.

⁴ *R. v. Breeme*, Leach, 220; East, P. C. 1026.

⁵ *R. v. Pedley*, Leach, 220; Cald. 218.

⁶ *R. v. Spalding*, Leach, 218; East, P. C. 1025. See also *R. v. Scofield*, East, P. C. 1028.

⁷ *R. v. Harris*, East, P. C. 1023.

⁸ *R. v. Gowen*, East, P. C. 1027.

⁹ Fost. 115.

¹⁰ In *R. v. Ball*, 1 Moo. C. C. 33, 34, but the point was not decided.

ble to do so, and prudent likewise to have one count, omitting a statement of possession. Still the name of the party to whom the building burnt belonged must always appear on the record, and, therefore, care is still necessary upon the subject of ownership and possession. In *R. v. Rickman*, although the judges held the conviction wrong for want of stating some name, they expressed their opinion nevertheless, (as the prisoners were paupers and lived in the parish house, to which they had set fire,) that the building might be laid in the overseers, or in persons unknown.¹ The prisoner was charged with burning certain outhouses. The dwelling house and farm adjoining to these outhouses belonged to B. S., but the outhouses, except a brewhouse, to her son. Heath, J., held that the premises should have been laid according to the fact, and not as in the sole occupation of the mother, and another indictment having been found agreeably to this opinion, the prisoner was convicted and executed. The brewhouse being in the joint occupation of the mother and son, it was laid accordingly.² In burglary, where the landlord is found to inhabit under the same roof with his lodgers, it is usual to lay the property of the mansion in him only, unless there be an outer door for the lodger, in which case it is proper to make use of the name of the lodger. If, however, the landlord be not under the same roof as an inhabitant, nor any servant on his behalf, the apartments should be laid as the respective dwellings of the lodgers. But in arson, although in the case of the landlord's non-inhabitaney by himself or his servant, the place burnt must indeed be laid in the tenant or lodger, yet, even if he should inhabit, and whether there be an outer door or not for each lodger, the possession may be laid in the lodger, although in the case of the landlord's residence, it may also be laid in him. Ball was charged with firing certain premises; it turned out, that the place in question was a back room, which the prisoner had hired, but where he did not sleep. He set fire to this room, and the damage did not go beyond it. He had the exclusive possession of it. The landlord dwelt in the house. After a verdict of guilty, and a case reserved as to whether the house were rightly described as in the possession of the landlord, the judges held, that the conviction was right, the possession of the tenant being that of the landlord.³ Thus, the absence of the tenant at night from the apartment was held to make no difference, which is another diversity between burglary and arson under the statutes. Even, if wrongful, it is proper to lay the possession in the actual occupier, as where a farm servant received notice to quit his cottage in a month, but held over, upon which, at the expiration of two days from the end of the month, an attempt was made to eject him forcibly, and his wife then set fire to the dwelling house. It was held that the cottage was rightly laid in the husband, notwithstanding the

¹ *R. v. M. and S. Rickman*, East, P. C. 1034.

² *R. v. Glandfield, East*, P. C. 1034.

³ *R. v. Ball*, 1 Moo. C. C. 30.

wrongful refusal to quit, and the conviction was affirmed.¹ Mr. Justice Parke thought at the trial that the possession should have been laid in the farmer, whose leasehold it was under another person.² An indictment had been prepared against a man for setting fire to his own goods in his own dwelling house, and as the statute 1 Vict. c. 89, s. 3, did not mention the firing of goods, he could not be convicted, but the 14 & 15 Vict. c. 19, s. 8, was brought in aid of the conviction, and as that Act expressly mentioned goods and chattels being in any building, the setting fire to which is made felony by any Act of parliament, the court coupled the two Acts and two intents together, and affirmed the conviction.³

Arson at common law.] Arson at common law, which is felony,⁴ instead of being the act of burning a house or other building, is confined to burning the house of a person other than the possessor. But it is said, that to burn a mansion house in a town, or so near to other houses as to place them in danger, is a high misdemeanor.⁵ And if a house be burnt by accident, contrary to the original design of the incendiary, as if B.'s house were to be burnt in an attempt to burn that of C., it is a felony at common law,⁶ and so it would be, although the party only intended to burn his own premises.⁷ The misdemeanor committed in burning the offender's own house becomes merged in the felony as soon as the fire reaches the house of another person according to the common law.⁸

It may be further remarked, that the conflagration must be wilful in order to constitute arson at common law, unless, indeed, the party were in pursuit of an illegal act, in which case he would be guilty of felony or misdemeanor according to the circumstances.⁹ As if he were shooting at poultry with intent to steal them, and thus were to set fire to a thatch,¹⁰ and at common law it was necessary that some part of the premises or other matter should be burnt.¹¹ But to burn a barn, whether parcel of the dwelling house or not, is felony at common law, provided it have hay or corn in it, and the only distinction made between the hay and the corn was, that, in the first case, clergy was allowed, but not for burning a barn with corn.¹² Two abortive attempts to fire premises were admitted in evidence, although the prisoner had no connection with them, and the case of Donellan was cited.¹³ But Erle, J.,

¹ *R. v. Wallis*, 1 Moo. C.C. 344.

² *Id.* 345.

³ *R. v. Lyons*, Bell, 38.

⁴ *R. v. Powlter*, 11 Rep. 29.

⁵ *R. v. Scofield*, East, P. C. 1028;

⁶ Hale, 568.

⁷ 1 Hale, 569.

⁸ East, P. C. 1031.

⁹ *R. v. Roberts*, East, P. C. 1030.

R. v. Isaac, *Id.* 1031.

¹⁰ See East, P. C. 1019.

¹¹ *Id.*

¹² 1 Hale, 568.

¹³ See 1 Hale, 567; 1 Hawk. c. 33,

s. 1.

R. v. Bailey, 2 Cox, 311.

upon a charge of arson, where the prisoner was shown to have claimed a reward for giving notice of fires, refused to allow evidence to prove that other fires of which notice had been so given were similar to that for which he was on his trial.¹ But the behaviour or demeanour of the prisoner at other fires during the same night will not be evidence,² nor will threats, statements, nor particular acts be admitted with reference to other fires charged in other indictments against the prisoner.

Indictment.] The indictment for burning a church usually states that A., on, &c., did unlawfully, and maliciously, and feloniously, set fire to the parish church of —, situate, &c., on —, against the form, &c. And under sect. 3, that A., on, &c., did unlawfully, and maliciously, and feloniously set fire to a certain dwelling house, or house, or other building, situate, &c., in the possession of one B., [and it sometimes adds, that by such firing he did burn and consume the same,] with intent to injure the said B., or defraud the said B. of it in a case of insurance, &c., against the form, &c. But the words “burn and consume” do not form a necessary averment, because the expression “set fire to” sufficiently satisfies the statute.³ The word “unlawfully” must not be omitted; therefore upon a charge of firing a barn where the act was charged to have been “feloniously, voluntarily, and maliciously,” the judges ordered a new indictment to be preferred at the next assizes, because the statute 7 & 8 Geo. 4, c. 30, s. 2, used the words “*unlawfully* and maliciously.”⁴ An intent to injure some one should be stated, but as a man must be intended to understand the necessary consequences of his own act,⁵ it would be no ground of objection to a charge for burning the house of C. with intent to injure C., that the intent was to injure another person, even although the jury should express an opinion that the intent was not to injure C. but S.⁶ In the case just cited, the jury found no intent to injure C. *except so far as by law it must be so considered*, and the judges were unanimous that the indictment was right as to the intent to injure C.⁷ There must, however, in the case of husband and wife, be a design to injure or defraud a third person; and, therefore, the judges held that a wife could not be properly convicted of burning her husband’s house, the husband being identified with herself, although it appeared that the prisoner’s intent was not merely to burn the house, but to do her husband a personal injury.⁸ In this case the woman had gone by her maiden name for two

¹ *R. v. Regan*, 4 Cox, 335.

² *R. v. Taylor*, 5 Cox, 138.

³ See *R. v. Salmon*, Russ. & Ry. 26. So decided under 9 Geo. 1, c. 22.

⁴ *R. v. Turner*, 1 Moo. C. C. 239.

⁵ Russ. & Ry. 209; 1 Moo. C. C.

459.

⁶ *R. v. Newill*, 1 Moo. C. C.

458.

⁷ *Id.* 461.

⁸ *R. v. March*, 1 Moo. C. C.

182, under 7 & 8 Geo. 4, c. 30, s. 2.

years previously to the offence, being separated from her husband.¹ Yet under the 2nd section a woman might be convicted for such an offence, for there are no words "with intent to injure" in that clause, and according to this view it was held, that upon an indictment for setting fire to a dwelling house under 1 Vict. c. 89, s. 2, there being no count under section 3, for burning with intent to injure—*i.e.*, the prisoner could not be convicted of the lesser or transportable offence under the 3rd section.² In stating the property of the house the words of "A. B.," instead of "*one* A. B.," have been held sufficient.³ A common gaol occupied by prisoners is not, *eo nomine*, a dwelling house; nor was it in sections 7 & 8 Vict. c. 62. S. S. was keeper of a gaol in the liberty of Haverling-atte-Bower; he did not reside, but kept the keys; he was also liable to be rated as an inhabitant of the liberty. Here the house was considered to have been rightly laid in him, but the intent should have been laid to injure the inhabitants of the liberty.⁴ A count stating the intent to have been to defraud the Globe Insurance Company was held insufficient, because the Globe Insurance Company was not shown to have been a corporation, and the word "person," as used in 7 Geo. 4, c. 64, s. 14, was not mentioned.⁵ At common law, it need not be said, that the house is a dwelling house (should such be the case),⁶ nor needs the description of an outhouse to be set forth in charging the arson of such a building, whether at common law, or by statute,⁷ and though the building be within the curtilage, it is sufficient to say, an outhouse.⁸ It has been held, that where there was a counsellor and procurer of an arson, and the person so counselled attempted to set the building on fire, both might be convicted as principals for the misdemeanor, although the procurer was not present at the attempt.⁹ And under sect. 8 the counsellor and procurer, not being present, would be accessory before the fact to the felony.

The indictment for arson where there is an inmate, runs thus:— That A., on, &c., unlawfully, maliciously, and feloniously did set fire to a certain dwelling house of B., situate, &c., one C. being then therein, against the form, &c. Concerning farm buildings,— that A., on, &c., unlawfully, &c., did set fire to a certain hovel, shed, &c., situate, &c., in the possession of one B. [or of him the said A.], with intent thereby then to injure the said B. [or to defraud a certain assurance office called —], against the form, &c. As to hay, straw, &c.,— that A., on, &c., unlawfully, &c., did set fire to a large quantity of hay, &c., to wit —, then being in a certain farm building, to wit, a barn of one B., in the parish of —, in the county of —, with intent thereby then felo-

¹ *R. v. March*, ut supra.

² *R. v. Paice*, 1 Car. & K. 73.

³ *R. v. Swatkins*, 4 C. & P. 48.

⁴ *R. v. Connor*, 2 Cox, 65.

⁵ *R. v. Allison*, 1 Cox, 24.

⁶ East, P. C. 1033. See 1 Hawk. c. 39, s. 1.

⁷ East, P. C. 1033.

⁸ *Id.*

⁹ *R. v. Clayton*, 1 Car. & K. 128.

niously to set fire to the said farm building, and to injure the said B., [or to defraud a certain assurance company called —,] against the form, &c.

CHAPTER II.

OF INJURIES BY EXPLOSIVE SUBSTANCES TO BUILDINGS OR GOODS THEREIN.

Injuries by explosion.] By 24 & 25 Vict. c. 97, s. 9, whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroy, throw down, or damage the whole or any part of any dwelling house, any person being therein, or of any building whereby the life of any person shall be endangered, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen years, with or without whipping.

By sect. 10, whosoever shall unlawfully and maliciously place or throw in, into, upon, under, against, or near any building any gunpowder or other explosive substance, with intent to destroy or damage any building, or any engine, machinery, working tools, fixtures, goods, or chattels, shall, whether or not any explosion take place, and whether or not any damage be caused, be guilty of felony, and liable to penal servitude not exceeding fourteen and not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen, with or without whipping.

Indictment. Gunpowder.] That A., on, &c., unlawfully, maliciously, and feloniously did put and place a large quantity, to wit, — pounds weight of gunpowder, near unto the dwelling house of one B. situate, &c., and then unlawfully, &c., did cause the said gunpowder to explode, and by such explosion the said A. did then and there unlawfully, &c., destroy, throw down, and damage the said dwelling house of the said B., the said B. being in the said dwelling house at the time when the said A. committed the said offence as aforesaid —, against the form, &c.

CHAPTER III.

OF RIOT AND DESTRUCTION OF PROPERTY.

A general rising, an unlawful concourse of people, a mutinous movement, and an endeavour to promote general disaffection, are offences which more or less threaten the tranquillity of the public. But a partial excitement, as a riot, has no such extensive danger. In its locality, it certainly furnishes grounds for apprehension and interference, but the welfare of the community is not endangered by an outbreak which, in most instances, is directed against particular persons or solitary subjects of grievance. Although, therefore, an unlawful assembly, or an insurrectionary movement, has a manifest tendency to violate the peace, and is of a more serious character, a mere riot is limited to the breach of the public tranquillity at a particular spot. It may be added, that the observations respecting the Riot Act, which may be found in this work, will fully apply to the case of an ordinary riot, for the same precautions are put in force against tumultuous multitudes, whether their designs are formidable in a small or greater degree, and whether they threaten a spreading or contracted circle.

Riot combined with the destruction of property is the felony we have to notice in this place.

By 24 & 25 Vict. c. 97, s. 11, if any persons riotously and tumultuously assembled together to the disturbance of the public peace shall unlawfully and with force demolish, or pull down or destroy, or begin to demolish, pull down, or destroy, any church, chapel, meeting house, or other place of divine worship, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel, or fold, or any building or erection used in farming land, or in carrying on any trade or manufacture or any branch thereof, or any building other than such as are in this section before mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor law union, parish, or place, or belonging to any university or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture or in any branch thereof, or any steam engine or other engine for sinking, working, ventilating, or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggonway, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and liable to penal servitude for life, or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 12, if any persons, so riotously and tumultuously assembled, shall unlawfully and with force injure or damage any such church, &c., as in the last preceding section mentioned, shall be guilty of a misdemeanor, and liable to penal servitude not exceeding seven nor less than three years, or to imprisonment not exceeding two years, with or without hard labour. Provided that if upon the trial of any person for any felony in the last preceding section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any offence in this section mentioned, then the jury may find him guilty thereof, and he may be punished accordingly.

In reviewing these sections, it is evident that there must be such a gathering as will constitute a riotous assembly, that violence must be the result of the meeting, and that the destruction of some property of the nature specified in the section must accompany the outrage. And the intention to demolish must, moreover, be shown to the satisfaction of the jury. As to the first point, although the statute speaks of "any persons," words which might be satisfied upon ordinary occasions by two or more, it is conceived that the original common law definition of riot must prevail, and that three or more must be present in order to induce the penal consequences of the Act.¹ For the statute is silent upon that head. It gives no information as to what shall be deemed a riot within the Act, and therefore recourse must be had to the common law meaning of a riot, so that if any of Her Majesty's subjects be terrified by these acts, that is a sufficient terror and alarm to constitute a riot within the statute. The assemblage, again, must be unlawful; therefore if it should become necessary, either by authority of law or otherwise, to destroy any kind of property mentioned in the 9th section, an assemblage for that purpose is not an unlawful assembly. As if a house were to be pulled down in order to save a general conflagration, or, through its unworthiness, in order to prevent its tumbling down.² So where persons assembled with tumult, and demolished a house under the idea that it belonged to one of them, had they acted *bonâ fide* in their assertion of right, this act would not have been a demolition within the statute, although there was a riot.³ Again, violence of an unlawful nature must be exercised during the continuance of the assembly. If the parties should meet but separate without any act of outrage, they might, indeed, be guilty of having formed an illegal assembly, but they are not rioters within the statute.⁴ A person caused a mob to assemble, and encouraged them and led them on to mischief. The mob attacked the house of B. and set it on fire, but the leader was not present. It was held that he could not be convicted of the demolition of B.'s house, because, first, it did not

¹ See 1 Hawk. c. 65, s. 1; Burn's *and others*, 2 Moo. C. C. 252. Just., tit. "Riot." *Sembl.* S. C.

² *R. v. Langford*, Car. & M. 602. ⁴ *R. v. Birt and others*, 5 C. & P. 154.

³ S. C. And see *R. v. Phillips*

appear what the design of the mob was when they were led on by the prisoner; neither did it appear, secondly, whether these parties were amongst those who actually demolished the house.¹ But if the rioter comes to the demolition and aids in it by his presence or otherwise, it is no defence that he was not there when the house was first set on fire.² Thirdly, this violence must end in the demolition of the property, or in a beginning to do that which manifests an intent totally to destroy. Thus it was held upon one occasion, that the destruction of part of a building would not fully compromise the prisoners because a total overthrow was necessary,³ whilst, on the other hand, if the intent to demolish entirely is fully developed, an indictment for beginning to demolish will be sustained.⁴ If rioters commence the destruction of a house and then leave off of their own accord, it is so far evidence that they did not intend the demolition contemplated by the statute. But it would be no defence to allege that they had left off if the justice should be shown to have interfered, or if any other cause should be brought forward to prove that the rioters had been compelled to desist. In this latter event, the jury would probably be of opinion that it was a beginning to demolish.⁵ Then what shall be said to be a demolition? The destruction of a house so as to deprive it of the character of a dwelling house will be sufficient for this purpose. But in order to do this, the mere shell of the building must alone be left remaining. When the devastation has extended to the walls themselves, which are scarcely capable of demolition, the offence may be said to be complete.⁶ And the beginning to do that which would lead, unless arrested, to similar results, is the same nature of offence. So, again, the prisoners pulled a cottage down to the ground, but they left the chimney standing. It was contended hereupon that there was no demolition, the prisoners not having been interrupted; but the jury were directed that the cottage had been destroyed as a dwelling, and that the offence was complete. And it was also held, that force used by four men in order to terrify the old man whose cottage they pulled down, was a riot. The judges held the conviction right under the circumstances above mentioned.⁷

It is observable here, that if the house be destroyed by fire, it is not the less within the section. The prosecution need not be instituted for arson under the 2nd section. Damage by fire is held to be as much a demolition as any other mode of demolition.⁸ It was made a question upon one occasion, whether the charge of demolition could be sustained upon proof that fire was set to some furniture in the house of the prisoners, and that it

¹ *R. v. Howell*, 9 C. & P. 437.

² *R. v. Simpson*, Car. & M. 669.

³ *R. v. Ashton*, 1 Lew. C. C. 296.

⁴ *R. v. Thomas*, 4 C. & P. 237.

⁵ *R. v. Howell*, 9 C. & P. 437.

⁶ *R. v. Adams*, Car. & M. 299.

⁷ *R. v. Phillips and others*, 2

Moo. C. C. 252. *R. v. Langford*,

Car. & M. 602. *Sembl. S. C.*

⁸ *R. v. Howell*, 9 C. & P. 437.

R. v. Harris, Car. & M. 661. *R.*

v. Christian, 12 L. J. (N. S.)

M. C. 26; Car. & M. 388.

communicated to some woodwork in the house. No other means of destruction were employed.¹ However, the demolition of moveable shop-shutters is not within the statute, for they are not part of the freehold.² Fourthly, the jury must be satisfied that the intent of the prisoners was to accomplish the act of demolition. For if in endeavouring to gain some other object the work of violence should be carried on incidentally, the crime does not fall under this head. Therefore, where the purpose was to gain possession of some pits, the case was held to be not within the Act.³ However, where two intents are present, it is no defence that the prisoners meant to combine some other plan with their purpose of demolition.⁴ So it was where the object of intending to injure a person who had taken refuge in a house was united with that of demolition.⁵ Some of the prisoners set fire to a house, and others took the furniture out of it, and burnt the furniture upon a gravel walk outside: here it was left to the jury to say whether the latter prisoners were not abetting in the destruction of the house and furniture, for, if so, they were guilty of the offence.⁶

Indictment.] The indictment states, that the prisoners unlawfully, riotously, and tumultuously did assemble together, to the disturbance of the public peace, and did then unlawfully, feloniously, and with force, demolish [or destroy], &c., the property, situate, &c., against the form, &c. It seems to be necessary to identify the prisoners before the riot is given in evidence. It is said to have been so held at the special commission at Salisbury.⁷

¹ *R. v. Whiston and others*, 6 Jur. 1039. Whether in this particular case the indictment should have been framed upon sect. 2 (arson) qu. ? See also S. C. as to the mode of bringing the question before a superior court.

² *R. v. Howell*, 9 C. & P. 437.

³ *R. v. Price and others*, 5 C. & P. 510. See *R. v. Thomas*, 4 C.

& P. 237. *R. v. Phillips and others*, 2 Moo. C. C. 252.

⁴ *R. v. Batt and others*, 6 C. & P. 329.

⁵ *R. v. Howell*, 9 C. & P. 437.

⁶ *R. v. Harris*, Car. & M. 661.

⁷ See also *R. v. Nicholson and others*, Carlisle Sp. As. 1822; 1 Lew. C. C. 300.

CHAPTER IV.

OF INJURIES TO BUILDINGS BY TENANTS.

Injuries to buildings by tenants.] By 24 & 25 Vict. c. 97, s. 13, whosoever, being possessed of any dwelling house or other building, or part of any dwelling house or other building, held for any term of years or other less term, or at will, or held over after the termination of any tenancy, shall unlawfully and maliciously pull down or demolish, or begin to pull down or demolish, the same or any part thereof, or shall unlawfully and maliciously pull down or sever from the freehold any fixture being fixed in or to such dwelling house or building, or part of such dwelling house or building, shall be guilty of a misdemeanor.¹

CHAPTER V.

OF INJURIES TO MANUFACTURES AND MACHINERY.

Injuries to manufactures and machinery.] By 24 & 25 Vict. c. 97, s. 14, whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any goods or article of silk, woollen, linen, cotton, hair, mohair or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture, or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any warp or shute of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or render useless, any loom, frame, machine, engine, rack, tackle, tool, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles, or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences in this section mentioned, shall be guilty of felony, and liable to penal servitude for life, or not less

¹ Punishable by fine and imprisonment.

than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen, with or without whipping.

By sect. 15, whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any machine or engine, whether fixed or moveable, used or intended to be used for sowing, reaping, mowing, threshing, ploughing, or draining, or for performing any other agricultural operation, or any machine or engine, or any tool or implement, whether fixed or moveable, prepared for or employed in any manufacture whatsoever, (except the manufacture of silk, woollen, linen, cotton, hair, mohair, or alpaca goods, or goods of any one or more of those materials mixed with each other or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace,) shall be guilty of felony, and liable to penal servitude not exceeding seven nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen, with or without whipping.

It will be observed that there are three branches in the 14th section:—1, the mischief done to goods in the stage or progress of manufacture; 2, the like done to the machinery itself, as to the warp or shute, the loom, frame, &c.; and, 3, the entry into some place in order to effect the damage.¹ It is not to be supposed that the damage must necessarily be of a nature to destroy either the machine or the implement in question, or that part of the machine which is the subject of the charge. Where the prisoner entered a shop and took away part of two frames, which made the instrument of no use, but which part could be replaced without injury to the frame, it was held, that this act would support a charge for malicious damage under 28 Geo. 3, c. 55, the old Act upon the subject.² And it is worthy of observation, that although the words “loom, frame, &c.,” are not followed by “or any part thereof,” it would be difficult to find a case of malicious damage to a loom, where the intent to damage the whole would not be recognized. Cords employed to raise the harness or working tools of a loom in order to move the shuttle to and fro, are tackle.³ Still, if a piece of machinery does not answer its alleged name the indictment will fail. A warp was on its way to be sized, but, not being sized, it was not a warp within the statute.⁴ Goods are considered by law to remain in the “stage, process, and progress of manufacture” mentioned in the Act, until they are brought into a saleable condition. The texture being complete does not necessarily make them subjects for sale, and the statute, therefore, applies to articles though they may be in so forward a state as to have the texture perfect.⁵

¹ 2 B. & Adol. 755.

² *R. v. Tacey*, Russ. & Ry. 452.

³ *R. v. Smith*, 6 Cox, 198.

⁴ *R. v. Clegg*, 3 Cox, 295.

⁵ *R. v. Woodhead*, 1 Moo. & Rob. 549.

Indictment.] The indictment charges that A. on, &c., did unlawfully and feloniously cut, break, and destroy, &c., the property in question, of the goods and chattels of B., then being in a certain loom, &c., against the form, &c.

It should be averred that the goods destroyed or damaged were in the loom, or in a certain stage of manufacture, or otherwise, according to the facts; and, if the offence consists in damaging the loom, frame, or other such part of the machinery, it ought to be averred that such loom, &c., was prepared or employed in some one of the ways described in the section.¹ But this is not so with reference to the damaging a warp or shute of silk. It is not necessary to aver that the warp or shute was prepared or employed in manufacturing goods. A warp is a denomination of some kind of thread prepared to be woven and used in manufacture; it is in itself something "prepared for manufacturing goods." The warp is something already prepared for manufacture, and therefore the proof must be the same whether the indictment contains such an allegation or not, and consequently the words "prepared or employed" are not to be read as referring to all the preceding words, including "warp and shute," but to those only denoting the implements of manufacture. A writ of error, therefore, was ineffectual, which alleged, by way of objection, the omission of the words "prepared or employed," &c., and the judgment below was affirmed.² This seems not to be amongst the cases where an averment of intent is necessary, at least so far as cutting tackle is concerned, for that is of itself a complete offence.³

Threshing and other machines.] The questions which have arisen upon this clause seem, for the most part, to concern the fitness of the machine for business. It does not signify if it were worked differently from its usual mode, or if certain parts were deficient. The question is, whether the machine is competent to its office. Thus, the stage and lips of a threshing machine were wanting, but the threshing might go on if a man stood on a chair or a table, or some sheaves of corn. This machine was considered to be within the protection of the Act.⁴ Upon another occasion, the sideboards were wanting, and the machine certainly did not work so well, but it would work notwithstanding, and it was held to come within the section.⁵ So where the machine could be worked by water or by horses, and the prosecutor had established a water-wheel for his threshing machine, but for *that only*, and, at the time of the mischief done, had removed his machine, leaving the wheel, which was broken; it was held that the prisoner had completed the damage contemplated by the Act, for the prosecutor could at any time have attached the wheel again to his machine.⁶

¹ 2 B. & Adol. 755, by Lord Tenterden.

² *R. v. Ashton*, 2 B. & Add. 750.

³ *R. v. Smith*, 6 Cox, 198.

⁴ *R. v. Chubb*, Deac. Cr. L. 1687.

⁵ *R. v. Bartlett and others*, Deac. Cr. L. 1687.

⁶ *R. v. Fidler and others*, 4 C. & P. 449.

But where the prosecutor had broken his wheel for fear of the mob, and had so rendered the working impossible, the machine being no longer capable of action, could not be called a threshing machine; and, although the mob destroyed the remainder, the case was deemed not to be within the statute.¹ Yet a machine which is merely taken to pieces is competent to work as soon as the component parts are put together; and, therefore, where it is clearly the intention of the owner to use his machine again, it is an offence within the Act to burn or otherwise destroy or damage any one of the pieces, although it should happen to have been taken down at the time of the injury, for this is, at all events, a damage to the implement.² Therefore, the machine need not be in operation at the time of the mischief, for, although taken to pieces, it can be forthwith put up and worked as usual.³ The trifling nature of the injury, as a displacement, affords no excuse.⁴ In a case of machine breaking, the judge is said to have permitted the following questions:—"Did the mob compel persons to go with them?" "Did the prisoner give one blow to each machine?" "Did you run away on the first opportunity?"⁵

Indictment.] The indictment alleges the unlawful, malicious, and felonious destruction of the threshing or other machine, and it should mention the machines excepted in the statute.

CHAPTER VI.

OF INJURIES TO CORN, HOPBINDS, TREES, VEGETABLE PRODUCTIONS, ETC.

Hay, &c.] By 24 & 25 Vict. c. 97, s. 16, Whosoever shall unlawfully and maliciously set fire to any crop of hay, grass, corn, grain, or pulse, or of any cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, where-soever the same may be growing, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen, with or without whipping.

¹ *R. v. West*, Deac. Cr. L. 1687.

² *R. v. Hutchinson*, Deac. Cr. L. 1687.

³ *R. v. Mackerel and another*,

4 C. & P. 448.

⁴ *R. v. Foster*, 6 Cox, 25.

⁵ *R. v. Crutchley*, 5 C. & P. 33.

Stacks, &c.] By sect. 17, Whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, or to any steer of wood or bark, shall be guilty of felony, and liable to penal servitude for life, or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen, with or without whipping.

By sect. 18, Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any such matter or thing as in either of the last two preceding sections mentioned, under such circumstances, that, if the same were thereby set fire to, the offender would be, under either of such sections, guilty of felony, shall be guilty of felony, and liable to penal servitude not exceeding seven nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen, with or without whipping.

Hopbinds.] By sect. 19, Whosoever shall unlawfully and maliciously cut, or otherwise destroy, any hopbinds growing on poles in any plantation of hops, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen, with or without whipping.

Trees, &c.] By sect. 20, Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling house, (in case the amount of the injury done shall exceed the sum of 1*l.*.) shall be guilty of felony, and liable to penal servitude for three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen, with or without whipping.

By sect. 21, Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, growing elsewhere than in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining to or belonging to any dwelling house, (in case the amount of injury done shall exceed the sum of 5*l.*), shall be guilty of felony, and liable to penal servitude for the term of three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen, with or without whipping.

By sect. 22, Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, where-soever the same may be growing, the injury done being to the

amount of 1s. at the least, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding three months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding 5*l.*, as to the justices shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve months, as the convicting justice shall think fit; and whosoever, having been twice convicted of any such offence (whether both or either of such convictions shall have taken place before or after the passing of this Act), shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of a misdemeanor, and liable, at the discretion of the court, to imprisonment not exceeding two years, with or without hard labour, and confinement, and, if a male under sixteen, with or without whipping.

Plants, vegetables, &c.] By sect. 23, Whosoever shall unlawfully and maliciously destroy, or damage with intent to destroy, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery ground, hothouse, greenhouse, or conservatory, shall, on conviction thereof before a justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding 20*l.*, as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of parliament, shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of felony, and liable to be kept in penal servitude for the term of three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen, with or without whipping.

And by sect. 24, Whosoever shall unlawfully and maliciously destroy, or damage with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard, or nursery ground, shall, on conviction thereof before a justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding one month, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding 20*s.*, as to the justices shall seem meet, and in default of payment thereof, together with the costs,

if ordered, shall be committed as aforesaid for any term not exceeding one month, unless payment be sooner made; and whosoever, having been convicted of any such offence either against this or any former Act of parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding six months, as the convicting justice shall think fit.

In considering these statutes, it may be remarked that under the word "corn" barley is included.¹ And in a case where the prisoner was charged with firing a stack of beans, the judges held unanimously, that they were bound to consider beans as a species of pulse, and so within the Act.² So the flax plant with the seed in it was found by the jury to be grain, but Bramwell, B., doubted whether the stack of that plant with the seed or grain was a stack within the Act, but the conviction was affirmed.³ "Haulm" was a new word in the Act of 1 Vict. c. 89, s. 10. Under the stat. 7 & 8 Geo. 4, c. 30, "haulm" did not constitute a stack, the burning of which was felony.⁴ It was not considered to be "straw."⁵ So in a case at Hertford for burning cole seed straw, and wheat stubble, as soon as the jury had expressed their opinion that the stubble was "haulm," Lord Denman directed an acquittal.⁶ A "stack" of wood was likewise included in 1 Vict. c. 89, which was not the subject of arson under 7 & 8 Geo. 4, c. 30.⁷ With reference to a point once raised in *Judd's case*,⁸ it should seem, that a parcel of unthreshed wheat is not within these Acts, such wheat not being a crop of corn, whether standing or cut, for a crop usually signifies the product of a field. Yet it would be a misdemeanor at common law to fire any such produce, being valuable, if done with malice, and not by accident. It will not fail to attract notice, that the intent to injure is not mentioned in the clauses before us, and consequently according to the principle before adverted to, where the indictment is prepared, it is not necessary to state any such intent there. It has been so held by the judges in a case upon the 17th section of 7 & 8 Geo. 4, c. 30, for burning straw.⁹ It is no defence that the matter charged in the indictment was not originally set fire to. It is enough if the fire communicated so as to burn it. Therefore, where, upon a charge of setting fire to a wood, it appeared that the prisoners had set fire to a summer house which was in the wood, and the fire had communicated to the wood, it was held sufficient.¹⁰

Indictment.] The indictment states that A. on, &c., unlawfully, maliciously, and feloniously did set fire to a certain crop of wheat,

¹ *R. v. Swatkins*, 4 C. & P. 548.

² *R. v. Woodward*, 1 Moo. C. C. 323.

³ *R. v. Spencer and another*, 26 L. J. M. C. 16; Dears. & B. 131.

⁴ 1 Lew. C. C. 10.

⁵ See 1 Moo. C. C. 241.

⁶ *R. v. Tottenham and another*, 1 Moo. C. C. 461.

⁷ *R. v. Aris*, 6 C. & P. 348.

⁸ 2 T. R. 255; Leach, 484; East, P. C. 1018.

⁹ *R. v. Newill*, 1 Moo. C. C. 458.

¹⁰ *R. v. Price*, 9 C. & P. 729.

&c., to wit, — acres of wheat, &c., or under the other section, to a certain stack of wheat, &c., the property of B., then standing and growing in the parish of. &c., in the county, &c., or, in the case of the stack, &c., of the goods and chattels of B., against the form, &c.¹

Trial.] The offences of unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, are excluded from the jurisdiction of justices of the peace, and of recorders of boroughs.²

In the case of hopbinds, the evidence must disclose the death of the plant in consequence of the injury. The proof of cutting without also showing the destruction by reason of such cutting is insufficient.³

Indictment.] The indictment states that A. on, &c., unlawfully, maliciously, and feloniously did cut and destroy — hopbinds, the property of B., then growing on poles in a certain plantation of hops of the said B., situate, &c., against the form, &c.

It is not the less an offence to cut trees or shrubs because the title to the property happens to be in dispute.⁴ The name of the owner should be accurately stated in the indictment.⁵ Dwarf apple and pear trees were held to be within the protection of the old law.⁶ Under a section similar to that of sect. 22, it was held, that if the damage amounted to 6*d.* only, the defendant might be convicted.⁷ But, subsequently, Lord Denman said in another case, “the statute containing specific enactments for malicious injuries to trees where the damage is to the extent of 1*s.* and upwards, we are strongly inclined to think that the 24th section (*i. e.* of 7 & 8 Geo. 4, c. 30) was not intended to apply to injuries to trees, and that if the injury be less in amount than 1*s.*, it is too inconsiderable to be made the subject of prosecution. But in any view of the case, we are of opinion, that the 24th section can only be applicable in case the damage be less than 1*s.*”⁸ But now by 24 & 25 Vict. c. 97, s. 53, the general section concerning malicious injuries is expressly declared to apply to trees.

Indictment.] The indictment states that A. on, &c., unlawfully, maliciously, and feloniously did cut, root up, and destroy one oak tree of and belonging to one B., and then growing in a certain

¹ If the crop were standing when set fire to, it should seem that the local situation of it must be stated and proved, but if cut down it is otherwise. But in the case of the stack, &c., the parish need not be mentioned. Archb. Cr. P. 503.

² 5 & 6 Vict. c. 38, s. 1.

³ *R. v. Boucher*, 5 Jur. 709.

⁴ *R. v. Whateley*, 4 Man. & Ry. 431.

⁵ *R. v. Patrick and another*, Leach, 253.

⁶ *R. v. Taylor*, Russ. & Ry. 373.

⁷ *R. v. Dobson*, 9 Ad. & El. 704.

⁸ *Charter v. Græme*, 18 L. J. M.C. 73. *R. v. Dobson* was brought before the attention of the court.

pleasure ground of the said B., situate, &c., and then thereby doing injury to the said B. to an amount exceeding the sum of 1*l.*, (or 5*l.*, as the case may be, if the tree be growing elsewhere,) against the form, &c.

Whiteman was indicted under a clause similar to the 21st of this Act, for damaging two oak trees growing in a hedge, to the amount of 5*l.* 14*s.* The damage was made up thus:—

	£	s.	d.
Stubbing up the old hedge -	-	0	15 0
Post and rails for new hedge -	-	3	10 0
Quick wood setting and draining -	-	0	9 6
Damage to trees - - -	-	1	0 0
	£5	14	6

The chairman of sessions directed the jury that there was sufficient evidence of injury to the amount of 5*l.* Upon a case stated the counsel for the prosecution admitted that he could not sustain the conviction. The court stated that the statute did not apply to consequential injury.¹

CHAPTER VII.

OF INJURIES TO MINES.

By fire.] By 24 & 25 Vict. c. 97, s. 26, Whosoever shall unlawfully and maliciously set fire to any mine of coal, cannel coal, anthracite, or other mineral fuel, shall be guilty of felony, and liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour and solitary confinement, and, if a male under sixteen, with or without whipping.

By sect. 27, Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any mine, under such circumstances that if the mine were thereby set fire to the offender would be guilty of felony, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen, with or without whipping.

By water.] By sect. 28, Whosoever shall unlawfully and maliciously cause any water to be conveyed or run into any mine, or into any subterraneous passage communicating therewith, with

¹ *R. v. Whiteman*, 23 L. J. M. C. 120. or gates, which are not indictable misdemeanors, are provided for by

Injuries to fences, walls, stiles, 24 & 25 Vict. c. 97, s. 25.

intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall with the like intent unlawfully and maliciously pull down, fill up, or obstruct, or damage with intent to destroy, obstruct, or render useless, any airway, waterway, drain, pit, level, or shaft of or belonging to any mine, shall be guilty of felony, and liable to penal servitude not exceeding seven nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen, with or without whipping. Provided that this provision shall not extend to any damage committed underground by any owner of any adjoining mine in working the same, or by any person duly employed in such working.

Pulling down engines, &c.] And by sect. 29, the same punishments are awarded against such as shall unlawfully and maliciously pull down or destroy, or damage with intent to destroy or render useless, any steam engine or other engine for sinking, draining, ventilating, or working, or for in anywise assisting in sinking, draining, ventilating, or working any mine, or any appliance or apparatus in connection with any such steam or other engine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggonway, or trunk for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggonway, or trunk be completed or in an unfinished state, or shall unlawfully and maliciously stop, obstruct, or hinder the working of any such steam or other engine, or of any such appliance or apparatus as aforesaid, with intent thereby to destroy or damage any mine, or to hinder, obstruct, or delay the working thereof, or shall unlawfully and maliciously wholly or partially cut through, sever, break, or unfasten, or damage with intent to destroy or render useless, any rope, chain, or tackle, of whatsoever material the same shall be made, used in any mine, or in or upon any inclined plane, railway or other way, or other work whatsoever, in anywise belonging or appertaining to or connected with or employed in any mine or the working or business thereof.

There have been some decisions upon this subject. It has been determined, that the proviso at the end of the 6th section of 7 & 8 Geo. 4, c. 30, could not operate to discharge the owner or his workmen, if, in working their mine, they should commit a malicious mischief against the mine of their neighbour. So that if A. should maliciously order his servants to stop up the airway to the mine of B., and if the servants, confederating with their master, should do so, all the parties, notwithstanding the proviso, will be guilty of felony.¹ A scaffold, erected for the purpose of working a vein of coal, there being water in the bottom of the mine, was an erection within the 7th section of that Act.² But proof of damaging a cylinder, called a drum, which revolved and took up the rope as the coal was drawn up from the mine, was held not to be within the allegation of da-

¹ *R. v. James*, 8 C. & P. 131.

² *R. v. Whittingham*, 9 C. & P. 235.

mage to a steam engine used in working the mine.¹ Again, an engine had been stopped and locked up for the night; the prisoner got into the engine house and set the engine in motion, and there being no machinery attached, the engine received damage: this was held to be a damaging of the engine within the 7th section.² A still clearer construction has been given to the word "erections" in an Act which contains terms similar to the 7th section.³ The plaintiffs had constructed a wooden aqueduct raised upon piles, and called a trough, leading from a spring to a pool of water. They made use of the water for washing the slag from the beds as well as the mineral from the mine. The trough never approached nearer than half-a-mile to the mine, being as near as the nature of the ground would admit of. This wooden aqueduct was pulled down feloniously, and the question was whether it was an erection within the Act. And the court were quite of opinion that this was an erection "used in conducting the business" of the mine, so that the rule for entering a verdict for the defendants upon certain counts was discharged.⁴

Indictment.] The indictment for setting fire to a mine states, that A. on, &c., unlawfully, maliciously and feloniously did set fire to a certain coal mine, situate, &c., against the form, &c. The indictment for drowning a mine alleges that A. on, &c. unlawfully, maliciously, and feloniously did cause a large quantity of water to be conveyed into a certain mine of B., situate, &c., with intent thereby then to destroy and damage the said mine, and to hinder and delay the working thereof, against the form, &c. So, in the case of filling up airways, &c. That A., on, &c., unlawfully, maliciously, and feloniously did fill up, obstruct, and damage a certain airway, of and belonging to a certain mine of B., situate, &c., with intent thereby to damage the said mine, and to hinder and delay the working thereof, against the form, &c. And a similar form is proper under sect. 29. That A. on, &c., unlawfully, maliciously, and feloniously did pull down, destroy and damage a certain steam engine of one B. for sinking, draining, ventilating and working a certain mine of B., situate, &c., against the form, &c. Under 7 & 8 Geo. 4, c. 30, s. 6, an indictment which contained several counts laid the property of a mine in certain persons, naming them, but it appeared that the mine was worked by an agent; and upon a verdict of guilty generally, it was contended that the third count was bad, because it laid the property in the agent. The other counts laid it in the owners, or persons at all events claiming ownership. The statutes 7 Geo. 4, c. 46, s. 9, and 7 Geo. 4, c. 64, respecting the laying of the property in public officers and others, were cited for the prisoner. But the judges were unanimous in favour of the conviction.⁵

¹ *R. v. Whittingham*, 9 C. & P. 235.

² Of 7 & 8 Geo. 4, c. 30. *R. v. Norris*, 9 C. & P. 241.

³ 7 & 8 Geo. 4, c. 31. Remedies against the hundred, sect. 2.

⁴ *Barwell and others v. The Hundred of Winterstoke*, 19 L. J. Q. B. 206; and see *Nesham v. Armstrong*, 1 B. & Ald. 146.

⁵ *R. v. Jones*, 2 Moo. C. C. 293; 1 Car. & K. 181.

CHAPTER VIII.

OF INJURIES TO SEA AND RIVER BANKS, AND TO WORKS
ON RIVERS, CANALS, AND FISHERIES.

Sea banks.] By 24 & 25 Vict. c. 97, s. 30, Whosoever shall unlawfully and maliciously break down, or cut down, or otherwise damage or destroy any sea bank or sea wall, or the bank, dam, or wall of or belonging to any river, canal, drain, reservoir, pool, or marsh, whereby any land or building shall be or shall be in danger of being overflowed or damaged, or shall unlawfully and maliciously throw, break, or cut down, level, undermine, or otherwise destroy, any quay, wharf, jetty, lock, sluice, floodgate, weir, tunnel, towing-path, drain, water-course, or other work belonging to any port, harbour, dock, or reservoir, or on or belonging to any navigable river or canal, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen, with or without whipping.

By sect. 31, Whosoever shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any sea bank or sea wall, or the bank, dam, or wall of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbour, dock, quay, wharf, jetty, or lock, or shall unlawfully and maliciously open or draw up any floodgate or sluice, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, shall be guilty of felony, and liable to penal servitude not exceeding seven nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen, with or without whipping.

Fishponds, &c.] And by sect. 32, Whosoever shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam, floodgate, or sluice of any fishpond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish that may then be or that may thereafter be put therein, or shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam or floodgate of any mill pond, reservoir, or pool, shall be guilty of a misdemeanor, and

liable to penal servitude not exceeding seven nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen, with or without whipping.

Indictment.] The indictment under sect. 30 charges—That A. on, &c., unlawfully, maliciously, and feloniously did break and cut down a certain part of the bank of a [canal] called —, situate —, by means of which certain lands were then and thereby and there overflowed [or in danger, &c.], against the form, &c.

Under sect. 31, That A. on, &c., unlawfully, &c., did draw up and remove divers, to wit, twenty piles, fixed in the ground, and then used for securing the bank of a certain canal, called —, situate, &c., by means of which, &c., &c., against the form, &c.

And under sect. 32, That A. on, &c., unlawfully and maliciously did break down and destroy the dam of a certain fishpond of and belonging to one B. situate, &c., with intent thereby then to take and destroy the fish then being in the said pond, against the form, &c.

CHAPTER IX.

INJURIES TO BRIDGES, VIADUCTS, AND TOLL BARS.

By 24 & 25 Vict. c. 97, s. 33, Whosoever shall unlawfully and maliciously pull or throw down or in anywise destroy any bridge (whether over any stream of water or not), or any viaduct or aqueduct, over or under which bridge, viaduct, or aqueduct any highway, railway, or canal shall pass, or do any injury with intent and so as thereby to render such bridge, viaduct, or aqueduct, or the highway, railway, or canal passing over or under the same, or any part thereof, dangerous or impassable, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour and confinement, and, if a male under sixteen, with or without whipping.

And by sect. 34, Whosoever shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike gate or toll bar, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike gate or toll bar, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any Act of parliament relating thereto, or any house, building, or weighing engine erected for the better collection, ascertainment, or security of any such toll, shall be guilty of a misdemeanor.

Bridges.] Similar provisions are in force under the Chelsea

Bridge Act.¹ But the punishment may be mitigated to such a sentence as the law awards in a case of petty larceny. And by 12 & 13 Vict. c. 11, s. 1, the punishment of transportation was withdrawn from the list.

So, again, in the case of the *old* or New Westminster Bridge.²

Indictment.] The indictment charges that A. on, &c., unlawfully, maliciously, and feloniously did pull down and destroy a certain public bridge, situate, &c., against the form, &c.

The indictment with respect to the toll house states that A. on, &c., unlawfully and maliciously did throw down, level, and destroy a certain turnpike gate and toll bar called —, situate, &c., against the form, &c.

CHAPTER X.

OF INJURIES TO RAILWAYS, CARRIAGES, AND TELEGRAPHS.

Injuries to railways and telegraphs.] With regard to railways and telegraphs, it is enacted by 24 & 25 Vict. c. 97, s. 35, that Whosoever shall unlawfully and maliciously put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove or displace any railway sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or show, hide or remove, any signal or light upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage or truck using such railway, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and, if a male under sixteen, with or without whipping.

By sect. 36, Whosoever, by any unlawful act, or by any wilful omission or neglect, shall obstruct or cause to be obstructed any engine or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and liable to imprisonment not exceeding two years, with or without hard labour.

By sect. 37, Whosoever shall unlawfully and maliciously

¹ 9 & 10 Vict. c. 39, s. 85.

² 16 & 17 Vict. c. 46, s. 14.

cut, break, throw down, destroy, injure, or remove any battery, machinery, wire, cable, post, or other matter or thing whatsoever, being part of or being used or employed in or about any electric or magnetic telegraph, or in the working thereof, or shall unlawfully and maliciously prevent or obstruct in any manner whatsoever the sending, conveyance, or delivery of any communication by any such telegraph, shall be guilty of a misdemeanor, and liable to imprisonment not exceeding two years, with or without hard labour. Provided, that if it shall appear to any justice, upon the examination, that it is not expedient to the ends of justice that the same should be prosecuted by indictment, the justice may summarily convict the offender upon proof, and may adjudge him to be imprisoned only, or to be imprisoned and kept to hard labour not exceeding three months, or to forfeit and pay such sum, not exceeding 10*l.*, as to the justice shall seem meet.

And by sect. 38, Whosoever shall unlawfully and maliciously, by any overt act, attempt to commit any of the offences in the last preceding section mentioned, shall, on conviction thereof before a justice, either be committed and imprisoned only, or imprisoned and kept to hard labour, not exceeding three months, or forfeit and pay such sum, not exceeding 10*l.*, as to the justice shall seem meet.

It is no defence to urge that the conveyance of passengers had not commenced, and that the traffic was confined to workmen and materials. If the line be completed and a truck be placed across it, so that the safety of passengers who might be in a carriage would be endangered, the crime is accomplished.¹ Again, where it was proved that the prisoners placed a stone on the railway so as to create an obstruction, this fact was held sufficient to enable the jury to decide what their intention was.² But where the tender against which a stone was thrown was empty, the prisoner was acquitted, the statute requiring that some person should be within it.³

Indictment.] The indictment states that A., on, &c., wilfully, maliciously, and feloniously did put, place, cast, and throw a piece of wood upon and across a certain railway, called —, situate, &c., with intent thereby then to obstruct and injure a certain engine and carriages then using the said railway, against the form, &c.

¹ *R. v. Bradford and others*, 8 Cox, 309.

² *R. v. Upton and another*, 5 Cox, 298.

³ *R. v. Court*, 6 Cox, 202. *R. v. Sanderson*, 1 Fost. & F. 37.

CHAPTER XI.
OF INJURIES TO WORKS OF ART.

It having become too plain that the handsomest works of art, or public statues, &c., were not safe from attacks from mischievous or evil-disposed persons, the statutes 8 & 9 Vict. c. 44,¹ and the 17 & 18 Vict. c. 33, s. 6,² were passed for the purpose of restraining such unprincipled actions, and their provisions have been adopted in the present code of legislation. By 24 & 25 Vict. c. 97, s. 39, Whosoever shall unlawfully and maliciously destroy, or vase, or any other article or thing kept for the purpose of art, science, or literature, or as an object of curiosity, bust, or statue, or from time to time open for the admission of the public, or of any museum, gallery, cabinet, library, or other repository, in any museum, gallery, cabinet, library, or other repository, which at all times or from time to time open for the admission of the public, either by the permission of the proprietor thereof, or by the same, either by money before entering the same, or any picture, statue, monument, or work of art, in any church, chapel, meeting-house, or other place of divine worship, or to any university, or college, or hall of any university, or to any inn of court, or in any street, square, or monument exposed to public view, or any building belonging to the Queen, parish, or place, or to any building, city, borough, or poor law union, burial ground, public garden or ground, or any statue or monument, or fence surrounding such statue or monument, shall be guilty of a misdemeanor, and liable to imprisonment for any term not exceeding six months, with or without hard labour, and, if a male under sixteen years, with or without whipping; provided that nothing herein contained shall be deemed to affect the right of any person to recover, by action at law, damages for the injury so committed.

Indictment.] That A., on, &c., unlawfully and maliciously did damage a certain —, in the manner following, that is to say, by —, which said — was then kept for the purpose of —, in a certain museum called —, which museum was then from time to time open for the admission of the public to view the same, against the form, &c. Or, that A., on, &c., unlawfully and maliciously did damage a certain statue, the same then being within the meaning of the Act of the session of the 24 & 25 Vict. c. 97, against the form, &c.

¹ Repealed.

² Repealed.

CHAPTER XII.

OF MALICIOUS INJURIES TO CATTLE AND OTHER ANIMALS.

By 24 & 25 Vict. c. 97, s. 40, Whosoever shall unlawfully and maliciously kill, maim, or wound any cattle shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment, not exceeding two years, with or without hard labour, and solitary confinement.

And by sect. 41, Whosoever shall unlawfully and maliciously kill, maim, or wound any dog, bird, beast, or other animal, not being cattle, not being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or for any domestic purpose, shall, on conviction thereof before a justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the amount of injury done, such sum, not exceeding 20*l.*, as to the justice shall seem meet; and whosoever, having been convicted of any such offence, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve months, as the convicting justice shall think fit.

The principal questions, in considering this statute, are, what shall be said to be cattle, and what the malicious injuries which it contemplates. It may, however, be premised, that, although the prisoner's object may have been to commit an injury of another description, he is not the less guilty under this statute, if an animal be injured in the prosecution of his felonious design. As if a cowhouse be set fire to, and a cow burnt; here the party may well be charged with the malicious killing of the cow.¹

A case occurred under the 7 & 8 Geo. 4, c. 30, s. 16, which occasioned some discussion. The prisoner was charged with wounding a mare. The evidence sustained this charge, but no malice could be detected. It did not appear that the prisoner even knew to whom the mare belonged. The counsel for the prisoner, upon this, relied upon the statute, 1 Vict. c. 90, s. 2, which altered the punishment for this offence. His argument was, that as this section of the 1 Vict. c. 90 repealed the former Act as to the punishment, the operation of the 7 & 8 Geo. 4,

¹ *R. v. Haughton*, 5 C. & P. 559.

c. 30, s. 25, was taken away. But Patteson, J., at the trial, held, that the evidence of malice was not necessary, and the objection above alluded to was rejected by eight judges, who met and affirmed the conviction.¹ Yet if the prisoner do any act to an animal with a good motive, he cannot be convicted of a felonious act. He may be mistaken; but he is not guilty of felony. The prisoner stood indicted for administering sulphuric acid to eight horses. But it turned out that the man's object was to improve their appearance, and thereupon he was acquitted. Evidence of administering at different times was admitted in order to show the intent, and proof that the acid was given to each horse separately was held sufficient to sustain the charge of administering generally.²

What cattle within the Act.] It was objected upon one occasion, that as one Act of parliament spoke of sheep or other cattle, and another *specified* these cattle, amongst which "horses, mares, and colts" were not included, therefore, that the word "cattle" did not include "horses," &c.; but the judges overruled the objection,³ and several convictions subsequently followed.⁴ The question, although never raised as to sheep, was made as to pigs, and the judges held pigs to be cattle within the 9 Geo. 1, c. 22, s. 1, and the conviction accordingly right.⁵ Lastly, the point was again presented to the attention of the judges with respect to asses, and they held that asses were cattle within the Black Act;⁶ and it may be added that these cases still apply, because of the enacting words, "If any person shall kill, maim, or wound any cattle," &c.

Nature of the injury.] The next point is the nature of the injury which will bring an offender within the penalties of the Act, or what shall be said to be a killing, maiming, or wounding within it.

Questions have been raised upon these terms, maiming and wounding. John Haywood was proved to have driven a nail into the frog of a horse's foot with intent to injure the prosecutor. The horse continued for some time to be of no value to the owner on account of the injury; but as the animal ultimately showed signs of recovery, it was doubted, whether the hurt not being of a per-

¹ *R. v. Tivey*, Den. 63; 1 Car. & K. 704. See the old cases concerning malice. *R. v. Ranger*, East, P. C. 1074. *R. v. Pearce*, Leach, 527. *R. v. Kean*, East, P. C. 1073. Leach, 527, n. *R. v. Shepherd*, East, 1073; Leach, 539. Another case, East, 1073; Leach, 540, n. *R. v. Austin*, Russ. & Ry. 492; S. C. cited by Bayley, J., 3 B. & C. 252. See also 4 Geo. 4, c. 54, s. 2.

² *R. v. Mogg*, 4 C. & P. 361.

³ *R. v. Patey*, East, P. C. 1074; Leach, 72; 2 Sir Wm. Bl. 721.

⁴ *R. v. Mott*, East, P. C. 1075; Leach, 73. *R. v. Moyle*, East, P. C. 1076.

⁵ *R. v. Chapple*, Russ. & Ry. 77.

⁶ *R. v. Whitney*, 1 Moo. C. C. 3.

manent nature, was within the Act. But as there was a count for malicious wounding, as well as one for maiming, the judges held the conviction right, for wounding does not import a permanent injury.¹ Whilst upon a charge of maiming only, the law contemplates no other than a permanent injury, and so it has been held under the 7 & 8 Geo. 4, c. 30, s. 16.² Upon another occasion the prisoner was proved to have poured some nitrous acid into a mare's left ear, and it was probable that some of the acid had run down into the animal's left eye, so as to cause blindness. The mare was killed, having lived in extreme pain about ten days. It was stated at the trial by medical persons that the injuries done to the ear of the animal were ulcers, and not wounds, though such ulcers would have turned into wounds. The nitrous acid, therefore, not having been the cause of death immediately, and not having produced wounds, technically so called, the jury were directed to find a verdict of guilty upon the third count only, which was for *maiming*, and the question submitted to the judges was, whether the mischief done to the eye in the manner above stated was a maiming under the statute 7 & 8 Geo. 4, c. 30. The conviction was affirmed.³ An injury done to a sheep by setting on a dog has been held by Park, J., not to be a wounding within the statute.⁴

It may be noticed, that at common law, these acts of unlawful maiming are only trespasses.⁵

Indictment.] The indictment alleges that A., on, &c., unlawfully, maliciously, and feloniously did [kill, maim, or wound] a certain —, the property of one B., against the form, &c.

Indictment.] In treating of larceny, we have seen that a person who has a special property in goods, may lay them to be his property in an indictment for stealing, and it was upon this principle that a case was decided regarding the malicious killing of certain sheep. The prosecutor, it appeared, had only taken in the cattle in question to agist for another person, and an objection was made, that the agister could not maintain this charge, and one of the judges doubted, it is said, at first, because the agister would not be liable for the sheep *at all events*, as the innkeeper would be for the goods of his guest. But all the judges finally agreed that the conviction was right.⁶ There is no occasion to aver that the particular animal which is the subject of the indictment is "cattle." The point was once made by way of objection where the charge was for shooting a mare and colt, and it was moved to arrest the judgment; but the judges decided against the prisoner.⁷ And a similar objection was

¹ *R. v. Haywood*, Russ. & Ry. 16; East, P. C. 1076; Leach. 539, n.

² *R. v. Jeans*, 1 Car. & K. 539.

³ *R. v. Owens*, 1 Moo. C. C. 205.

⁴ *R. v. Hughes*, 2 C. & P. 420.

⁵ East, P. C. 1074.

⁶ *R. v. Woodward*, East, P. C. 53.

⁷ *R. v. Patey*, East, P. C. 1074; Leach, 72.

raised in a case at York for wounding a gelding ; but Bolland, B., was against the objection, and the judges concurred with him.¹ However, it is necessary that the species should be set out in the indictment. So that where the charge was for killing a mare, and it turned out that the animal destroyed was a colt, and there was no proof of its sex, the judges held the conviction wrong. They held that the words "certain cattle," to wit, a "mare," did not verify the evidence ; that a certain mare, though laid under a *videlicet*, could not be rejected as surplusage, and that as the proof showed the killing of a colt generally, the indictment could not be supported, the sex not being distinguished.²

CHAPTER XIII.

OF MALICIOUS INJURIES TO SHIPS.

1. *Burning Ships.*
2. *Burning Ships with intent to prejudice the Underwriters.*
3. *Attempting to set Fire to a Vessel.*
4. *Gunpowder.*
5. *Damage otherwise than by Fire.*
6. *False Signals.*
7. *Cutting away Buoys, &c.*
8. *Destroying Wrecks.*

1. *Burning ships.*] By 24 & 25 Vict. c. 97, s. 42, Whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen years, with or without whipping.

2. *Burning ships with intent to prejudice the underwriters.*] By sect. 43, Whosoever shall unlawfully and maliciously set fire to, or cast away, or in anywise destroy any ship or vessel, with intent

¹ *R. v. Clark*, 1 Lew. C. C. 229.

² *R. v. Chalkley*, Russ. & Ry. 258.

thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that has underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour and solitary confinement, and, if a male under sixteen years, with or without whipping.

3. *Attempting to set fire to a vessel.*] By sect. 44, Whosoever shall unlawfully and maliciously, by any overt act, attempt to set fire to, cast away, or destroy any ship or vessel, under such circumstances that if the ship or vessel were thereby set fire to, cast away, or destroyed, the offender would be guilty of felony, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour and solitary confinement, and, if a male under sixteen years, with or without whipping.

4. *Gunpowder.*] By sect. 45, Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any ship or vessel any gunpowder, or other explosive substance, with intent to destroy or damage any ship or vessel, or any machinery, working tools, goods, or chattels, shall, whether or not any explosion take place, and whether or not any injury be effected, be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen years, with or without whipping.

5. *Damage otherwise than by fire.*] By sect. 46, Whosoever shall unlawfully and maliciously damage, otherwise than by fire, gunpowder, or other explosive substance, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same or render the same useless, shall be guilty of felony, and liable to penal servitude not exceeding seven nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen years, with or without whipping.

6. *False signals.*] By sect. 47, Whosoever shall unlawfully mask, alter, or remove any light or signal, or unlawfully exhibit any false light or signal, with intent to bring any ship, vessel, or boat into danger, or shall unlawfully and maliciously do anything tending to the immediate loss or destruction of any ship, vessel, or boat, and for which no punishment is hereinbefore provided, shall be guilty of felony, and liable to penal servitude for life, or not less than three years,—or to imprisonment not exceeding two

years, with or without hard labour, and solitary confinement, and, if a male under sixteen years, with or without whipping.

7. *Cutting away buoys, &c.*] By sect. 48, Whosoever shall unlawfully and maliciously cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall unlawfully and maliciously do any act with intent to cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall in any other manner unlawfully and maliciously injure or conceal any boat, buoy, buoy rope, perch, or mark used or intended for the guidance of seamen or for the purpose of navigation, shall be guilty of felony, and liable to penal servitude not exceeding seven years nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour and solitary confinement, and, if a male under sixteen years, with or without whipping.

8. *Destroying wrecks.*] And by sect. 49, Whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

It was, upon one occasion, attempted to be argued under 7 & 8 Geo. 4, c. 30, s. 9, (the clause which answers to 1 Vict. c. 89, ss. 4, 5, and the present,) that it was no offence for an owner or part owner to set fire to his own ship, and the objection was rested upon the common law principle that arson was burning the property of *another*, and that the statute 7 & 8 Geo. 4, c. 30, s. 4, had not, in its terms, introduced any alteration, and it was alleged, that in the old Acts the owners were *expressly pointed out* as persons who might be offenders against the statute in question. But it was replied, that the words of the statute were general, and that the term “part owner” was, for the first time, inserted in the Act of Geo. 4. So that, if it were possible to entertain a doubt as to the words, “owner or owners,” in the prior Act, the new word must of necessity include the prisoner. “Neither could it be said that the prisoner could not have intended to prejudice his co-partners, because, whatever injury might be done to them, he must himself share with them. Every man must be supposed to intend the necessary consequence of his own act.”¹ And the judges held that the intent to prejudice was implied by the act, and they affirmed the conviction.² This decision also disposed of another objection, which was, that the prisoner could not have acted from malice, and that the proof of malice was essential. The prisoner had been acquitted upon the counts for defrauding the insurance, and it was said that he could not be presumed to have intended an

¹ 1 Moo. C. C. 273.

² *R. v. Philp*, Id. 263.

injury to himself, by an act which, in effect, must have been injurious to himself, if the acquittal were taken into consideration. But upon this point also the judges were against the accused.¹

Indictment.] In drawing an indictment under this statute, care should be taken to notice those sections where the intent is mentioned, where it is necessary to lay the act as having been done with intent to prejudice some one, or to do a particular mischief. Thus, under 7 & 8 Geo. 4, c. 30, s. 9, it has been held essential to state that the offence of firing a vessel was committed with intent to prejudice the owner.² However, if there be a statement as to the manner of doing the mischief charged, it is not necessary to say that it happened otherwise than by fire.³

Whether a barge shall be said to be a vessel within 1 Vict. c. 89, is a question which does not seem to have been decided. The judges have occasionally adverted to the point under 7 & 8 Geo. 4, c. 30, which resembles the 1 Vict. c. 89, but it has not come directly in question, and therefore no determination has been had. However, a pleasure boat eighteen feet long seems to have been considered to be within 7 & 8 Geo. 4, c. 30.⁴

The indictment for damaging otherwise than by fire will state the nature of the damage done; but it is not necessary to use the words "damage otherwise than by fire," if the particular damage be fully set out.⁵

The law as to principal and accessory upon the subject of this section, has been discussed on several occasions. The case of *Pow*, who was discharged from a conviction for a felonious shipwreck under 4 Geo. 1, c. 12, and 11 Geo. 1, c. 29,⁶ no longer applies, because the more recent statutes fully embrace accessories. Accessories, again, before the fact, on shore, to the destruction of a ship on the high seas, were not amenable to the admiralty jurisdiction under 11 Geo. 1, c. 29.⁷ But this defect has long since been remedied. The question of principal and accessory came to be seriously canvassed in a much later case than those above mentioned. Two persons were tried at the Central Criminal Court in 1841 upon a charge of being accessories before the fact to a felony committed by E. L. as principal, the principal not having been previously convicted, and upon the evidence at the trial appearing not to be amenable to justice. The indictment was for "casting away and destroying a ship, with intent to prejudice," &c., and it charged, that the prisoners incited, moved, &c., the principal felon to do the same. And it was objected that the in-

¹ S. C. And see 7 & 8 Geo. 4, c. 30, s. 25.

² *R. v. Smith*, 4 C. & P. 569. *R. v. Bowyer*, Id. 559.

³ *R. v. Bowyer*, 4 C. & P. 559, under 7 & 8 Geo. 4, c. 30, s. 7.

⁴ See 4 C. & P. 500, *per* Patte-

son, J.; Id. 570, *note*, *per* Alderson, B.

⁵ *R. v. Smith*, *ut supra*.

⁶ Leach, 45; East, P. C. 1099.

⁷ *R. v. Easterby and another*, Leach, 947; Russ. & Ry. 37.

dictment was not properly framed as an indictment for a substantive offence within the meaning of 7 Geo. 4, c. 64, s. 9, but as an indictment at common law against the principal and accessory before the fact, and that as the principal felon had not been convicted, the accessory before the fact could not be convicted upon it. It was secondly objected, that upon the proper construction of the statutes, the Central Criminal Court had no jurisdiction to try the offence of an accessory before the fact in cases of felonies committed upon the high seas, unless where the principal felon himself has been committed to or detained in prison by that court for the offence. But the judges were of opinion, first, that the description of the offence had not been altered by the statute; it might have been put in a different shape, but every allegation in the indictment before them would have been included in any other. As to the second objection, they thought that the statute 4 & 5 Will. 4, c. 36, s. 22, concerning the Central Criminal Court, must be taken distributively, as to the commission of oyer and terminer and of gaol delivery. There was a general power to hear and determine all offences committed on the high seas, though the gaol delivery commission only extended to all prisoners committed or detained, and the conviction was held right.¹

It has been held, that the underwriters on a policy of goods were within the protection of 1 Vict. c. 89, s. 6 (to which this section answers), although, evidently, no goods were put on board the ship in question. The words in the statute are merely a description of a policy on goods.²

Dockyard, &c.] By 24 & 25 Vict. c. 115, s. 30, every person subject to this Act who shall unlawfully set fire to any dockyard, victualling yard, or steam factory yard, arsenal, magazine, building, stores, or to any ship, vessel, hoy, barge, boat, or other craft, or furniture thereunto belonging, not being the property of an enemy, pirate, or rebel, shall suffer death, or such other punishment as is hereinafter mentioned.³

Indictment, Sect. 42.] That A. on, &c., unlawfully, maliciously, and feloniously, upon the high seas, did set fire to a certain ship called —, the property of one B., against the form, &c.; or a certain ship called —, the property of one B., the same being then in an unfinished state, against the form, &c.

Indictment, Sect. 43.] That A. on, &c., unlawfully, maliciously, and feloniously did, upon the high seas, set fire to a certain ship called —, the property of one B., with intent thereby then to prejudice the said B., then being the owner of the said ship as aforesaid, against the form, &c.

¹ *R. v. Wallace*, 1 Moo. C. C. 200; *Car. & M.* 200. *son*, Russ. & Ry. 138. *R. v. Philp*, 1 Moo. C. C. 263.

² *R. v. Wallace and Wallace*, 2 Moo. C. C. 200; and see *R. v. Gib-* ³ See 22 Geo. 3, c. 33, Act 25 of the navy.

Indictment, Sect. 44.] That A. on, &c., unlawfully, maliciously, and feloniously did attempt to set fire to a certain ship called —, on the high seas, the property of one B., with intent then [state a felonious intent], against the form, &c.

Indictment, Sect. 45.] That A. on, &c., unlawfully, maliciously, and feloniously did place and throw a certain quantity, to wit, — pounds weight, of gunpowder in and upon and into a certain vessel called —, then being —, with intent to destroy and damage the said vessel, against the form, &c.

Indictment, Sect. 46.] That A. on, &c., unlawfully, maliciously, and feloniously did damage a certain ship called —, the property of one B., the same being then on the high seas (or in an unfinished state), with intent to destroy the same and render it useless, against the form, &c.

Indictment, Sect. 47.] That A. on, &c., unlawfully and feloniously did exhibit a false light and signal at a certain place within the parish of —, in the county of —, with intent thereby then to bring into danger a certain ship, the property of some person or persons to the jurors unknown, then sailing upon the high seas, near unto the said parish, against the form, &c.

Casting away buoys, &c.] It seems that the statute 19 Geo. 2, c. 22, which gives a summary jurisdiction of justices in cases of unloading rubbish, sinking old hulks, &c., to the damage of sewers, roads, channels, and navigable rivers, is still in existence.¹

Indictment, Sect. 48.] That A. on, &c., wilfully and feloniously did cast adrift [remove, &c.] a certain buoy (on the high seas), or at the parish of —, in the county of —, with intent to cut away, sink, and destroy the same, against the form, &c.

Indictment, Sect. 49.] That A. on, &c., unlawfully, maliciously, and feloniously did destroy a certain part of a certain ship called —, the property of some person or persons to the jurors unknown, then in distress, wrecked, and stranded, against the form, &c.

¹ See Woolrych on Waters, 2nd ed. p. 201.

CHAPTER XIV.

SENDING LETTERS THREATENING TO BURN OR DESTROY.

Sending letters threatening to burn or destroy.] By 24 & 25 Vict. c. 97, s. 50, Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce, or any grain, hay, or straw, or other agricultural produce in or under any building, or any ship or vessel, or to kill, maim, or wound any cattle, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten and not less than three years, or to imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under sixteen years, with or without whipping.

CHAPTER XV.

OF INJURIES NOT OTHERWISE PROVIDED FOR.

Injuries not otherwise provided for.] By 24 & 25 Vict. c. 97, s. 51, whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding 5*l.*, shall be guilty of a misdemeanor, and liable to imprisonment not exceeding two years, with or without hard labour; and in case any such offence shall be committed between the hours of nine of the clock in the evening and six of the clock in the next morning, shall be liable to be kept in penal servitude not exceeding five nor less than three years, or to imprisonment not exceeding two years, with or without hard labour.

By sect. 52, whosoever shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, shall, on conviction thereof before a justice, be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding two months, or else shall forfeit and pay such sum, not exceeding 5*l.*, as to the justice shall seem meet, and also such further sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of 5*l.*; which last-mentioned sum shall, in the case of private property, be paid to the party aggrieved; and in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in the same manner as every penalty imposed by a justice of the peace under this Act; and if such sums of money, together with costs (if ordered), shall not be paid either immediately after the conviction, or within such period as the justice shall at the time of the conviction appoint, the justice may commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, as the justice shall think fit, for any term not exceeding two months, unless such sums and costs be sooner paid. Provided that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game, but that every such trespass shall be punishable in the same manner as if this Act had not passed.

By sect. 53, the provisions in the last preceding section contained shall extend to any person who shall wilfully or maliciously commit any injury to any tree, sapling, shrub, or underwood, for which no punishment is hereinbefore provided.¹

CHAPTER XVI.

GUNPOWDER.

Making gunpowder to commit offences, and searching for the same.] By 24 & 25 Vict. c. 97, s. 54, whosoever shall make or manufacture, or knowingly have in his possession, any gunpowder or other explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument, or thing, with intent thereby or by means thereof to commit, or for the purpose of enabling any other person to commit, any of the felonies in this Act mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen, with or without whipping.

By sect. 55, any justice of the peace of any county or place in which any machine, engine, implement, or thing, or any gunpowder, or other explosive, dangerous, or noxious substance, is suspected to be made, kept, or carried for the purpose of being used in committing any of the felonies in this Act mentioned, upon reasonable cause assigned upon oath by any person, may issue a warrant under his hand and seal for searching in the daytime any house, mill, magazine, storehouse, warehouse, shop, cellar, yard, wharf, or other place, or any carriage, waggon, cart, ship, boat, or vessel, in which the same is suspected to be made, kept, or carried for such purpose as hereinbefore mentioned; and every person acting in the execution of any such warrant shall have, for seizing, removing to proper places, and detaining every such machine, engine, implement, and thing, and all such gunpowder, explosive, dangerous, or noxious substances found upon such search, which he shall have good cause to suspect to be intended to be used in committing any such offence, and the barrels, packages, cases, and

¹ Therefore, a damage done to trees under the value of 1s. will suffice.

other receptacles in which the same shall be, the same powers and protections which are given to persons searching for unlawful quantities of gunpowder under the warrant of a justice, under 23 & 24 Vict. c. 139.

CHAPTER XVII.

OF OTHER MATTERS.—24 & 25 VICT. c. 97.

By 24 & 25 Vict. c. 97, s. 56, in the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall be liable to imprisonment not exceeding two years, with or without hard labour, and solitary confinement; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act shall be liable to be proceeded against, indicted and punished as a principal offender.

Loiterers at night punishable.] By sect. 57, any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place during the night, and whom he shall have good cause to suspect of having committed or being about to commit any felony against this Act, and shall take such person as soon as reasonably may be before a justice of the peace, to be dealt with according to law.

Malice unnecessary.] By sect. 58, every punishment and forfeiture by this Act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise.

Possession by defendant.] By sect. 59, every provision of this Act not hereinbefore so applied shall apply to every person who, with intent to injure or defraud any other person, shall do any of the acts hereinbefore made penal, although the offender shall be in possession of the property against or in respect of which such act shall be done.

No statement to defraud particular persons.] By sect. 60, it shall be sufficient in any indictment for any offence against this Act, where it shall be necessary to allege an intent to injure or defraud, to allege that the party accused did the act with intent to injure or defraud (as the case may be), without alleging an intent to injure or defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to injure or defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to injure or defraud (as the case may be).

No warrant.] By sect. 61, any person found committing any offence against this Act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law.

Compelling appearance.] By sect. 62, where any person shall be charged on the oath of a credible witness before any justice of the peace with any offence punishable on summary conviction under this Act, the justice may summon the person charged to appear at a time and place to be named in such summons; and if he shall not appear accordingly, then (upon proof of the due service of the summons upon such person by delivering the same to him personally, or by leaving the same at his usual place of abode,) the justice may either proceed to hear and determine the case *ex parte*, or issue his warrant for apprehending such person and bringing him before himself or some other justice of the peace; or the justice before whom the charge shall be made may (if he shall so think fit), without any previous summons (unless where otherwise specially directed), issue such warrant; and the justice before whom the person charged shall appear or be brought shall proceed to hear and determine the case.

Abettors—Summary conviction.] By sect. 63, whosoever shall aid, abet, counsel, or procure the commission of any offence which is by this Act punishable on summary conviction, either for every time of its commission, or for the first and second time only, or for the first time only, shall, on conviction before a justice of the peace, be liable, for every first, second, or subsequent offence of aiding, abetting, counselling, or procuring, to the same forfeiture

and punishment to which a person guilty of a first, second, or subsequent offence as a principal offender is by this Act made liable.

Application of forfeitures.] By sect. 64, every sum of money which shall be forfeited for the amount of any injury done shall be assessed in each case by the convicting justice, and shall be paid to the party aggrieved, except where he is unknown, and in that case such sum shall be applied in the same manner as a penalty; and every sum which shall be imposed as a penalty by any justice of the peace, whether in addition to such amount or otherwise, shall be paid and applied in the same manner as other penalties recoverable before justices of the peace are to be paid and applied in cases where the statute imposing the same contains no directions for the payment thereof to any person. Provided that where several persons shall join in the commission of the same offence, and shall, upon conviction thereof, each be adjudged to forfeit a sum equivalent to the amount of the injury done, in every such case no further sum shall be paid to the party aggrieved than such value or amount; and the remaining sum or sums forfeited shall be applied in the same manner as any penalty imposed by a justice of the peace is hereinbefore directed to be applied.

Committal.] By sect. 65, in every case of a summary conviction under this Act, where the sum which shall be forfeited for the amount of the injury done, or which shall be imposed as a penalty by the justice, shall not be paid, either immediately after the conviction, or within such period as the justice shall, at the time of the conviction, appoint, the convicting justice (unless where otherwise specially directed) may commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, according to the discretion of the justice, for any term not exceeding two months, where the amount of the sum forfeited, or of the penalty imposed, or of both, (as the case may be,) together with the costs, shall not exceed five pounds; and for any term not exceeding four months where the amount, with costs, shall not exceed ten pounds; and for any term not exceeding six months in any other case; the commitment to be determinable in each of the cases aforesaid upon payment of the amount and costs.

First conviction.] By sect. 66, where any person shall be summarily convicted before a justice of the peace of any offence against this Act, and it shall be a first conviction, the justice may, if he shall so think fit, discharge the offender from his conviction upon his making such satisfaction to the party aggrieved for damages and costs, or either of them, as shall be ascertained by the justice.

Summary conviction a bar.] By sect. 67, when any person convicted of any offence punishable upon summary conviction by virtue of this Act shall have paid the sum adjudged to be paid,

together with costs, under such conviction, or shall have received a remission thereof from the crown, or the lord lieutenant or other chief governor of Ireland, or shall have suffered the imprisonment awarded for nonpayment thereof, or the imprisonment awarded in the first instance, or shall have been so discharged from his conviction by any justice as aforesaid, he shall be released from all further or other proceedings for the same cause.

The 68th section gives the right of appeal, where the sum payable on summary conviction exceeds 5*l*.

The 69th section takes away the writ of *certiorari*.

By sect. 70, the convictions are to be returned to the quarter sessions.

By sect. 73, whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act, the court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized. Provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

By sect. 74, whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this Act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.

By sect. 75, whenever solitary confinement may be awarded for any indictable offence under this Act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year; and whenever whipping may be awarded for any indictable offence under this Act, the court may sentence the offender to be once privately whipped; and the number of strokes, and the instrument with which they shall be inflicted, shall be specified by the court in the sentence.

By sect. 76, every offence hereby made punishable on summary conviction may be prosecuted in England in the manner directed by the 11 & 12 Vict. c. 43, so far as no provision is hereby made for any matter or thing which may be required to be done in the course of such prosecution, and may be prosecuted in Ireland before two or more justices of the peace, or one metropolitan or stipendiary magistrate, in the manner directed by the Act of 14 & 15 Vict. c. 93, or in such other manner as may be directed by any Act that may be passed for like purposes, and all provisions contained in the said Acts shall be applicable to such prosecutions in the same manner as if they were incorporated in this Act. Provided that nothing in this Act contained shall in any manner

alter or affect any enactment relating to procedure in the case of any offence punishable on summary conviction within the city of London or the metropolitan police district, or the recovery or application of any penalty or forfeiture for any such offence.

By sect. 77, the court before which any indictable misdemeanor against this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

PART V.

Of Cheats, Frauds, and Forgery.

CHAPTER I.

OF CHEATS AND FRAUDS.

THE offences we propose to treat of in this class are those which consist in obtaining property through fraud; and they are occasionally accompanied by a species of force, which, although short of robbery, operates so powerfully upon the mind, as to induce an individual to part with his property rather than encounter the consequences of a refusal. The offence of extortion very particularly applies to offences of this nature. Extortion considered as a misdemeanor, is but an artifice of a violent character successfully practised upon the mind.

The principle which pervades all crimes of this class seems to be, that the party plundered, whether the transaction be of a public or private nature, should appear, nominally at least, to assent to the imposition which effects the transit of property from the one hand to the other. Even in extortion, this apparent acquiescence forms a part of the transaction, although it is wrung from the victim under the influence of mental terror. And to take the other extreme, where false accounts are rendered, or false entries made in books of account for purposes of fraud, it is plain, that the trick is so carried on as *primâ facie* to exhibit an assent, either express or implied, on the part of those whose money is thus tampered with.

The machinery of cheating, in cases independent of extortion, seems to be so worked as more or less to lull the suspicions of the other party. Whether the offence be an intrigue to defraud the government or an individual, a specious and false appearance is put forward in various ways, and with different degrees of art, greater or less according to the likelihood of discovery, or the awakening of apprehension.

Unless it be a matter relating to the public welfare the law will not recognize a bare lie as a misdemeanor, nor such a trick as

the commonest caution can detect and guard against.¹ But as soon as the semblance becomes more deceitful, so that care and vigilance are less liable to be called into action, the law will punish the transgression thus attempted or accomplished as a *cheat and a fraud*. Very frequently, in addition to the art which the rogue adopts in order to attain his ends, he uses a false token of some kind, either with reference to himself or a third person, so as to invest the proceeding with greater credit than if he had contented himself with a simple act of knavery. This is a *false pretence*, punishable both at common law and by statute. In order to make the purpose in view more attainable, the dishonest individual sometimes throws a still deeper shade over his plan, more calculated to silence suspicion, and advance credit, and tenders with this idea a counterfeit writing. This act is in very many instances deemed *forgery* both at common law and by statute. And if in order to gain more completely the unlawful booty which is hoped for, the party calls another person or more than one other to his councils, in order to perpetrate one common design of fraud, both, or all, as the case may be, may be indicted for a *conspiracy*. And where the property is, indeed, acquired through the medium of terror, but, at the same time, where the transaction, although apparently free from deceit upon the surface, is nevertheless bottomed in fraud and falsehood, it is said to be extorsively gained.

Cheats at common law.] An early case concerning frauds affecting the community was where the defendant pretended that he had a power to discharge soldiers. A soldier being deluded by his representation paid him money for a discharge, and the court held the indictment well enough.² Joseph Jones, an apprentice, who had not served his term, enlisted himself as a soldier, and received a sum as bounty money. Being discharged, he was indicted for the fraud, his master having it in his power to reclaim his servant, and no objection was made to the subject matter of the indictment, although the conviction was subsequently set aside for want of due proof of the indenture.³

Again, the sellers of unwholesome victuals,⁴ or bad wine,⁵ or dealers who use false weights,⁶ are liable to be punished for

¹ Much less a letter written for the purpose of drawing a man to a certain town, where no mischief was done nor intended. *R. v. Emerton*, 2 Show. 20. Information for deceit. But the court were divided; Wylde and Jones, JJ. for arresting the judgment, Scroggs, C. J., and Twisden, J., *contra*. No judgment was given.

² *R. v. Serlested*, Latch, 202.

³ *R. v. Jones*, Leach, 174. S. C. East, P. C. 822.

⁴ East, P. C. 822; 4 M. & S. 220, by Lord Ellenborough.

⁵ By Lord Ellenborough, 6 East, 133, commenting upon the *Queen v. M'Carty and another*, 2 Lord Raym. 1179.

⁶ But the quantity of the article so sold must appear in the indictment, although the name of the party to whom it was sold need not be alleged. *R. v. Gibbs*, Str. 497.

those respective misdemeanors. The case of furnishing bad provisions to the French prisoners, is one which caused some discussion at the time. The charge against the defendant, a contractor, consisted in supplying 500 lbs. of unwholesome and insufficient bread, the bread being composed of bad and filthy materials, whereby the health of the French prisoners became endangered. The defendant was convicted, but it was moved to arrest the judgment, because it did not appear that the act done was in breach of any contract with the public, or of any moral or civil duty, and the case was submitted to the judges. But the conviction was held right,¹ and it is added, that it was not stated in the indictment that the defendant was a contractor, and, moreover, that such an allegation was not by any means necessary by reason of the enormity of the offence which, under any circumstances, would have been indictable.² So, where the baker of the Royal Military Asylum at Chelsea introduced alum into his bread in such quantities as strongly to impregnate the food, and thus to make it pernicious, it was held, that he was indictable for a misdemeanor, and that his defence of dissolving the alum, and mixing it with the yeast, so that it might be equally divided over the batch, was not to be admitted.³ For, by Lord Ellenborough, "if a baker will introduce such a substance into his bread, he must do it at his own hazard, and he must take especial care that the benefit he proposes to himself does not produce mischief to others."⁴ A new trial was, however, moved for upon the ground, that the proportion of alum used was not only innoxious but wholesome; and it was moved to arrest the judgment, because the indictment had failed to set out the noxious materials, so that the defendant could not ascertain the nature of the case he had to defend himself against; and secondly, because, although it alleged that he delivered the loaves for the use and supply of the children of the asylum, it omitted to add that he intended to injure the health of the children, or that he intended the children should eat the bread, and, consequently, the *malus animus* did not appear, as it might have done, upon the record. But the court was against the defendant upon all these points. The new trial was refused upon the ground taken at the trial by Lord Ellenborough, and the first point in arrest of judgment was repelled, because a party may allege generally what is within the knowledge of the other party; and the second ground was deemed untenable, for the intention is an inference of law resulting from the act done, and if the loaves were for the use and supply of the children, they must have been delivered with an intention that the children should eat them.⁵

By 23 & 24 Vict. c. 84, s. 1, the first offence of selling adulterated food or drink is punishable at petty sessions by a penalty not exceeding 5*l.*, and a second, &c., in like manner, and the

¹ *R. v. Treeve*, East, P. C. 821.

² *Id.* 822.

³ *R. v. Dixon*, 4 Campb. 12.

⁴ *R. v. Dixon*, 4 Campb. 14.

⁵ *R. v. Dixon*, 3 M. & S. 11.

justices may cause the name, place of abode, and the offence of the person to be published in a newspaper at his expense.

The same rule as to cheats prevails with respect to false weights and measures, for these are instruments calculated for deceit, and as the public may be imposed upon by them without any imputation of folly or negligence,¹ the matter becomes one which concerns the community at large, and not the mere interests of private men. Thus, cases are cited where cloth was sold with the counterfeited seal of the alnager or public officer;² and, again, with the seal of the trade fabricated upon the cloth for the purpose of fraud.³ These were false tokens superadded to the deceit, or false representation that the cloth was genuine. So, if a man produce a measure, or a bushel, and fraudulently fill it with some other material than that which is the subject of the bargain, he is indictable.⁴ So, the selling of coals by a false measure, is a subject for indictment.⁵ And the delivery of bread deficient in weight.⁶ So the selling of ale in black pots not marked.⁷ So if the owner of a soke mill, where the inhabitants of the vicinage were compellable to grind their corn, were to make his privilege a colour for practising fraud, he might probably be indicted.⁸ So, again, independently of the question of forgery, the use of false stamps or marks upon plate is indictable.⁹ And on the other hand, the fraudulent affix of public and authentic marks on goods of a value inferior to such tokens is in itself a cheat at common law.¹⁰ As when Fabian put too much alloy into plate, and then corrupted one of the assay master's servants to help him to the proper marks,—he was convicted and sentenced as at common law.¹¹ So is the sale of a picture with the painter's name imitated upon it. This is a cheat by a false token at common law, but it is not forgery.¹²

The use of false dice is ranged by writers under the same head.¹³ And one Leeser was called by the court a common cozenor of the king's people, because he had been detected in such practices, and he was punished at common law.¹⁴

Moreover, false news, which are likely to be detrimental to the public, are deemed to be cheats. Therefore, the writers of such

¹ *R. v. Farmer*, East, P. C. 820; Trem. 109.

² *Id.* *R. v. Edwards*, citing 1 Trem. P. C. 103.

³ *Id.* citing *R. v. Worrell*, Trem. P. C. 106. Also *R. v. Allen*, *Id.* 109.

⁴ See *Id.*

⁵ Cowp. 324, by Aston, J.

⁶ 2 Ch. Crim. L. 559. See also 6 & 7 Will. 4, c. 52, s. 8, penalty for not obliterating labels under the paper duties, probably repealed by 2 & 3 Vict. c. 23, s. 67.

⁷ *R. v. Burgen*, 1 Vent. 13. *R. v. Marsh*, 2 Keb. 539.

⁸ By Lord Ellenborough, 4 M. & S. 220.

⁹ East, P. C. 820.

¹⁰ *Id.* 194.

¹¹ *R. v. Fabian*, Kel. 39. East, P. C. 194.

¹² *R. v. Closs*, 27 L. J. M. C. 54; Dears. & B. 460.

¹³ East, P. C. 820.

¹⁴ *R. v. Leeser*, Cro. Jac. 497. *R. v. Maddocke*, 2 Ro. Rep. 107.

fabricated intelligence have been deemed by all the judges worthy of punishment, and the subjects of a criminal proceeding.¹

And Hawkins observes, that if a person maim himself in order to have a more specious pretence for asking charity, or preventing his being impressed as a sailor, or enlisted as a soldier, he may be fined or imprisoned.²

Public officers.] There is no point more plain than that public officers are liable to be called to account for malversations, falsities of accounts, or other fraudulent conduct in the course of their employment; and it makes no difference whether they may happen to be connected with the government, or whether they are engaged in other employments of a public nature. Two parties were charged with enabling persons to pass their accounts with the pay office, so as to defraud the government, and it was objected that this was only a private matter of account, and so not indictable, but the court held otherwise, as the matter related to the public revenue.³

So again, the major commandant of a battalion of volunteers was convicted of charging and receiving pay from government for a greater number of men than had mustered in his corps, within certain periods mentioned in his returns to the War Office.⁴

So proceedings were taken without objection against a commissary of stores abroad under 42 Geo. 3, c. 85, for misconduct.⁵ So an overseer of the poor who omitted to give credit in his account with the parish for a sum paid by the putative father of a bastard child, although liable to the father, was yet held likewise indictable for a fraud, by reason of his false account.⁶ So where the minister and churchwardens of a parish returned a smaller sum on the back of a brief for relieving sufferers by fire than they had received, the court referred the prosecutors to their remedy by indictment.⁷

So it seems, that an indictment at common law will lie against an overseer for not accounting, or refusing to account.⁸ And the act

¹ 1 Russ. C. M. 234, n., citing Stark. on Libel, ed. 1, 546.

² 1 Hawk. c. 55, s. 4. An indictment for bringing a bastard child privately into a parish, with intent to burden the parish, was quashed only because the bastard being settled where born, could not become so chargeable. *R. v. Warne*, 1 Str. 644.

³ *R. v. Bembridge and another*, 6 East, 136.

⁴ *R. v. Gardner*, 2 Campb. 513. Prosecuted by information.

⁵ *R. v. Jones*, 8 East, 31.

⁶ *R. v. Martin*, 2 Campb. 268.

⁷ *R. v. The Minister, &c., of St.*

Botolph, 1 Sir Wm. Bl. 443. The court refused an information, although it appeared that some of the money collected had been spent at tavern entertainments.

⁸ See *R. v. Hummings*, Comb. 374; S. C. nom. *R. v. Commings and another*, 5 Mod. 179; nom. *R. v. Hemmings and another*, 3 Salk. 187. The court doubted because another remedy had been given by statute. And the court declined to quash an indictment against overseers for not paying money over to their successors. *R. v. King*, 2 Str. 1268.

of procuring a man to marry a single woman, for the sake of getting the child to follow the husband's settlement, has always been deemed fraudulent.¹

It must, however, be carefully set out in the indictment, that the individual in question was a public officer when he committed the breach of duty imputed to him. Where the defendants, collectors of the property tax, were charged with having taken from A. P., a person not named in the commissioner's assessment, the sum of 5*l.* 5*s.*, *under colour and pretence* of their being collectors, and it appeared that, in fact, they had been appointed collectors, though in an informal manner, the court made the rule absolute for a new trial; for it is not competent to the commissioners to prosecute men whom they had in reality appointed, under a statement of their having acted as such by colour and pretence.² And it was likewise questioned in this case, whether as the statute 43 Geo. 3, c. 99, s. 19, had ordained, that no collector should be liable to any punishment or penalty in respect of the execution of that Act, excepting that which was prescribed by the Act and by one other Act, the common law remedy by indictment was not taken away.³ The decision of the court upon the other point made it unnecessary to determine the latter point.⁴

So where the defendant was prosecuted under 49 Geo. 3, c. 123, s. 35, for receiving prize money from seamen without a licence, and it appeared that he had been licensed by the treasurer of the navy, but that his licence had expired and had not been renewed, Lord Ellenborough interposed, and directed an acquittal. The defendant advanced money upon the orders, and although he had received the prize money before the expiration of his licence, still he bore the character of a licensed prize agent, and the learned chief justice said, it could not be intended that those orders should become nullities at the expiration of the licence, and that receiving payment of them afterwards should be an indictable offence.⁵

It was made a question upon one occasion, upon an indictment

¹ *R. v. Compton and others*, Cald. 246. *R. v. Tarrant*, 4 Burr. 2106. *R. v. Herbert and others*, East, P. C. 461. In this case, proof of the consent of the parties was equivalent to an acquittal; for some violence, threat, or contrivance was necessary in order to constitute the offence. *R. v. Fowler and others*, East, P. C. 461. But it was deemed sufficient to allege the threat or menace, without adding that the marriage was against the will or consent of the parties, although evidence to that effect was indispensable. *R. v. Parkhouse and another*, Id. 462; see also *R. v. Edwards and others*, 8 Mod. 320. The new

Act for the amendment of the laws relating to the poor has, in a great measure, put an end to the temptation on the part of overseers to carry out this species of fraud, see 4 & 5 Will. 4, c. 76, s. 1. See also *R. v. Slaughter*, Cald. 246, *n.*

² *R. v. Dobson and another*, 7 East, 218. By information for a misdemeanor at common law, filed by the attorney-general.

³ S. C.

⁴ Collectors, however, who have jointly received money contrary to law, may be indicted jointly. *R. v. Atkinson and others*, 11 Mod. 79.

⁵ *R. v. Davis*, 4 Campb. 48.

against a public officer, whether the counsel for the crown could avail themselves of two counts, so as to give evidence of part of the sums which the defendant had illegally obtained, under one count, and of the residue, under another. And by Lord Ellenborough, "In point of law there is no objection to a man being tried on one indictment for several offences of the same sort. It is usual in felonies for the judge, in his discretion, to call upon the counsel for the prosecution to select one felony, and to confine themselves to that; but this practice has never been extended to misdemeanors. It is the daily usage to receive evidence of several libels, and of several assaults upon the same indictment; and here I see not the slightest objection to evidence of various acts of fraud committed by the defendant in his office of commissary-general, though ranged under different counts as distinct and substantive misdemeanors."¹

Private cheats and frauds.] We now proceed to the consideration of private cheating. The defendant came to a person, and said he had been commissioned by B. to receive 20*l.* due from that person to B., and he received it. Being indicted, the court said, that, unless there were a false token, the case was not punishable, and the party was left to his action.² So where a rogue persuaded a woman to give him several sums of money upon the plea of his having sold part of a ship to her husband, the same doctrine obtained.³ The defendant delivered so many bushels less than he had contracted for, and the prosecutor was left to his action.⁴ Pinkney sold a sack of corn at Ripon, and falsely affirmed that the measure was a Winchester bushel, but the court quashed the indictment upon motion.⁵ Driffeld delivered a quantity of coals, purporting to be two bushels, but there were only one bushel and three pecks; and the rule for quashing the indictment was made absolute.⁶ So it was where the defendant delivered a deficient quantity of beer.⁷ The offence of selling by *false* measure must be made out before the indictment can be maintained.⁸ The cases on the subject were much considered where a

¹ *R. v. Jones*, 2 Camp. 132.

² *The Queen v. Hannon*, 6 Mod. 311. But this is a false pretence within 24 & 25 Vict. c. 96.

³ *R. v. Jones*, 1 Salk. 379. See also 7 Mod. 317. (Lord Hale had laid down a contrary doctrine, 1 Hale, 506.) To the same effect, *R. v. Holt*, 354; *R. v. Glanvill*, 11 Mod. 222; *R. v. Grantham*, Semble, S. C. But this would be a false pretence within 24 & 25 Vict. c. 96, if there were, in reality, a debt due to B., and the money were paid to the defendant.

⁴ *R. v. Nicholson*, East, P. C. 818, n. (a.)

⁵ *R. v. Pinkney*, 2 Burr. 1129; cited by Wilmot, J. On the other hand, it must not be understood, that where the court has refused, on these occasions, to quash the indictment, they have necessarily considered that the charge was well founded. East, P. C. 818, n. (b.)

⁶ *R. v. Driffeld*, Say. Rep. 106.

⁷ *R. v. Combrune*, 1 Wils. 301.

⁸ *R. v. Osborn*, 3 Burr. 1967, a case of coals. See also as to false pretences, *R. v. Reed*, 7 C. & P. 248.

brewer had been convicted for delivering sixteen gallons instead of eighteen, and fraudulently receiving the difference. It was insisted that all the old cases were decided before verdict, whereas the jury having found the defendant guilty, it might be presumed that he had sold by false measure.¹ But the court arrested the judgment, and Denison, J., mentioned to the court the case of one Wilders, who was indicted for sending so many vessels of ale *marked* as containing a certain measure, and writing a letter assuring the buyer that they did contain that measure, and yet the indictment was quashed, after argument, upon motion,² "a stronger case than the present."³ A parish contractor agreed to supply so much bread for the poor at 3½ lbs. per loaf. If he broke the contract, *inter alia*, by a deficiency in weight, the guardians might employ another, and have their remedy against the contractor. There was a deficiency, *scienter*, and the jury found fraud. The case was argued before the fifteen judges, and the conviction was affirmed.⁴

In all these cases, the prosecutor might have detected the cheat by investigating the circumstances at the time; at all events, he might have had his action. And now by various statutes penalties are ordained against persons who sell goods below the due measure.

The law is the same if a tradesman be requested to send goods by the hands of the defendant, who falsely pretends that he has been directed by another person to give the order.⁵ And, on the other hand, if the tradesman should sell goods of an inferior quality, affirming them to be the best, it is a mere lie, and not a cheat at common law.⁶ So where a servant sold a gold chain for his master to a customer, affirming that the chain was of real gold, whereas it was under the standard, and not marked, the defendant, a pawnbroker, was held not to be indictable for a misdemeanor.⁷ The case of an unsound horse sold upon a false warranty, is governed by the same rule.

So again, the fraudulent deposit of goods in pawn under false representations of their value is a mere lie, as far as an indictment at common law is concerned. As where Lewis, in consideration of an advance of money, deposited some gum with the lender, which he pretended to be gum seneca, and which he subsequently sold to the prosecutor for 7*l.*, whereas it was worth but 3*l.*⁸ And a breach of

¹ An indictment for using false weights and measures, should state that they were used in trade. 1 Freem. 524.

² *R. v. Wheatley*, 2 Burr. 1125; *R. v. Dunnage*, 2 Burr. 1130; *R. v. Wilders*, *Id.* 1128. To the same effect, *R. v. Botwright*, Say. Rep. 147.

³ By Lord Mansfield in giving judgment upon *R. v. Wheatley*.

⁴ *R. v. Eagleton*, Dears. 376; 24 L. J. M. C. 158.

⁵ *R. v. Bryan*, 2 Str. 866; *R.*

v. Wood, 5 Mod. 18. But if the goods are obtained, these are false pretences.

⁶ *The Queen v. Dixon*, 6 Mod. 61.

⁷ *R. v. Bower*, Cowp. 323.

⁸ *R. v. Lewis*, Say. Rep. 205. However, in a case for selling goat's hair instead of human hair, the defendant had judgment against him, but it was subsequently arrested because of a want of venue. *R. v. Mayor*, Com. Rep. 94.

promise with reference to a pawn is within the same construction. A woman was sufficiently foolish to lend 600*l.* upon the faith of a pledge that the defendant would send her fine cloth and gold dust. The defendant sent her neither, but only some coarse cloth worth little or nothing. And the court granted a *certiorari*, observing, that it was the prosecutor's fault to repose such a confidence in the defendant.¹

An indictment was once preferred against a person for taking and detaining wheat. He was the keeper of a common grist mill, and kept back 42*lbs.* weight of the wheat, but as there was neither any allegation of actual force, nor of taking, as for unreasonable toll, it was held, that no indictment would lie, and the prosecutor was left to his action of trover.² So where a miller received good barley to grind, and delivered in return a musty and unwholesome mixture of barley meal, there being no allegation that the bad material was for the food of man, the judgment at quarter sessions against the miller was reversed upon error brought. The indictment was likewise held bad for want of stating a place where the defendant received the barley, and likewise for uncertainty in not stating to which of two separate parcels of four bushels alleged to have been received, the three bushels of mixed oat and barley meal (the subject of the charge) applied.³

After these numerous instances of moral offences, which the common law of misdemeanor could not reach, it might almost be questioned whether any common cheat could be said to be at all punishable, or whether every deceit might not be qualified as a bare lie, and so escape retribution upon the plea of due want of caution. However, we have seen, that in public matters this distinction is not admitted, and, in private transactions, as soon as a false token is introduced, a new feature is immediately communicated to the

¹ *R. v. Nehuff*, 1 Salk. 151. Whether a pawnbroker could be properly convicted of fraud, for refusing to deliver up pledged goods upon a tender of the money, seems to have been doubtful. Holt, C. J., and Eyre, J. were in favour of the affirmative upon one occasion. Anon. 2 Salk. 522. But at another time, the court quashed an indictment for refusing to deliver up gold rings under such circumstances, *R. v. Bainham*, 1 Salk. 379.

² *R. v. Channell*, 2 Str. 793.

³ *R. v. Haynes*, 4 M. & S. 214. In *R. v. Wood*, 1 Sess. Ca. 217, the court were unanimous not to quash an indictment against a miller for changing corn, apparently on the ground that as it was a cheat in the way of trade, it concerned the public; but unless the mill were a

soke mill, *R. v. Haynes* is an authority against this decision, if put upon the footing of public interest. If it were intended to put the defendant to demur, in order that the matter might be further considered, or by reason of the enormity of the offence, the case would be different. It was once held that the tearing by the defendant of a settled account, of which he had contrived to get possession by fraudulent insinuations, was an indictable offence, but as it is now understood that an indictment will not lie for a mere trespass, that case cannot be considered of much authority. *R. v. Crisp*, 6 Mod. 175. The prisoners in another case used force in taking away a horse, which the prosecutor said in a passion was not worth more than 5*l.* The prisoners had just asked him what

offence.¹ Govers, intending to cheat the prosecutor, falsely assumed to himself the character of a merchant, and affirmed that he was such a trader, and that he had received commissions from Spain. If he had stopped there, his subsequent conduct would have been no offence at common law. But he produced several paper writings which he declared to be letters from Spain, containing commissions for goods to a large amount, and thus obtained two watches from the prosecutor. And by reason of the tendering of these paper writings, the court refused to arrest the judgment,² for here were the counterfeit tokens superadded to the falsehoods. So, before the uttering of a forged instrument was made felony, one who produced a promissory note with a counterfeit indorsement was held to have obtained the money which formed the subject of the charge, by a false token, and Pengelly, C. B., directed the jury to convict.³ So where the defendant brought a bill of exchange to the prosecutors, and showing the indorsement, declared that he was the payee, it seems, although he was not convicted of the bare cheat, but of a conspiracy, that he might have been charged with the misdemeanor first mentioned, by reason of the false token, had it been necessary.⁴ But the defendant's own cheque upon a banker with whom he had no effects when he drew it, is not such a fraudulent token as will support an indictment at common law, although it is a false pretence under 24 & 25 Vict. c. 96.⁵ The defendant had a note given upon condition. He brought an action upon it, and tore off the condition, and an information was granted against him for the fraud.⁶ One Lara obtained some lottery tickets by a fictitious order, and Lord Kenyon in pronouncing his opinion that the judgment should be arrested, observed, that it would be ridiculous to call the cheque a false token, "that left the defendant's credit just where it was before." Grose, J., said that the offer of the false draft was "only adding another lie." And Lawrence, J., cited *Nehuff's case*,⁷ where the court

he would take for the horse, and upon his answer, tendered him the money. The prosecutor then said the horse was borrowed, and that he could not sell it, but not being able to get it back, he charged the prisoners with horse-stealing. The jury upon being told that the indictment could not be supported, were inclined to find a verdict "guilty of fraud," but Lord Ellenborough expressed his opinion, that had there been an indictment for fraud it could not have succeeded, and of course an acquittal was directed in respect of the felony. *R. v. Alexander and another*, 3 Ch. Burn. 338. For other cases,

see *R. v. Parris and others*, 1 Sid. 431. Obtaining goods upon the pretence of a treaty of marriage, Anon. Lofft. 146. See 1 Barnard, 87.

¹ See 1 East, 185, by Lord Kenyon.

² *R. v. Govers*, Say. Rep. 206.

³ *R. v. Hales*, East, P. C. 825, citing 9 St. Tr. 75. See 1 Barnard, 112.

⁴ *R. v. Hevey*, Leach, 229, 332; East, P. C. 1010.

⁵ *R. v. Jackson and another*, 3 Campb. 370; 1 Moo. C. C. 223.

⁶ 1 Barnard, 126.

⁷ *Ante*, p. 615.

found fault with the prosecutor for reposing confidence improperly in the defendant.¹ Where the defendants had made a person drunk in order to induce him to sign a note for 20*l.*, the court considered the matter as one belonging to civil rights, and refused an information.²

Indictment.] With respect to the form of the indictment, it may be remarked, that the false token must be set out, and, consequently, that a general allegation of cheating by false tokens is insufficient.³ If no fraudulent means of obtaining money are set forth, the indictment will fail. The attempt to defraud is not a misdemeanor, unless the obtaining of the money would be such; therefore the means must appear. The indictment must also state to whom the money intended to be obtained belonged.⁴ But it does not appear necessary to describe the means more particularly than they were shown or described to the party at the time, and in consequence of which he was imposed upon.⁵ Several may be joined in the same indictment with reference to the same cheat, as if they were present and concurring with those who employed the false tokens.⁶

An objection was once taken to a count which described the false pretence as having been made to J. S., but alleged that the cheat and fraud were practised upon another person, thus making the pretence which was used to deceive one man operate to the prejudice of another. But the defendant was convicted notwithstanding this objection; although the judgment was ultimately arrested upon another ground.⁷

Trial.] The trial may be either where the cheat is performed, or where it comes into fraudulent operation. As where one Munton, a government storekeeper in Antigua, was indicted for transmitting false vouchers to his agent in London, which *were delivered by the agent at the Custom House in London*. He was tried and convicted in Middlesex.⁸

Judgment.] The judgment for a cheat or fraud at common law, is fine and imprisonment.⁹

¹ *R. v. Lara*, 6 T. R. 565; Leach, 647. There are many other instances of private frauds which, although not indictable as simple misdemeanors, become the subjects of a criminal proceeding as soon as they are attempted, through the medium of a conspiracy. See East, 823.

² *R. v. Roo and another*, 1 Barnard, 87.

³ East, P. C. 837. *R. v. Hannon*, 6 Mod. 311.

⁴ *R. v. Marsh and another*, 19 L. J., M. C. 12; Den. 505.

⁵ East, P. C. 837.

⁶ East, 838. See also *R. v. Wood*, Sty. 145, and East, P. C. 517.

⁷ *R. v. Lara*, Leach, 652.

⁸ *R. v. Munton*, cited, 6 East, 590. *R. v. Munton*, 1 Esp. 62.

⁹ East, P. C. 838. The power of restitution does not extend to the offence of cheating at common law.

Witchcraft.] There is still an Act in force respecting witchcraft. By 9 Geo. 2, c. 5, s. 4, if any person shall pretend to exercise, or use any kind of witchcraft, sorcery, enchantment or conjuration, or undertake to tell fortunes, or pretend from his or her skill or knowledge in any occult or crafty science, to discover where or in what manner any goods or chattels supposed to have been stolen or lost, may be found, every such offender shall suffer imprisonment by the space of one whole year, without bail or mainprise; and also shall, if the court shall think fit, be obliged to give sureties for his or her good behaviour, in such sum, and for such time, as the said court shall judge proper, and in such case shall be further imprisoned until such sureties be given. And an information at common law will lie for imposture.¹

False pleading.] False pleas may be called cheats. As to plead any manner of recovery in bar of a popular action, such recovery having been obtained by covin.²

Games and wagers.] Cheating at games has likewise attracted the attention of the legislature.³ By 8 & 9 Vict. c. 109, s. 17, every person who shall, by any fraud or unlawful device in playing at cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or in adventures, or betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself or any other, any money or valuable thing, shall be deemed guilty of obtaining such money, &c. by a false pretence, with intent to cheat and defraud such person, and shall be punished accordingly.

Upon an indictment under this statute it was held unnecessary to state whose the money was which the defendant had won by fraud in playing.⁴

By 39 & 40 Geo. 3, c. 60, s. 4, to certify or declare anything which shall be untrue in any certificate or declaration made to the committee of the corporation of orphan girls, the settlement of whose parents cannot be found, or in any certificate, &c., which any three or more of such committee may require previously to the admission of a girl, is a misdemeanor punishable by imprisonment, for not less than six months, nor more than two years, at the discretion of the court.

By 50 Geo. 3, c. 59, s. 2, any officer, collector, or receiver, intrusted with the receipt, custody, or management of any part of the public revenues, who knowingly furnishes false statements or returns of the sums of money collected by him or intrusted to his care, or of the balances of money in his hands or under his control, shall be punished by fine and imprisonment, and become incapable of holding any office under the crown.

¹ *R. v. Hathaway*, 12 Mod. 556.

³ The Act 9 Anne, c. 14, is repealed.

² 4 Hen. 7, c. 20; 20 Hen. 3, c. 1.

⁴ *R. v. Moss*, 26 L. J. M. C. 9.

So in the case of assessed taxes, false declarations are punishable, by 50 Geo. 3, c. 105, s. 9, with six months' imprisonment, and a fine not exceeding treble the amount of duty with which the officer may have been charged, as the court shall think fit.

By 32 Geo. 3, c. 56, if any person shall falsely personate any master or mistress, executor, administrator, wife, relation, house-keeper, agent, steward, or servant of a master or mistress, and either personally, or in writing, give a false character to a servant, or pretend, or falsely assert in writing, that a servant had been hired for a period of time, or in a station, or was discharged at any other time, or had not been hired in any previous service, contrary to truth; and if any person shall offer as a servant, with a pretence of service contrary to truth, or a false, or altered certificate of character; and if any person having been before in service, shall pretend not to have been in any previous service, on conviction before two justices, these respective offenders shall forfeit 20*l*.

But assuming the name of another person who had been a servant in the same place with the offender, is not within the provisions of the Act.¹

Excise.] By 7 & 8 Geo. 4, c. 53, s. 44, if any collector or other officer of excise, shall neglect to keep distinct accounts, and according to the form prescribed, of all duties, &c., and penalties received by him, and of all balances of money in his hand, or shall knowingly render false accounts thereof, he shall be punished upon conviction by fine and imprisonment.²

Officer of excise fraudulently delivering out false permits.] By 2 Will. 4, c. 16, s. 15, it is enacted, that every officer of excise who shall deliver out, or suffer to be delivered out any paper, prepared or provided, or appointed by the commissioners of excise, to be used for permits in blank, or before such permit shall be filled up and issued, agreeably to and in conformity with a request note; and every officer who shall knowingly give or grant any permit to any person not entitled to receive the same, or shall knowingly give or grant any false or untrue permit, or shall make any false or untrue entry in the counterpart of any permit given or granted by him, or shall knowingly or willingly receive or take any goods or commodities into the stock of any person or persons, brought in with any false or untrue or fraudulent permit, or shall knowingly or willingly grant any permit for the removal of any goods or commodities out of or from the stock of any person or persons who shall have received or retained such goods or commodities, or any of them, under or by virtue or pretext of any false, untrue, forged, or fraudulent permit, or shall knowingly or willingly give any false credit in the stock of any person or per-

¹ 2 Russ. C. M. 316, *n.*, citing,
8 Ev. St. 909.

² A portion of this Act is repealed,
but, it is believed, not this part.

sons, beyond the credit to which such stock is justly and truly entitled, so as to enable such person or persons falsely and fraudulently to obtain a permit or permits; or if any such officer shall knowingly or willingly suffer the same to be done directly or indirectly; every officer so offending in any of the cases aforesaid, shall be guilty of a misdemeanor, and, on conviction, shall suffer such punishment by fine and imprisonment, or fine or imprisonment, as the court shall award; and every officer so convicted, shall from thenceforth be incapable of holding any office or place in or relating to any of the revenues of the United Kingdom.

Ecclesiastical leases, false recitals, &c.] By 6 & 7 Will. 4, c. 20, s. 3, to execute an ecclesiastical lease knowingly with false recitals therein, or wilfully to introduce any such false recitals therein, or aid in so doing, or to prepare and engross, or cause to be prepared, &c., any such lease or counterpart containing such false recitals, is a misdemeanor.¹

Chelsea Hospital certificate.] By 7 Geo. 4, c. 16, s. 25, to obtain, or endeavour to obtain, any pension or allowance from Chelsea Hospital, by means of a false or altered certificate, is punishable by fine and imprisonment as a common law misdemeanor.

By 11 Geo. 4, c. 20, s. 89, any petty officer or seaman, non-commissioned officer of marines or marine obtaining or attempting to obtain pay, by means of a false or forged certificate, purporting to be a certificate of discharge, shall incur the penalties of perjury.²

The numerous statutes upon this subject, repealed or unrepealed, cause some difficulty. But it would appear that the statute 7 Geo. 4, c. 16, s. 25, and the 11 Geo. 4, c. 20, s. 89, are not repealed, and that they are the Acts alluded to in 9 & 10 Vict. c. 10, and 19 & 20 Vict. c. 20, as governing the punishment of frauds. The 9 & 10 Vict. c. 10, is repealed. But by 19 & 20 Vict. c. 20, s. 5, any person guilty of fraudulently receiving, or endeavouring to receive, pension money, or money in the nature of pension, from the secretary of war, &c., shall be subject to the same pains and penalties as in the case of frauds upon the commissioners of Chelsea Hospital, the lord high admiral, or commissioners of the admiralty, the treasurer of the navy, and the paymaster-general; and these punishments seem to be fine and imprisonment for misdemeanor under 7 Geo. 4, c. 16, and for perjury under 11 Geo. 4, c. 20.³

¹ And the offender shall be punished by a fine of 500*l.*, in addition to any other punishment for misdemeanor, or, at his option, he may, in lieu of the penalty of 500*l.*, forfeit five years' improved annual

value of the hereditaments comprised in such lease.

² Neither of these sections seem to be repealed.

³ See Lonsdale, 279.

Metropolis Police Act.] By 2 & 3 Vict. c. 47, s. 28, any constable may take into custody every person who for the purpose of preventing the seizure or discovery of any materials, furniture, stores, or merchandize belonging to or having been part of the cargo of a ship, boat, or vessel lying in the Thames, or in the docks or creeks adjacent, or of any other articles unlawfully obtained from any such ship or vessel, shall wilfully let fall or throw into the river, or in any other manner convey away from any ship, &c., wharf, quay, or landing place, any such article, or who shall be accessory to any such offence, and also may seize and detain any boat in which such person shall be found, or out of which any article shall be so let fall, &c., and every such person shall be deemed to be guilty of a misdemeanor.

By sect. 29, every person who for the purpose of protecting or preventing anything whatsoever from being seized within the metropolitan police district, on suspicion of its being stolen or otherwise unlawfully obtained, or of preventing the same from being produced or made to serve as evidence concerning any felony or misdemeanor committed or supposed to be committed within the metropolitan police district, shall frame or cause to be framed any bill of parcels, containing any false statement in regard of the name or abode of any alleged vendor, the quantity or quality of any such thing; the place whence, or the conveyance by which the same was furnished, the price agreed upon or charged for the same, or any other particular, knowing such statement to be false, or who shall fraudulently produce such bills of parcels, knowing the same to have been fraudulently framed, shall be deemed guilty of a misdemeanor.

By sect. 30, every person who shall be found within the metropolitan police district, in or upon any canal, dock, warehouse, wharf, quay, or bank, or on board any ship or vessel, having in his or her possession any tub or other instrument for the purpose of unlawfully obtaining any wine, spirits, or other liquors, or having in his or her possession any skin, bladder, or other material or utensil, for the purpose of unlawfully secreting or carrying away any such wine, spirit, or other liquors, and any person who shall attempt unlawfully to obtain any such wine, &c. shall be deemed guilty of a misdemeanor.

By sect. 31, every person within the metropolitan police district, who shall bore, pierce, break, cut open, or otherwise injure any cask, box, or package, containing wine, spirits, or other liquors, on board any ship, boat, or vessel, or in or upon any warehouse, wharf, quay, or bank, with intent feloniously to steal, or otherwise unlawfully obtain any part of the contents thereof; or shall unlawfully drink, or wilfully spill, or allow to run to waste any part of the contents thereof, shall be guilty of a misdemeanor.

And by sect. 32, every person who shall within the metropolitan police district, wilfully cause to be broken, pierced, started, cut, torn, or otherwise injured any cask, chest, bag, or other package, con-

taining or prepared for containing any goods while on board of any barge, lighter, or other craft, lying in the said river, or any dock, creek, quay, wharf, or landing place adjacent to the same, or in the way to or from any warehouse, with intent that the contents of such package or any part thereof, may be spilled or dropped from such package, shall be deemed guilty of a misdemeanor.¹

Fraudulent assignments.] By 2 & 3 Vict. c. 51, s. 8, fraudulent assignments and claims under the Act for regulating the assignments of pensions by soldiers and sailors, are punishable as misdemeanors.²

Law of Evidence Amendment Act.] By 14 & 15 Vict. c. 99, s. 15, certifying a false document under that Act is a misdemeanor, and punishable with imprisonment not exceeding eighteen months.

Pharmaceutical chemists.] By 15 & 16 Vict. c. 56, s. 15, every registrar making a falsification under the Act relating to any register or certificate, shall be deemed guilty of a misdemeanor; and by sect. 16, wilfully to procure by false or fraudulent means any certificate of registration under the Act, or fraudulently to exhibit a certificate purporting to be a certificate of membership of the Pharmaceutical Society, is a misdemeanor.

Woods, forests, &c.] By 15 & 16 Vict. c. 62, s. 8, if any officer shall certify as true, any copy or extract of document in the office of land revenue records, he shall be guilty of a misdemeanor, and punishable with imprisonment not exceeding eighteen months.

Patent Law Amendment.] By 15 & 16 Vict. c. 83, s. 37, to make any false entry in the register of proprietors, or to forge any writing purporting to be a copy of any entry, or produce, or tender, &c. any such writing, is a misdemeanor, and punishable by fine and imprisonment.³

Fraudulent conveyances.] Covinous and fraudulent feoffments, gifts, conveyances, &c. are forbidden by 13 El. c. 6, s. 1. By sect. 2, such are declared void. By sect. 3, all parties to them, and those who alien any lands, &c. so covinously conveyed, shall be punished by the loss of one year's value of the lands, &c., and of the whole value of the goods, and of the money contained in a covinous bond, half to belong to the Queen, half to the party grieved. The recovery is to be by action of debt, &c. or by information, and upon conviction the punishment is imprisonment for half-a-year, without bail or

¹ See sects. 33, 34.

² It is believed that this section was not repealed by 9 & 10 Vict. c. 10.

³ "And" in this place must be read "Or."

mainprise.¹ Similar provisions with respect to lands, tenements, and hereditaments, were enacted by 27 El. c. 4.²

Joint Stock Companies.] By 11 & 12 Vict. c. 45, s. 114, whosoever shall alter, mutilate, or falsify the books, papers, &c. of joint stock companies shall be liable to imprisonment not exceeding two years. So to insert a false advertisement in a newspaper under the Railway Companies' Dissolution Act, is, under 9 & 10 Vict. c. 28, s. 16, a misdemeanor.

Of frauds by bankrupts.] Certain frauds by dishonest bankrupts are provided against and declared to be misdemeanors.

By 24 & 25 Vict. c. 134, s. 221, from and after the commencement of this Act, any bankrupt who shall do any of the acts or things following, with intent to defraud or defeat the rights of his creditors, shall be guilty of a misdemeanor, and shall be liable, at the discretion of the court before which he shall be convicted, to punishment by imprisonment for not more than three years, or to any greater punishment attached to the offence by any existing statute:

1. If he shall not upon the day limited for his surrender, and before three of the clock of such day, or at the hour and upon the day allowed him for finishing his examination, after notice thereof in writing, to be served upon him personally or left at his usual or last known place of abode or business, and after the notice herein directed in the "London Gazette," surrender himself to the court (having no lawful impediment allowed by the court), and sign or subscribe such surrender, and submit to be examined before such court from time to time:
2. If he shall not upon his examination fully and truly discover, to the best of his knowledge and belief, all his property, real and personal, inclusive of his rights and credits, and how and to whom, and for what consideration, and when he disposed of, assigned, or transferred any part thereof, except such part as has been really and *bonâ fide* before sold or disposed of in the way of his trade or business, if any, or laid out in the ordinary expense of his family, or shall not deliver up to the court, or dispose as the court directs of all such part thereof as is in his possession, custody, or power, except the necessary wearing apparel of himself, his wife and children; and deliver up to the court all books, papers, and writings in his possession, custody, or power relating to his property or affairs:³

¹ Common recognizances are saved by sect. 4.

² The criminal procedure under these Acts is obsolete, but they are extensively resorted to in the civil courts. The Court of Chancery is frequently appealed to, and both statutes have many decisions pronounced upon them up to this day.

³ A plea of *aut. acq.* could not be maintained by an insolvent

debtor charged under the 7 & 8 Vict. c. 96, s. 39 (repealed), with omitting goods in his schedule, which were not specified in the indictment upon which he was acquitted, but Patteson, J., observed, that such a course ought not to be taken, except under very peculiar circumstances. *R. v. Champneys*, 2 Moo. & Rob. 26.

3. If he shall, after adjudication, or within sixty days prior to adjudication, with intent to defraud his creditors, remove, conceal, or embezzle any part of his property to the value of 10*l*. or upwards :
4. If, in case of any person having to his knowledge or belief proved a false debt under his bankruptcy, he shall fail to disclose the same to his assignees within one month after coming to the knowledge or belief thereof :
5. If he shall, with intent to defraud, wilfully and fraudulently omit from his schedule any effects or property whatsoever :
6. If he shall, after the filing of the petition for adjudication, with intent to conceal the state of his affairs, or to defeat the object of the law of bankruptcy, conceal, prevent, or withhold the production of any book, deed, paper, or writing relating to his property, dealings, or affairs :
7. If he shall, after the filing of the petition for adjudication, or within three months next before adjudication, with intent to conceal the state of his affairs, or to defeat the objects of the law of bankruptcy, part with, conceal, destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, paper, writing, or security, or document relating to his property, trade, dealings, or affairs, or make or be privy to the making of any false or fraudulent entry or statement in or omission from any book, paper, document, or writing relating thereto :
8. If, within the like time, he shall, knowing that he is at the time unable to meet his engagements, fraudulently and with intent to diminish the sum to be divided amongst the general body of his creditors, have made away with, mortgaged, encumbered, or charged any part of his property, of what kind soever, or if after adjudication he shall conceal from the court or his assignee any debt due to or from him :
9. If, being a trader, he shall, under his bankruptcy, or at any meeting of his creditors within three months next preceding the filing of the petition for adjudication, have attempted to account for any of his property by fictitious losses or expenses :
10. If, being a trader, he shall, within three months next before the filing of the petition for adjudication, under the false colour and pretence of carrying on business and dealing in the ordinary course of trade, have obtained on credit from any person any goods or chattels with intent to defraud :

11. If, being a trader, he shall, with intent to defraud his creditors, within three months next before the filing of the petition for adjudication, pawn, pledge, or dispose of, otherwise than by *bonâ fide* transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for.

By 24 & 25 Vict. c. 134, s. 159, if, upon the hearing of an application for discharge, the court should think that the bankrupt ought to be charged with a misdemeanor under the Act, they may appoint a day for trying the bankrupt, with his consent, and may summon a jury if the bankrupt should require it. And, if upon the trial the bankrupt should be convicted, the commissioner may, in addition to any other punishment, either refuse or suspend the order of discharge at his discretion. Still, the court may, if they see right, direct a prosecution instead in one of the ordinary courts of criminal justice.

Under the old law, and after notice in the "London Gazette" of the issuing of the fiat, or filing of the petition, &c., the omission, of course, was wilful. The summons to appear needs not to contain a statement, that the person summoned has been adjudicated a bankrupt.¹ The bankrupt must also be, in like manner, and before that time, prepared to sign and subscribe the surrender, and submit to be examined before the court from time to time, under the same clause.

Great indulgence has always been shown to bankrupts with respect to the surrender. The Court of Chancery will not lend its aid to a prosecution by ordering the clerk to the commission to attend the trial and produce the proceedings.² On the contrary, that court has superseded commissions in order to prevent a prosecution for not surrendering, in the absence of fraud in the bankrupt, or where his absence arose from ignorance or accident.³ And great exactness is required in commitments by commissioners, for if the bankrupt be committed as a criminal, it must be until he shall be delivered by due course of law.⁴ Where the prisoner put his refusal to answer or conform upon a resolution on his part to dispute the commission, the judges held, that, as he had submitted and surrendered, a subsequent non-submission was not within the Act, (5 Geo. 2, c. 30,) and that the submitting was confined to the time of the surrender; and that, although the jury had found that the refusal had proceeded from a fraudulent intention.⁵ And a bankrupt's balance delivered upon oath under his commission is not receivable against him in a criminal charge.⁶ Moreover, al-

¹ *R. v. Dealtry*, Den. C. C. 287. By the judges, 2 Car. & K. 521.

² 1 Hawk. c. 49, s. 7.

³ *Ex parte Wood*, 1 Atk. 222; *Ex parte Shiles*, 1 Madd. 248.

⁴ 1 Salk. 348, note (a).

⁵ *R. v. Page*, Russ. & Ry. 392;

1 Br. & Bing. 308, 317. There was another question as to the act of bankruptcy. See Russ. & Ry. 396, 397.

⁶ *R. v. Britton*, 1 Moo. & Rob. 297.

though the bankrupt's imprisonment be collusive, it has been held, that he need not give notice to the commissioners of his being in prison, nor make an application to be brought up to surrender, nor apply to enlarge the term for such surrender.¹ Nor can he be convicted for not delivering up his books until his last examination has been passed. Till then he has a *locus pœnitentiæ*.² The following decisions were arrived at in the case of Cosmo Gordon.³ 1. That the presumption is against any alteration of an affidavit, and therefore the court will admit it notwithstanding erasures. 2. C. Lane, W. Lane, of Middlesex. In the Gazette it was W. Lane, of Essex; held, immaterial. 3. Petition allotted to Commissioner G., notice signed by Commissioner H., sufficient. 4. Notice to surrender on one of two days, *one was past*. But the last was the day limited by the statute for surrender, sufficient. 5. Search at the counting-house, giving the bankrupt notice to produce, sufficient to warrant secondary evidence of the documents left at the counting-house. 6. Not material, that the prisoner had no knowledge of his having been made a bankrupt, if the notice, &c., were duly served. 7. A separate notice to surrender should have been left for each bankrupt at his last place of business. Two objections rose out of the above, and were repelled. Conviction quashed on No. 7.⁴ Where that notice at the last abode appears, the petition is sufficient.⁵ The prisoner was again indicted with one Davison under the same section, (12 & 13 Vict. c. 106, s. 251,) for embezzling part of their personal estate to the value of 10*l*. The adjudication took place on June 21st. The bankrupts, four days previously (on the 17th) received several bank notes, and on the same day they went to Belgium, where they remained for a considerable time. Some of these identical notes were received by mercantile houses in London from places in Belgium, to which the bankrupts were traced, but there was no evidence as to how, or when the notes were dealt with by them. A memorandum book of their expenditure in Belgium was found upon them, the items being stated in foreign coin. When they returned to England, they were arrested, and gave no aid before the Bankruptcy Court as to the disposal of the notes. It was held—1. That there was no evidence of any offence committed within this realm, for the disposal, if any here, must have taken place on the 17th of June, before the adjudication; and, if disposed of abroad, that was a complete offence there. 2. Although a subsequent non-accounting was evidence of a fraudulent appropriation, it was no part of the crime of embezzlement. 3. Although the bankrupts

¹ *R. v. Mitchell*, 4 C. & P. 251.

² *R. v. Walters*, 5 C. & P. 138.

³ 25 L. J. M. C. 19; 7 Cox, 19.

⁴ *Diss.*—Jervis, C. J.; Erle, J.; Platt, B.; Willes, J.

Affir.—Lord Campbell; Parke, B.; Alderson, B.; Wightman, J.;

Cresswell, J.; Williams, J.; Crompton, J. Seven to four.

Absent.—Pollock, C.B.; Coleridge, J.; Crowder, J.; Martin, B.

⁵ *R. v. Hughes*, 1 Fost. & F. 726.

And it is not necessary to give notice to produce the notices of the adjudication.

refused to answer before the commissioners, lest they should criminate themselves, no unfavourable conclusion ought thereby to be drawn. 4. The word "money" in the indictment must mean English money, not foreign coin. 5. The description of the money, though laid under a *videlicet*, was material, and therefore not amendable, and by Alderson, B., the embezzlement of 10/. must be as one sum. The disposal of several smaller sums at different times was not within the statute.¹

Indictment and evidence.] The chief points, however, upon this subject will be found upon a consideration of the indictment and evidence applicable to each particular head. It is manifest that the substance of the bankruptcy must appear upon the record; although, indeed, in one case the prisoner was convicted on two counts, one of which did not set out this fact. The point was saved, but the judges held the conviction wrong, upon another ground.² So again, it has been held insufficient to allege a concealment by the bankrupt without also averring the bankruptcy.³ The adjudication not being proved to have been in the Gazette is insufficient.⁴ So where under 5 & 6 Vict. c. 122, s. 32, the indictment charged the bankrupt with not discovering when he disposed of his estate, but failed to aver that he had disposed of it, the judgment was arrested.⁵

It is necessary that the indictment should in this, as well as in other cases, pursue, as far as may be, the words of the statute; and therefore, where the indictment used the word "awarded" instead of "issued," it was held bad.⁶ And it is a good form to say that the bankrupt was requested to surrender himself to the commissioners *in the said commission named*,⁷ for a general description of the commissioners would be deemed too loose and uncertain.⁸ The summons to appear was before the commissioner in the district court at Manchester, and was signed "W. T. J., Commissioner." But there was another commissioner, and, although the bankrupt had not surrendered himself to Mr. W. T. J., nor to the district commissioner, it was urged for him, that he might have surrendered elsewhere to Mr. S., the other commissioner. This objection was overruled, and the judges held the conviction right.⁹ The notice also must be truly set out, with an averment of the service.¹⁰

¹ 25 L. J. and 7 Cox, *ut supra*.

² *R. v. Evani*, 1 Moo. C. C. 70, 75, 76.

³ *R. v. Jones*, 4 B. & Adol. 345; 1 Nev. & M. 78.

⁴ *R. v. Lands*, 25 L. J. M. C. 14. Misdemeanor under 12 & 13 Vict. c. 106, s. 253; *R. v. Hilton*, 2 Cox, 318.

⁵ *R. v. Harris*, 19 L. J. M. C. 11 Den. 461. The words "at the time of his said examination" were

not equivalent to "upon such examination," which are the words of the statute. 13 Jur. 990. Whether the absence of an averment that the bankrupt had been examined vitiated the indictment, *qu.?*

⁶ *R. v. Frith*, Leach, 10.

⁷ Stark. Cr. P. 571.

⁸ *R. v. Frith*, Leach, 11.

⁹ *R. v. Dealtry*, Den. 287; 2 Car. & K. 521.

¹⁰ *R. v. Kenrick*, 1 Cox, 146.

Where the indictment averred that the notice was according to 5 Geo. 2, c. 30, and it turned out to be according to 49 Geo. 3, c. 121, the variance was fatal.¹ So again, it must appear in evidence that the party was a bankrupt. For want of this proof, "all falls to the ground" in a criminal proceeding,² and, therefore, an infant was acquitted, because an infant cannot be a bankrupt.³ Likewise, if the words "with intent to defraud," be omitted, there is an end of the case.⁴ Parole evidence of what the bankrupt said at his last examination cannot be received, although no part of it was committed to writing.⁵ Some discussion has taken place as to whether the bankrupt's forced examination can be admitted in evidence. The prisoner was charged with mutilating one of his trade books. The principal evidence against him was his own examination before the court, got from him under a threat of committal. Willes, J., received it after objection made, and the conviction was affirmed.⁶ This subject underwent further considerable discussion. An indictment was framed on 5 & 6 Vict. c. 39, s. 6, which provides that no agent shall be convicted by any evidence, if, previously to the indictment, he shall have disclosed the same before the commissioners of bankruptcy. The defendants before the indictment had been taken by their creditors, and disclosed the whole of their fraudulent conduct, in having transformed a bill of lading intrusted to them for their own benefit. They pleaded Not guilty, and under that plea offered their examination before the commissioners as a defence. The case was reserved. The point in question was, what could be called a *disclosure*? Nine judges⁷ held, that what was known before could not be called a disclosure. Four⁸ were of opinion that the facts came out at a compulsory examination, instituted *bonâ fide* by creditors, and that the defendant was entitled to protection. The conviction was affirmed.⁹

Very strict proof is required for these indictments. The petitioning creditor's debt was laid to have been due to A. B., C. D., and E. F., surviving executors of the last will and testament of G. H. Evidence was given that the prisoner had made an acknowledgment that he was indebted in a sum not exceeding 100*l.* to

¹ *R. v. Burraston*, Gow. 210.

² 3 Campb. 97, by Lord Ellenborough.

³ *R. v. Cole*, 1 Lord Raym. 443; 12 Mod. 243; Holt's Ca. 360.

⁴ *R. v. Hill*, 1 Car. & K. 168.

⁵ 5 C. & P. 138.

⁶ *R. v. Scott*, 25 L. J. M. C. 128. The court consisted of Lord Campbell; Alderson, B.; Coleridge, J.; Willes, J.; Bramwell, B. But Coleridge, J., delivered a long, learned and constitutional argument against the decision. *Id.* 133.

And see *R. v. Slogett*, 25 L. J. M. C. 93. S. P. To abide *R. v. Scott*. *R. v. Cross and another*, Dears. & B. 68.

⁷ Lord Campbell, C.J.; Pollock, C.B.; Wightman, J.; Willes, J.; Hill, J.; Martin, B.; Watson, B.; Bramwell, B.; Channell, B.

⁸ Williams, J.; Crompton, J.; Crowder, J.; Byles, J.

⁹ *R. v. Sheen and another*, Bell, 97; 28 L. J. M. C. 91. So was *R. v. Strahan*.

the executors of G. H. for work done, but it was not shown that the third executor had ever acted in the management of the business, although the two others had done so. And by Le Blanc, J., "It is not to be presumed that the three petitioning creditors had assented to carry on the business as trustees under the will, and the defect in evidence cannot be supplied by the admission tendered. It would be going too far to infer that he meant to include all three." An acquittal was directed.¹ Again, the prosecutor gave evidence that the prisoner had stated on his last examination the fact of his having given in a book containing an account of all his effects, but the book was not produced, nor was any reason assigned for its non-production. And the judges held the conviction wrong, for it could not be known whether the effects had been concealed or not, unless the book were brought forward.² It was also held in this case, that although the indictment had mentioned twenty or thirty creditors by name, it was sufficient to prove that five or six were actually creditors, for this case, said the learned judge, differed from forgery or uttering base coin: there the intent being to defraud particular persons, the parties must be proved to have been defrauded, *seriatim* as laid; whereas here, the intention being to defraud creditors generally, a single person might be shown to be a creditor, and the indictment would be supported. But in order to prove that twenty persons were creditors, the proceedings under the commission were deemed inadmissible.³ Various other objections were urged. It was said that there ought to have been an averment that the commissioners had taken the oaths, and that the adjournments ought to have been set out; that no statement was made of the objects of the commission, nor of the authority of the commissioners; that although the prisoner was said to have been declared a bankrupt, it was not added that he was so declared by the commissioners. And to one of the counts it was objected, that it did not even speak of the prisoner as a person subject to the bankrupt laws, or that he became indebted to any creditors, or became bankrupt.⁴ The judges, however, considered the difficulty respecting the book to be fatal, and it does not appear that they disposed of the other points.⁵ Another case will show the strictness which governs these proceedings. The indictment against the prisoner sufficiently specified certain portions of the property which were alleged to have been concealed, but went on to the mention of "one hundred other articles of household furniture," and "a certain debt due from one A. B. to the said prisoner," without entering into more particulars either of the debt or furniture. It was held, upon a case reserved, that the judgment should be arrested, for the property was not wholly specified, and no distinct value had been put upon the articles enumerated.⁶ Another objection was taken at the trial, that the

¹ *R. v. Barnes*, 1 Stark. 243.

⁴ *Id.* 75, 76.

² *R. v. Evans*, 1 Moo. C. C.

⁵ 1 Moo. C. C. 76.

70.

³ 1 Moo. C. C. 75.

⁶ *R. v. Forsyth*, Russ. & Ry.

274.

nature of the act of bankruptcy had not been set forth, and it was said that facts, from which the legal effect of bankruptcy might ensue, should have been alleged.¹ And it was, moreover, objected, that no venue, nor time, had been laid with respect to the averment of putting the notice in the "London Gazette."² The judges, however, decided upon the objection which we have first mentioned. Evidence of a prior secret act of bankruptcy cannot be received to invalidate the commission upon which the criminal proceeding is founded.³ It was also held in this case, that the statement of a commission under the Great Seal of Great Britain, was satisfied by proof of such a commission under the seal of Great Britain and Ireland, and that a commission of bankruptcy was not liable to stamp duty imposed by 44 Geo. 3, c. 98.⁴ By 12 & 13 Vict. c. 106, ss. 252, 253, (now repealed,)⁵ if the bankrupt made a false book with a view to deceive his creditors as to the mode of his expenditure, but not with a view to defraud them, he was not guilty of making a false and fraudulent entry under the 252nd section. The jury having negatived the intent to defraud, the conviction was holden wrong.⁶ The following proof was deemed insufficient, it being distinctly laid down that evidence of bankruptcy, not of adjudication merely, must be produced to satisfy the statute 12 & 13 Vict. c. 106, s. 253. A petition was filed in the Insolvent Court. A copy of the petition, certified to be a true copy by the proper officer, was made evidence by sect. 239 of the same Act. There was, however, *no date* of the filing of the petition, although on the back there was an indorsement purporting to state when the petition was filed. It was no part of the petition, and the conviction was quashed.⁷ An indictment alleged that the prisoner was possessed of real estate, and then went on to charge him with feloniously making default in discovering to whom he had assigned. This inconsistency was held fatal to the count.⁸ But an overt act, as a wilful absence from creditors, is enough without proving the intent to defraud.⁹ Proof, likewise, that the bankrupt received goods from a seller, who urgently got him to take them, is not sufficient.¹⁰

¹ *R. v. Forsyth*, Russ. & Ry. 275.

² As to the proof of the Gazette itself, which was made the foundation of a fourth objection. *Id.*

³ *R. v. Bullock*, Leach, 996; 1 Taunt. 71.

⁴ Leach, 1006; 1 Taunt. 82. See also 5 C. & P. 140; 6 & 7 Vict. c. 85.

⁵ See sect. 255.

⁶ *R. v. Ingham*, 29 L. J. M. C. 18; Bell, 181. The case might be presented to the commissioners under sect. 256, when the question of certificate should arise. See *R. v. Marner*, Car. & M. 628.

⁷ *R. v. Lands*, 25 L. J. M. C. 14; 7 Cox, 89.

⁸ *R. v. Harris*, 3 Cox, 565. The indictment did not even state that he had been examined as to his estate.

⁹ *R. v. Hughes*, 1 Fost. & F. 726. The bankrupt left before the adjudication. On sect. 251 of 12 & 13 Vict. c. 106, Verdict, Guilty. It was likewise held in this case, that as the bankrupt had acted in procuring loans and lending money, he was liable as a "scrivener," and that proof of one instance would throw the onus on him.

¹⁰ *R. v. Boyd*, 5 Cox, 502.

Trial.] It seems that the trial may take place wherever the offence or respective offences charged in the indictment have been committed. As if the bankrupt's fraudulent refusal to answer were to occur at the examination before commissioners; in this case the indictment would probably be preferred in London. Again, if a concealment were to be the subject of the indictment, the prisoner would be tried in the county where such concealment took place; and it is no objection to say that the trial ought to be in London where the last examination took place, if it be in the power of the prosecutor to show a concealment in some other county, as, for instance, in Middlesex.¹ The venue under 5 & 6 Vict. c. 122, should be either in the county where the defendant was a trader, or where he committed the act of bankruptcy. Where a bankrupt committed felony by not surrendering to a fiat, the place where the district court is situate should be adopted for the venue.² Moreover, the statute 5 & 6 Vict. c. 38, enumerates offences against the laws relating to bankrupts and insolvents, amongst those which cannot be tried by the courts of quarter session, nor by the recorders of boroughs.³ By 12 & 13 Vict. c. 106, s. 272, knowingly to insert a false advertisement under the Act in the "London Gazette," is a misdemeanor.

¹ *R. v. Evani*, 1 Moo. C. C. 72. 33 Geo. 3, c. 5. And see 39 Geo. 3,

² *R. v. Milner*, 2 Car. & K. 310. c. 50.

³ See 32 Geo. 2, c. 28, s. 17;

CHAPTER II.

OF FORGERY AT COMMON LAW.

Forgery is the false making of any written instrument for the purpose of fraud and deceit. It is punishable, according to its various forms, both at common law and by statute.

It relates both to public and private instruments, and in order to make the discussion of it more complete, we must treat of uttering forged instruments with a guilty knowledge.

Forgery at common law consists in the fraudulent design of cheating another. As soon as private advantage begins to operate by means of the forgery, or a prejudice begins to work to the detriment of a third person, the common law deems the defendant to be guilty, and there are cases where a mere erasure was not held to be forgery, because of the absence of any intent to defraud, whether for the sake of private benefit or mischief towards another individual.¹

The act of putting wax to writs, without sealing, has been deemed a high misdemeanor, and next to counterfeiting the seal.

The counterfeiting of matters of record is one of the offences under this head best known to the common law. It is, consequently said, that the public are deeply interested in the integrity of such matters, and that it cannot but be very mischievous that they should be either forged or falsified.² As, if the name of a person, against whom the coroner's jury had not found a verdict, should be inserted in an indictment founded upon the inquest.³ The coroner in such a case was found guilty upon an information for forgery.⁴ But many other public instruments may be enumerated. Hawkins mentions a privy seal, a licence from the barons of the exchequer to compound a debt, a certificate of holy orders, or a protection from a parliament man,⁵ and there is a case in Keble for forging patents.⁶ So where a person who was committed for contempt, counterfeited a discharge as from his creditors to the sheriff and gaoler, it was held by a majority of the judges that he might have been indicted for forgery at common law, but all

¹ See East, P. C. 854, whether, if no fraud result, the uttering of a forged instrument with a fraudulent intent be forgery, qu.? *R. v. Withers*, 4 Cox, 17.

² 1 Hawk. c. 70, s. 8.

³ *R. v. Marsh and others*, 3 Mod. 66.

⁴ *R. v. Marsh*, 3 Salk. 172.

⁵ 1 Hawk. c. 70, s. 9.

⁶ *R. v. Winter and others*, 2 Keb. 74.

held it to be a misdemeanor, and the conviction consequently right.¹ It is *felony* for a soldier to counterfeit the warrant of his captain.² In another case of a public nature it was objected, that as the writing,³ if genuine, must have been a nullity, the offence could not be of a higher nature than a cheat, but as the sessions had improperly adjudicated upon it as a case of forgery, which was not within their jurisdiction, no opinion was given.⁴ And, in a recent case where the prisoner forged an order from a magistrate to a gaoler for the discharge of a prisoner, the judges held the conviction right.⁵ And the better opinion seems to be, that at common law, the alteration of any written instrument is as much a forgery as the making of it,⁶ provided the alteration were material, and done for the ultimate advantage of the forger.⁷

Forgery at common law must be of some document or writing. Hence painting an artist's name in the corner of a copy of a picture, in order to pass it off as the original, is not forgery.⁸ So, forging and uttering wrappers with "Borwick's Baking Powders" on them, is not a forgery of a document at common law. It was an imitation, but no forgery. The fraud consisted in putting powder within the wrappers which was not genuine.⁹

Private instruments.] Several private writings are also mentioned as the subjects of forgery. And there was a suspicion at one time that some of these, as wills, making a false order for the payment of rent, and other writings of an inferior nature, were not such forgeries as the common law would recognize.¹⁰ But, at length, a defendant forged an order from the Duke of Buckingham, addressed to J. W. the defendant, to charge so much alum to the duke's account, and out of the money arising from the sale to pay J. W. and another so much per ton. And, upon conviction, it was urged, that this was but a cheat, and no forgery, and the more so as the fraud did not succeed. But it was held to be a forgery, and a distinction was made between cheats at common law, and upon the statute 33 Hen. 8, where the party received a prejudice in a case like the present, where it was not necessary that any damage at all should accrue to the person intended to be defrauded.¹¹ So that the rule became settled that the counterfeiting of any writing with a fraudulent intent, whereby another party might be prejudiced, was forgery at common law.

¹ *R. v. Fawcett*, East, P. C. 862.

² 2 Ro. Rep. 266.

³ The initials of the name of a clerk to commissioners of appeal.

⁴ *R. v. Gibbs*, 1 East, 173; East, P. C. 864.

⁵ *R. v. Harris*, 1 Moo. C. C. 393.

⁶ *R. v. Kinder*, 1 Hawk. c. 70, s. 2; East, P. C. 855.

⁷ 1 Hawk. c. 70, s. 4.

⁸ *R. v. Closs*, Dears. & B. 460.

⁹ *R. v. Smith*, Dears. & B. 566;

27 L. J. M. C. 225.

¹⁰ See 1 Hawk. c. 70, s. 11; East, P. C. 859, 860.

¹¹ *R. v. Ward*, 2 Ld. Raym. 1461; Str. 747. S. P. *R. v. Deakins*, 1 Sid. 142.

Although a distinction had been made between false deeds and other writings, it being necessary to show in the former case that some person was prejudiced by the forgery.¹ Still, if no one can by possibility be prejudiced by the act, it is not a forgery.² And thus when the defendant was acquitted of forging a railway pass, but convicted of uttering it, the judgment was arrested, no fraud having been perpetrated.³ But *R. v. Boulton* is overruled, for some one might have been prejudiced, and, therefore, when a person forged the certificate of a clergyman, testifying to the prisoner's merits as a schoolmaster, he was, although acquitted of the forgery, held rightly convicted of uttering the document, although the fraud failed.⁴ However, when an indictment charged the defendant with forging a diploma of the College of Surgeons, in order to represent himself as a member, he was held to have been wrongly convicted of forgery, because no one was defrauded by it. Had the charge been for uttering, the case might have been different.⁵ But it was never doubted that making a false deed concerning a private writing was punishable at common law.⁶ Or antedating a deed with a fraudulent view.⁷ And although it was held that the omission of matters out of a will was not forgery, as a legacy which the testator had ordered,⁸ yet if one were directed to give land for life with a remainder in fee, and the estate for life were wilfully omitted, it was said, that this would be forgery.⁹ And the wilful insertion of a legacy without authority is held to have been forgery,¹⁰ although *Sir John Marvin's case* seems to militate against this position.¹¹ But the statute law upon the subject of wills has made such an alteration as to render any further inquiry upon these points immaterial.

It was also held, that if the instrument were genuine upon the face of it, it did not matter whether it were of validity or not, if in truth it were such as it was counterfeited for. So that the forgery of a protection in the name of A. was deemed as much a crime as if A. had really been a member of parliament.¹² And herein consists the difference between cases where the instrument is good in itself, and where it is informal.¹³

¹ *R. v. Goate*, 1 *Ld. Raym.* 737.

² *R. v. Knight*, 1 *Salk.* 375; 1 *Ld. Raym.* 527.

³ *R. v. Boulton*, 2 *Car. & K.* 604.

⁴ *R. v. Sharman*, *Dears.* 285; 23 *L. J. M. C.* 51. See *R. v. Smythies*, 19 *L. J. M. C.* 31; *Den.* 498.

⁵ *R. v. Hodgson*, 25 *L. J. M. C.* 78; *Dears.* & *B.* 3. One name had been substituted for another, and the date had been changed, but the intent to defraud was absent, and that must have been proved.

⁶ 1 *Hawk. c.* 70, s. 11.

⁷ *Puckering v. Fisher*, 1 *And.* 100. See also 1 *Hawk. c.* 70, s. 2.

⁸ *R. v. Combe*, *Mo.* 759.

⁹ *R. v. Combe*, *Noy.* 101.

¹⁰ *East, P. C.* 856.

¹¹ *Dy.* 288.

¹² *R. v. Deakin*, 1 *Sid.* 142.

¹³ See *R. v. Burke*, *Russ. & Ry.* 496, where an instrument was described in the indictment as a promissory note, and being produced, turned out not to be payable to bearer on demand, nor payable in

Other private writings are, a bill of lading¹, a power of attorney,² letters of credit to gather money,³ an acquittance,⁴ a marriage register,⁵ a bill of exchange,⁶ a promissory note,⁷ or indorsement, (all these being instruments not under seal), and, as it seems, a county court summons.⁸ An affidavit to obtain money.⁹ A certificate of good conduct as an able seaman.¹⁰ A station-master's account of the collection and delivery of parcels.¹¹ A false letter of recommendation for the place of police constable, forged and uttered.¹² The alteration of letter M. in a seaman's character, signifying middling, and the insertion of G., for good, uttered.¹³

Indictment.] It may be observed that the indictment should set out the forged record or public instrument, or private writing,¹⁴ with the accuracy which would be required upon an indictment for stealing it, but no copy or *fac-simile* need be placed upon the record.¹⁵ And the indictment then goes on to state, that the defendant did falsely¹⁶ make, forge,¹⁷ and counterfeit the same; or in the case of uttering, did, unlawfully and fraudulently, utter it with intent to defraud.¹⁸ But it is not sufficient to state the writing to be a certain instrument partly printed, partly written, in the words and figures following, that is to say, &c. The judges in this case were of opinion, that the indictment was bad for want of stating what the instrument was, in respect of which

money, but only promissory, on the part of the maker, that it should be taken in payment in part for a two-pound note. And the judge held that the judgment should be arrested, and independently of the question concerning the promissory note, it was disputed at the trial whether the instrument itself was not a mere nullity, and so not the subject of forgery at common law.

¹ *R. v. Stocker*, 1 Salk. 342; 5 Mod. 137.

² *R. v. Farr*, T. Raym. 84.

³ *R. v. Savage*, Sty. 12.

⁴ *R. v. Ferrers*, 1 Sid. 287.

⁵ *R. v. Dudley*, 2 Sid. 71; S. C. 3 Leon. 170.

⁶ *R. v. Sheldon*, Str. 748, cited.

⁷ *R. v. Ward*, cited, Id.; see also East, P. C. 862, note (g); 2 Str. 1144.

⁸ *R. v. Collier*, 5 C. & P. 160, *semble*, by Patteson, J.

⁹ *R. v. O'Brian*, 7 Mod. 378.

¹⁰ *R. v. Toshack*, Den. 492. With intent to defraud the ex-

aminers, or the Trinity House. At all events if uttered.

¹¹ *R. v. Griffiths*, Dears. & B. 548; 27 L. J. M. C. 205.

¹² *R. v. Moah*, Dears. B. 550; 27 L. J. M. C. 204.

¹³ *R. v. Wilson*, Dears. & B. 558; 27 L. J. M. C. 230.

¹⁴ Before the repeal of 5 Eliz. it had been held, that an indictment for an offence, cognizable by that statute, might be laid equally well at common law. Str. 1144, *R. v. O'Brian*.

¹⁵ 24 & 25 Vict. c. 98, s. 41.

¹⁶ The word "counterfeit" implies falsity. *R. v. Savage*, Sty. 12.

¹⁷ To say "forge or cause to be forged," is bad for uncertainty. *R. v. Stocker*, 1 Salk. 342; S. C. 5 Mod. 137; S. P. *R. v. Walcot*, Ca. Temp. Holt, 345. *R. v. Flint*, Ca. T. H. 370. See also *R. v. Morley*, 1 Y. & Jer. 221.

¹⁸ The intent to cheat or defraud must be alleged, *R. v. Rushworth*, Russ. & Ry. 317, though not any particular person.

the forgery was alleged to have been committed, and also because it did not appear that the party signing it had the authority for that purpose. The defendant having previously been bound over to appear at the next assizes to receive sentence, the judgment was arrested.¹

Trial.] By 24 & 25 Vict. c. 98, s. 41, the trial may be either in the county where the offence was committed, or where the offender has been apprehended, and is in custody.² Although the prisoner be not in court when the trial begins, he still is indicted in custody. The jurisdiction appears sufficiently by the caption. A verdict "guilty of forgery, but there is no evidence of its having been done within the jurisdiction of the court," amounts to a conviction.³ And any accessory, before or after the fact, may be dealt with in the same manner as the principal offender.⁴

Judgment.] The judgment is, that the offender be fined and imprisoned.⁵ The same judgment may be passed upon principals in the second degree, and accessories before the fact, for in forgery *at common law* all are principals,⁶ and accessories after the fact are also punishable in like manner. The offence itself is said to rest in misdemeanor,⁷ and in other cases where the act in question is not a cheat, it is alleged to be indictable as for misdemeanor.

¹ *R. v. Wilcox*, Russ. & Ry. 50.

² But not at the quarter sessions, either at common law, *R. v. Gibbs*, 1 East, 173, or by statute.

³ *R. v. Smythies*, 19 L. J. M. C. 31. Den. 498; on the authority of *R. v. Whiley*, 1 Car. & K. 150; 2 Moo. C. C. 186; incorrectly reported. Lord Denman alone held the conviction wrong. Littledale,

J., doubted. 19 L. J. M. C. 32, Parke, B.

⁴ See 3 Campb. 78; Russ. & Ry. 214; Id. 428.

⁵ East, P. C. 1003; 1 Hawk. c. 70, s. 1.

⁶ East, P. C. 973; 2 Russ. C. M. 31; Leach, 1096, n. See likewise *R. v. Bothe*, Mo. 663.

⁷ East, P. C. 100.

CHAPTER III.

OF FORGING OR COUNTERFEITING THE SEALS.

The forgery of the Queen's seals is now reduced from high treason to forgery.

By 24 & 25 Vict. c. 98, s. 1,¹ Whosoever shall forge or counterfeit, or shall utter, knowing the same to be forged or counterfeited, the great seal of the United Kingdom, Her Majesty's privy seal, any private signet of Her Majesty, Her Majesty's royal sign manual, any of Her Majesty's seals appointed by the twenty-fourth article of the Union between England and Scotland to be kept, used, and continued in Scotland, the great seal of Ireland, or the privy seal of Ireland, or shall forge or counterfeit the stamp or impression of any of the seals aforesaid, or shall utter any document or instrument whatsoever, having thereon or affixed thereto the stamp or impression of any such forged or counterfeited seal, knowing the same to be the stamp or impression of such forged or counterfeited seal, or any forged or counterfeited stamp or impression made or apparently intended to resemble the stamp or impression of any of the seals aforesaid, knowing the same to be forged or counterfeited, or shall forge or alter, or utter knowing the same to be forged or altered, any document or instrument having any of the said stamps or impressions thereon or affixed thereto, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement.

It was formerly holden, that, besides these seals, other regal seals might be the subjects of treason, especially before the 25 Ed. 3,² although, after that statute, the better opinion is, that to counterfeit such seals was only felony.³ However, it is now agreed that the forgery of other seals than those mentioned in the 2nd section of the Act of 1 Will. 4, c. 66, would be a high misdemeanor only.⁴ Instances of such other seals are—those appertaining to courts of justice, the seals of statutes and recognizances, and the seal of the docket.⁵ And it is observable, that the great seal does not become valueless upon a demise of the crown, but continues to be the great seal of England until another be delivered.⁶ And so it is with respect to the other seals, and by Lord

¹ The commencement of this Act is Nov. 1, 1861. [Sect. 56.] It is not to extend to Scotland. [Sect. 55.] The interpretation of criminal possession. [Sect. 45.]

² Cap. 2, s. 5.

³ See 1 Hale, P. C. 179.

⁴ East, P. C. 84.

⁵ Id.

⁶ Id. 85.

Hale, even after the breaking of the old seal. If a counterfeit of such were to be applied to an instrument of the date wherein the old seal stood, or to an instrument without date, it would be high treason.¹ Although if one were to counterfeit the seal of one prince to a patent supposed to be granted in the time of another, or to a supposed patent of the same prince after a new seal made and delivered, the case would be different, on the ground of there being no such seal.² There is this difference between the offence of counterfeiting these seals and forgery—that in the case of forgery, the crime consists in the falsification of the instrument, but in the former the offence is created by the falsification of the seal, with reference in particular to the instrument. And hence it follows, that a person cannot be convicted under this Act for affixing a true seal to a false instrument. This offence, indeed, *i. e.* of affixing a true seal to a false instrument, was once deemed high treason,³ but it subsequently came to be considered a great misprision only.⁴ L., a clerk in chancery, joined two clean parchments, fit for letters patent, by means of glue, so close together, that they might have been taken for one. The upper one was very thin. The prisoner then put one label through both, and wrote a true patent upon the thin piece, which was brought to the lord chancellor, and sealed with the great seal. The label and seal were then annexed to both the parchments, one of which was written, and the other blank. The prisoner then cut off the glued skirts, and taking off the parchment from the labels, wrote another patent on the blank parchment, and published it, and this was considered a very great misprision by a majority of the judges.⁵ Upon the same principle, should the lord chancellor or lord keeper put the great seal to any instrument without warrant, it is only a misprision.⁶ But if the least alteration be made in the seal itself, the higher offence attaches forthwith, as if the seal were split, and then closed again to a false patent.⁷ And, as in cases of perjury, if the counterfeiting be such as to deceive an ordinary beholder, it is no defence to allege that there is a slight variance. As, where one Robinson urged that the crown had been left out in the fabricated signet which he was charged with uttering, and that certain usual words in the style were omitted, and certain new words inserted.⁸

The question of counterfeit or not is particularly for the consideration of the jury.⁹

It may be added, that the mere intent to use a false seal is in-

¹ 1 Hale, P. C. 177 : see 1 Taunt. 71. *R. v. Badcock*, Leach, 996.

² 1 Hale, P. C. 178 ; East, P. C. 86.

³ See 1 Hale, P. C. 181. *R. v. Peytenyn*, cited, 2 Ro. Rep. 51, by Sir Henry Yelverton, att.-gen. *R. v. Winter*, 2 Keb. 74. See East, P. C. 85.

⁴ 3 Inst. 15 ; East, P. C. 85.

⁵ *R. v. Leek*, 3 Inst. 15 ; 12 Rep. 15 ; Kel. C. C. 80.

⁶ See 3 Inst. 15 ; 1 Hawk. c. 17, s. 51 ; East, P. C. 85.

⁷ East, P. C. 86.

⁸ *R. v. Robinson*, 2 Ro. Rep. 50.

⁹ East, P. C. 87.

sufficient to create this offence, as if one should have such a seal in possession without employing it.¹

Indictment.] That A., on, &c., feloniously did forge the great seal of the United Kingdom of Great Britain and Ireland, and the same did affix to a certain parchment, &c., he the said A. well knowing that the said seal was forged, against the form of the statute, &c.

CHAPTER IV.

OF FORGERY AND PERSONATION, TRANSFER OF STOCK, &c.

By 24 & 25 Vict. c. 98, s. 2, Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any transfer² of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or at the Bank of Ireland, or of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter, or by, under, or by virtue of any Act, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, or to receive any dividend or money payable in respect of any such share or interest, or shall demand or endeavour to have any such share or interest transferred, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered power of attorney or other authority, knowing the same to be forged or altered, with intent to defraud, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 3, whosoever shall falsely and deceitfully personate any owner of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England, or at the Bank of Ireland, or any owner of any share or interest of or in the capital stock of any body corporate, company, or society which now is or hereafter

¹ 1 East, P. C. 85; 1 Hawk. against forgers of transfers of stock, c. 27, s. 50. was repealed by 24 & 25 Vict.

² The Act 33 Geo. 3, c. 39, c. 101.

may be established by charter, or by, under, or by virtue of any Act, or any owner of any dividend or money payable in respect of any such share or interest, and shall thereby transfer or endeavour to transfer any share or interest belonging to any such owner, or thereby receive or endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 4, whosoever shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of a witness attesting the execution of any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock as is in either of the last two preceding sections mentioned, or to receive any dividend or money payable in respect of any such share or interest, or shall offer, utter, dispose of, or put off any such power of attorney or other authority, with any such forged name, handwriting, or signature thereon, knowing the same to be forged, shall be guilty of felony, and liable to penal servitude not exceeding seven nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 5, whosoever shall wilfully make any false entry in, or wilfully alter any word or figure in, any of the books of account of the Bank of England or the Bank of Ireland, in which books the accounts of the owners of any stock, &c., shall be kept, or shall in any manner wilfully falsify any of the accounts of any of such owners, with intent to defraud, or shall wilfully make any transfer of any share or interest of or in any stock, &c. in the name of any person not being the true and lawful owner of such share or interest, with intent to defraud, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

And by sect. 6, whosoever, being a clerk, officer, or servant of or other person employed or intrusted by the governor and company of the Bank of England or the governor and company of the Bank of Ireland, shall knowingly make out or deliver any dividend warrant, or warrant for payment of any annuity, interest, or money payable at the bank of England or Ireland, for a greater or less amount than the person on whose behalf such warrant shall be made out is entitled to, with intent to defraud, shall be guilty of felony, and liable to penal servitude not exceeding seven nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

The authorities connected with these sections are not numerous. In the case of *Fauntleroy*, some of the counts charged him with forging a letter of attorney to transfer and assign certain stock belonging to F. Young, and others called this power of attorney a deed. The prisoner was acquitted upon the counts which mentioned the letter of attorney, and was convicted upon those which

alleged that he had forged "a certain false and counterfeit deed," and the question raised was, whether this power was "a deed." The judges, however, entertained no doubt, and the prisoner was executed.¹ In another case, it was objected that the party whose name was forged, and who was a mere trustee, could not be a competent witness to prove the forgery. But it appearing that he had disavowed the power of attorney, and that the attestation had not been made according to the rules of the bank, the judges held that he had been rightly admitted a witness, and the prisoner was executed.² And even if the rules of the bank are not always strictly followed, the offender will not be allowed to escape under all circumstances. As where the prisoner forged a transfer of stock which was not witnessed according to the orders of the bank, an objection was raised to the conviction upon that ground; but the judges held that the offence was completed without the attestation, that being no part of the instrument, but only added *ex abundanti cautela* by the bank for their own protection. In the same case, much stress was laid upon the want of acceptance by the proprietor of the stock in question, and as the Act of parliament expressly provided that no transfer should be valued unless accepted, it was earnestly contended that the transfer was incomplete; and that being so, it would follow that no transfer could be made, nor forgery committed. But the judges held, that the transfer was complete notwithstanding this want of acceptance, for the mere act of transferring stock would cause it, in case of death, to pass into the hands of the transferee's executors; and, moreover, they were of opinion, that had no stock at all been standing in the name of the party whose name was forged, the transfer would have been equally complete for the purposes of forgery, and the prisoner was executed.³

By 5 Geo. 4, c. 53, s. 22, to forge any certificate, &c., used in the mutual transfer of capital under that Act, was made felony. So also to alter any number, figure, or word therein, or alter or publish any such counterfeit or altered instrument.

*Indictment.*⁴] That A., by the name and description of —,

¹ *R. v. Fauntleroy*, 1 Moo. C. C. 52; 2 Bing. 413. *R. v. Waite*, Russ. & Ry. 505; 1 Bing. 121.

² *R. v. Gade*, Leach, 732.

³ By 24 & 25 Vict. c. 98, s. 42, in any indictment for forging, altering, uttering, disposing, or putting off any instrument it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or *fac-simile* thereof, or otherwise describing the same or the value thereof.

⁴ By sect. 44, it shall be sufficient,

in any indictment for forging, altering, uttering, offering, disposing of, or putting off any instrument whatsoever, where it shall be necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging to defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud.

on, &c., was possessed of and entitled to a certain interest and share, to wit, £—, interest and share of and in —, and that B. well knowing the premises, but unlawfully devising and intending to defraud, heretofore and whilst the said A. was so possessed and entitled as aforesaid unto the said interest and share of and in, &c., to wit, on, &c., feloniously did make a certain transfer of the said — from the said A. to one C., with intent to defraud, against the form, &c. 2nd count, uttering; 3rd count, making a false entry in the books of account; 4th count, forging a transfer.

The prisoner bought twenty shares of a broker. They stood in the name of B., and were of the C. company. The prisoner owed the broker money, and therefore the latter would not let the prisoner have the deed of transfer. The prisoner then got a boy to forge a transfer in B.'s name, and it was held, that the intent might be laid to defraud the C. company and B.¹

It is not necessary that the money due upon a dividend warrant should be actually received in order to bring the case within the 6th section. For where, under the old statute 31 Geo. 2, c. 22, s. 77, the prisoner succeeded in his personation of one *Hart*, and had thereby obtained the dividend warrant in the usual way, but was apprehended before he applied for the money, the judges held, that the offence was complete by obtaining and indorsing the warrant, and the prisoner was executed.²

CHAPTER V.

OF FORGERY OF EAST INDIA BONDS.

By 24 & 25 Vict. c. 98, s. 7, whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any East India bond, or any East India bond debenture, or security, or any indorsement on or assignment of any such bond, &c., with intent to defraud, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.³

¹ *R. v. Hoatson*, 2 Car. & K. 777. But the general intent is now sufficient.

² *R. v. Parr*, Leach, 434.

³ And the same punishments are awarded against the forgery of East Indian debentures issued under 24 & 25 Vict. c. 25, of that Act, sect. 13.

Indictment.] That A. on, &c., feloniously did forge a certain East India bond, [debenture,] [security,] with intent to defraud, against the form, &c.

Second count, uttering.

CHAPTER VI.

OF FORGERY OF EXCHEQUER BILLS, BONDS, &c.

By 24 & 25 Vict. c. 98, s. 8, whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any exchequer bill, bond, or debenture, or any indorsement on or assignment of any exchequer bill, &c., or any receipt or certificate for interest accruing thereon, with intent to defraud, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment for not exceeding two years, with or without hard labour, and solitary confinement.¹

By sect. 9, whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make or cause, &c. or aid or assist in making, or shall knowingly have in his custody or possession, any frame, mould, or instrument having therein any words, letters, figures, marks, lines, or devices peculiar to and appearing in the substance of any paper provided or used for exchequer bills, bonds or debentures, or any machinery for working any threads into the substance of any paper, or any such thread, and intended to imitate such words, &c., or any plate peculiarly employed for printing such exchequer bills, &c., or any die or seal peculiarly used for preparing any such plate, or for sealing such exchequer bills, &c., or any plate, die, or seal intended to imitate any such plate, die, or seal, shall be guilty of felony, and liable to penal servitude not exceeding seven nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 10, the like punishments are awarded against such as make paper in imitation of that used for exchequer bills, &c.

And by sect. 11, having in possession any paper to be used for exchequer bills, &c. before it is stamped, signed, and issued for public use, is a misdemeanor, and punishable with im-

¹ The stat. 17 & 18 Vict. c. 23, ss. 17, 18, 19, is virtually dispensed with, although not repealed.

prisonment not exceeding three years, with or without hard labour.¹

By 24 & 25 Vict. c. 5, s. 13, if any person shall forge, &c. any exchequer bill or coupon for interest, or any indorsement, or tender the same in payment, or demand to have such bill, or exchequer bill with a counterfeit indorsement, exchanged for money or another bill, with a guilty knowledge, with intent to defraud the Queen, or the persons appointed to pay the same, &c., he shall be adjudged a felon, and suffer accordingly.²

Indictment—Exchequer bills.] That A. on, &c., feloniously did forge a certain paper writing commonly called an exchequer bill, [bond,] with intent to defraud. Second count, uttering.

With reference to the description of instruments in indictments for engraving, the 43rd section of 24 & 25 Vict. c. 98, enacts, in any indictment for engraving or making the whole or any part of any instrument, matter, or thing whatsoever, or for using or having the unlawful custody or possession of any plate or other material upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been engraved or made, or for having the unlawful custody or possession of any paper upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been made or printed, it shall be sufficient to describe such instrument, matter, or thing by any name or designation by which the same may be usually known, without setting out any copy or *fac-simile* of the whole or any part of such instrument, matter, or thing.

And as to criminal possession, the interpretation of that offence is as follows:—Under 24 & 25 Vict. c. 98, s. 45, where the having any matter in the custody or possession of any person is in this Act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in the actual custody or possession of any other person, or shall knowingly and wilfully have any such matter in any dwelling house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or for the use or benefit of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this Act.

¹ See 24 & 25 Vict. c. 5, s. 19, a similar clause, but the words "not less than six months" are omitted here, and hard labour is substituted.

² "Felon and suffer accordingly." The statute 24 & 25 Vict. c. 98, punishes the forgery of an exchequer bill, or the fraudulent indorsement on or assignment of it, or

any receipt or certificate for interest thereon, with penal servitude for life, &c. Therefore, the only way to interpret this clause must be to refer to the 7 & 8 Geo. 4, c. 28, s. 8, and 20 & 21 Vict. c. 3, s. 2, for the punishment of such felonies under 24 & 25 Vict. c. 5, s. 13, as are not mentioned in 24 & 25 Vict. c. 98, s. 8.

CHAPTER VII.

OF FORGERY OF BANK OR OTHER NOTES, AND OTHER INCIDENTS RELATING TO THEM.

The forgery of bank notes, with the kindred offences belonging to those instruments, is the next subject for our notice.

By 24 & 25 Vict. c. 98, s. 12, Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any note or bill of exchange of the governor and company of the Bank of England or of the governor and company of the Bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any indorsement on or assignment of any bank note, &c. with intent to defraud, shall be guilty of felony, and liable to penal servitude for life or not less than three years, or to be imprisoned not exceeding two years, with or without hard labour and solitary confinement.

By sect. 13, Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall purchase or receive, or have in his possession, any forged bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same to be forged, shall be guilty of felony, and liable to penal servitude not exceeding fourteen years nor less than three years, or to imprisonment not exceeding two years, with or without hard labour.

By sect. 14, as to making and engraving plates, &c. for bank notes, &c.,—Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make or have any frame, &c., for making paper with the words "Bank of England," &c. upon it, or shall sell such paper, shall be liable to the like punishments.

By sect. 15, Nothing in the last preceding section contained shall prevent any person from issuing any bill of exchange or promissory note having the amount thereof expressed in guineas, or in a numerical figure or figures denoting the amount thereof in pounds sterling, appearing visible in the substance of the paper upon which the same shall be written or printed, nor shall prevent any person from making, using, or selling any paper having waving or curved lines or any other devices in the nature of watermarks visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not so contrived as to form the groundwork or texture of the paper, or to resemble the waving or curved laying

wire lines or bar lines or the watermarks of the paper used by the governor and company of the banks of England and Ireland respectively.

By sect. 16, the like punishments, again, are awarded against such as engrave or have any plate, &c., for making notes of Bank of England or Ireland, or other banks, or who have such plate, &c., or utter or have paper upon which a blank bank note, &c. shall be printed.

Or by sect. 17, who shall engrave on a plate, &c. any word, number, or device resembling part of a bank note or bill, or use or have any such plate, &c., or utter or have any paper on which any such word, &c. is impressed.

So, by sect. 18, for making or having mould for making paper with the name of any banker, or making or having such paper, the same punishments are ordained.

And by sect. 19 the same punishments are enacted for engraving plates for foreign bills or notes, or using or having such plates, or uttering paper on which any part of any such bill or note is printed.

Search for paper, &c. in forgery, and for forged instruments.]
By sect. 46, if it shall be made to appear, by information on oath or affirmation before a justice, that there is reasonable cause to believe that any person has in his custody or possession, without lawful authority or excuse, any note or bill of the governor and company of the bank of England or Ireland, or of any body corporate, company, or person carrying on the business of bankers, or any frame, mould, or implement for making paper in imitation of the paper used for such notes or bills, or any such paper, or any plate, wood, stone, or other material having thereon any words, forms, devices, or characters capable of producing or intended to produce the impression of any such note or bill, or any part thereof, or any tool, implement, or material used or employed or intended to be used or employed in or about any of the operations aforesaid, or any forged security, document, or instrument whatsoever, or any machinery, frame, mould, plate, die, seal, paper, or other matter or thing used or employed or intended to be used or employed in the forgery of any security, document or instrument whatsoever, such justice may, if he think fit, grant a warrant to search for the same; and if the same shall be found upon such search, it shall be lawful to seize and carry the same before some justice of the county or place, to be by him disposed of according to law; and all such matters and things so seized as aforesaid shall by order of the court where any such offender shall be tried, or in case there shall be no such trial, then by order of some justice, be defaced and destroyed or otherwise disposed of as such court or justice shall direct.

The questions which have arisen concerning the forgery of bank notes, apply chiefly to alterations of the instrument and to uttering. In a recent case, it was held that the uttering of a forged note in England, payable in Ireland only, was within the statutes in existence concerning forgery before the

passing of 1 Will. 4, c. 66.¹ The omission of the word "alter" in an indictment, will not occasion an acquittal if the word "forge" be used, because an alteration is a forgery.² Where a person expunged a receipt upon the face of a blank bill, it was urged that he could not be convicted of rasing an indorsement, but the judges held that the writing in question was of the same effect with an indorsement, that it had been always accepted and taken as such, and consequently, that the conviction was right.³ The alteration must be in a material part of the instrument, and the place of payment of the note has been considered such a material part. As where the prisoner covered the names of W. & Co., the London correspondents who had stopped payment, with those of B. & Co., solvent persons, and then exchanged a country bank note. The judges, with the exception of Lawrence, J., who considered the drawer liable notwithstanding the alteration, held the conviction right. Some said that in declaring upon the note, the place where it is payable must appear,⁴ and another⁵ observed, that it did not depend upon that circumstance, but that it was material to the credit of the note to be made payable at a solvent house.⁶ So where the prisoner altered a figure in a bank note from 2 to 5, it was held to be a forgery.⁷ Again, the prisoner altered a note for the payment of 1*l*. by substituting the word "ten," so that the note appeared to be for the payment of 10*l*.; but this was held not to be such an omission as would shelter the prisoner from the consequences of his fraudulent purpose, and his conviction was held right.⁸

There is no difference between uttering, and disposing and putting away. Where the prisoner P. gave some notes to his confederate H. for the purpose of being put off, and the confederate did so in the absence of the other prisoner P., the majority of the judges held that a conviction for disposing and putting away was correct, though H. was acquitted. P. was also convicted upon the count for uttering and publishing.⁹ It is, indeed, immaterial whether the party receiving the forged bank note be cognizant of its fabrication or not, and thus there is no distinction between an accomplice and an innocent agent on a count for disposing and putting away. So that a conviction of this nature was held right where the jury found that the person who uttered the note was not aware

¹ *R. v. Kirkwood*, 1 Moo. C. C. 311.

² *R. v. Elsworth*, East, P. C. 986.

³ *R. v. Bigg*, East, P. C. 882.

⁴ Macdonald, C. B.; Thomson, B.

⁵ Mansfield, C. J.

⁶ *R. v. Treble*, Russ. & Ry. 164; Leach, 1040; 1 Taunt. 328.

And to show that the alteration was not made by the country bank, the drawer was allowed to be called

as a witness to prove that he had never received a parcel containing this amongst other notes. And upon this point also the conviction was affirmed by a majority of the judges.

⁷ *R. v. Dawson*, East, P. C. 978.

⁸ *R. v. Post*, Russ. & Ry. 101.

⁹ *R. v. Palmer and another*, Leach, 978; 1 New Rep. 96. *R. v. Soares and another*, Russ. & Ry. 25.

of its being forged, but where the judges, on the contrary, when they considered the case, came to the conclusion, upon referring to the evidence, that he had that knowledge;¹ nor is it any objection that the party to whom the notes have been offered is an agent of the bank employed for the purpose of detecting utterers.² But it is not an offence of uttering, nor of disposing, nor putting away to exhibit a forged note to a person for the purpose of gaining a false reputation for substance, nor to leave it sealed up with that person, if, in fact, the forged instrument be not parted with, nor tendered, nor offered, nor used in any way to get money or credit upon it.³ But, on the contrary, if the object be to obtain money, either *on* the instrument, or, which is far more common, *by means of it*, the offence of uttering is completed. As where in order to induce the prosecutor to advance money to A., the prisoner placed a forged receipt for poor rates in the hands of the prosecutor, merely for the purpose of inspection as far as the property of the receipt was concerned, but, in reality, to gain an advance of money. Here, the jury having found an intent to defraud the prosecutor, the judges after two arguments held that the conviction was right for uttering the forged receipt.⁴ In *Shukard's case* the instrument was in this form:⁵ "I promise to pay, &c., five hundred pens, for the governor and company," &c. The judges, however, entertained no doubt upon this point, the rule being, that however ill an instrument may be executed, if it be calculated to deceive the person to whom it is tendered, the offence is complete, and thus a note which promised to pay to J. C., or bearer, the sum of fifty —, was considered sufficiently fabricated for the purposes of fraud, and especially as in the margin the word fifty appeared, although an experienced person might have detected the cheat.⁶ It was also objected in the last case that there was no watermark on the note, but it was answered, that upon the count charging the instrument to be a note for the payment of money, such an objection could not be available, and the case of *one Vaughan* was cited.⁷ So where a person from the bank declared that *he* could not have been imposed upon by the counterfeit notes, the court were of the same opinion, since others had been deluded by them.⁸ And so it was again where the evidence went to show that the note was likely to have imposed upon all persons who were not inspectors.⁹ And although the number be only put at the end of the note, it would nevertheless be a good bank note.¹⁰ But if a man with the most ordinary caution could not be deceived, the case would not be within the statute, although

¹ *R. v. Giles*, 1 Moo. C. C. 166.

² *R. v. Holden and others*, Russ. & Ry. 154; 2 Taunt. 334; Leach, 1019.

³ *R. v. Shukard*, Russ. & Ry. 200.

⁴ *R. v. Ion*, Den. & P. 475; 21 L. J. M. C. 166.

⁵ Russ. & Ry. 200.

⁶ *R. v. Elliott*, Leach, 175.

⁷ *Id.* 178.

⁸ *R. v. Hoost*, East, P. C. 950.

⁹ *R. v. Mazagora*, Russ. & Ry. 291.

¹⁰ By Buller, J., Leach, 748.

the offence would be a fraud at common law. As, "No. 946, I promise to pay to John Wilson, Esq., or bearer, ten pounds. London, March 4th, 1776, for self and company of my Bank of England 10*l.* entered. J. Jones." The prisoner had been tried for a fraud in uttering this instrument, and Blackstone, J., had directed an acquittal, believing that it was a forgery. But the judges upon an indictment for forgery, said that this note was anything but a bank note, and that the representation of the utterer avowing its validity could not vary the case,¹ and a note without a signature was held not to be the subject of forgery.² Upon an indictment for forging a guinea note of the Royal Bank of Scotland, it occurred to Hullock, B., that an express authority to draw and issue these notes should have been shown; but upon referring to the statutes 48 Geo. 3, c. 149, s. 16, and 55 Geo. 3, c. 184, s. 23, after the trial, the learned judge came to the conclusion that if these statutes did not confer a legal power to issue promissory notes, they recognized it in the amplest manner, and the judges were of the same opinion.³ In cases concerning illegal possession, the statute assumes the original possession to have been illegal, so that a person who retains a forged note in order to maintain an action against the party from whom he has received it, must not be charged with feloniously having the forged instrument in his possession.⁴

It seems that if a banking company be also a corporation for some other purpose, it will not be competent for them to issue bills in their corporate capacity without an especial authority from the legislature. Consequently, the uttering of their notes, if issued in the corporate names, would not be within the statute, and if it were so, the indictment must carefully express that the company in question were carrying on the business of bankers. So that a conviction was held wrong, because the uttering of a Scotch note in England was held not to be within an Act which excepted Scotland from its provisions.⁵ And so it is if the charge be for having a plate in possession for making bills of exchange in the name of a corporation; upon such an occasion, whilst the judges were disposed to entertain the objection above alluded to, they arrested the judgment for want of an averment that the company carried on the business of bankers.⁶ And where a promissory note ran thus, "I promise to pay the bearer one guinea on demand here in cash or Bank of England notes, &c.," the judges were understood to have held the conviction wrong.⁷ However, although the same exception alluded to above occurs in 1 Will. 4, c. 66, s.

¹ *R. v. Jones*, Leach, 204; 1 Doug. 300, 302, *n.*; East, P. C. 883. And see 4 Taunt. 303, recognized there by Mansfield, C. J., who said that *Jones's case* was that of telling a falsehood.

² *R. v. Pateman*, Russ. & Ry. 495.

³ *R. v. M'Keay*, 1 Moo. C. C. 130.

⁴ *Brooks v. Warwick*, 2 Stark. 389.

⁵ *R. v. M'Kay*, Russ. & Ry. 71.

⁶ *R. v. Catapodi*, Russ. & Ry.

⁷ *R. v. Wilcock*, 2 Russ. C. M. 498.

30, the forging, uttering, or altering in England of any writing or matter whatsoever purporting to be made, or actually made out of England, is declared to be punishable in like manner as if the instrument were made in England, or purported so to be. And by the same clause the same rule is extended to the forgery, &c., in England, of bills, notes, deeds, bonds, &c., payable or purporting so to be out of England. This Act extends to foreign notes.¹ Under sect. 18, the learned judge (Coleridge) doubted whether a plate merely bearing on it the royal arms of Scotland and the Britannia, although placed as they would have been found in a complete note of the British Linen Banking Company, satisfied the words of the statute; but the court were of opinion² that the conviction was right.³

Indictment.] The indictment for forging a bank note states that A. on, &c., feloniously did forge a certain note of the Bank of England with intent to defraud. There will be a second count for uttering. The same form will serve for a "bank post bill," *i. e.* "a certain bank post bill." Upon one occasion, it was held that it was not competent to describe a bank post bill as a bill of exchange, but the judges said that it might be called a bank bill of exchange. And in the same case they were of opinion, that discharging an indorsement and inserting another, or making it thereby a general instead of a special indorsement, was an alteration of an indorsement.⁴ An objection was once made that the indictment omitted to express in what manner, or to whom the notes in question were disposed of, but the judges observed that the general allegation was sufficient.⁵

It has been made a question, whether an indictment for forgery upon a joint stock bank must lay the intent to have been to defraud one of the registered officers, whose name is returned under 7 Geo. 4, c. 46, or whether it is sufficient to state the intent generally.⁶ But more recently it has been determined that the prosecution need not be in the name of the public officer, yet, nevertheless, that if the public officer be named as the party defrauded, there must be an averment of his appointment under the statute above mentioned.⁷ Again, it seems that an indictment against a shareholder for a forgery upon a joint stock bank, must not lay the intent to be to defraud another shareholder and others.⁸ But now the statement of general intent is sufficient.

¹ *R. v. Lee*, 2 Moo. & Rob. 281.

² Coleridge and Crompton, JJ., at first hesitating.

³ *R. v. Keith*, 24 L. J. M. C. 110; Dears. 486.

⁴ *R. v. Birkett and another*, Russ. & Ry. 251.

⁵ *R. v. Holden and others*, Russ. & Ry. 154.

⁶ *R. v. Burgiss*, 7 C. & P. 490.

Whether the returns must be proved by the production of examined copies to show that such persons are the officers of the joint stock bank, qu. ? And see *R. v. Carter*, Den. 65.

⁷ *R. v. Beard*, 8 C. & P. 143.

⁸ *R. v. Cooke*, 8 C. & P. 586.

Evidence.] Difficulties have occurred upon some occasions of uttering, disposing, and having in possession, as to the evidence. They have been principally upon the question of guilty knowledge. Thus, in the case of uttering, a prior tender of a forged note may be shown, provided the note be produced, or the forgery of it proved.¹

It was observed in this case by the judges, that the weight of the evidence would depend on the number of the other notes, the distance of time at which they were put off, and the situation of life of the prisoner, so as to make it more or less probable that so many notes should pass through his hands in the course of business.² The conduct of the prisoner may also be laid before the jury,³ and it seems that what he said upon a former uttering⁴ is likewise admissible. But there are adverse decisions to the latter holding.⁵ Such evidence was deemed allowable, although the witnesses' names were not on the back of the indictment, yet Littledale, J., observed, that it was not usual to press such evidence.⁶ And again, it was held upon an indictment for uttering Edinburgh notes, that evidence of uttering Paisley notes was clearly admissible if the latter formed the subject of another indictment.⁷ However, evidence of former utterings are admissible generally, whether the subjects of those utterings form charges in other indictments or not.⁸ The judges certainly doubted upon the point at one time.⁹ Upon another occasion two forged notes found upon the prisoner were given in evidence in furtherance of a prosecution for uttering with a guilty knowledge.¹⁰

Still, if the *second* uttering be made the subject of a fresh indictment, it cannot be brought forward to support a charge for a prior uttering.¹¹

However, it seems that there is more difficulty in admitting proof of uttering subsequent to the charge laid in the indictment, and the rule has been recognized that previous acts only can be in general offered for that purpose, although it has been said, that a subsequent uttering of notes of the same manufacture with those connected with the principal case, and upon an occasion not foreign from that transaction, might be admissible.¹² With reference to the

¹ *R. v. Ball*, Russ. & Ry. 132. *Diss. Chambre, J.*, 1 Campb. 324. See also *R. v. Green*, 3 Car. & K. 209. *R. v. Nisbett*, 6 Cox, 320, *post*.

² Russ. & Ry. 133.

³ *R. v. Whiley, and another*, Leach, 983; 1 New Rep. 92, nom. *Wylie and another. R. v. Tattershall* was cited, Leach, 984.

⁴ *R. v. Nisbett*, 6 Cox, 320.

⁵ *R. v. Phillips*, 1 Lew. C. C. 105; *R. v. Cooke*, 8 C. & P. 586.

⁶ *R. v. Martin and another*, 1 Lew. C. C. 104.

⁷ *R. v. Hodgson*, Id. 103. See however, *R. v. Sunderland*, *post*.

⁸ *R. v. Phillips*, ante. *R. v. Kirkwood*, 1 Lew. C. C. 103, *cor. Littledale, J.*

⁹ Id. per Hullock, B.

¹⁰ *R. v. Sunderland*, 2 Lew. C. C. 109.

¹¹ *R. v. Smith*, 2 C. & P. 633.

¹² *R. v. Taverner*, Car. Cr. L. 195; *cor. Lord Ellenborough*; Thomson, C. B.; Lawrence, J.

time of uttering, it has been held sufficient upon an indictment for uttering in June to prove another such uttering in November,¹ although some judges doubted upon one occasion whether *six* weeks were not too long an interval.² And Gaselee, J., was once disposed to admit evidence of an uttering, one month after the charge in the indictment.³ That learned judge consulted with Alexander, C. B., and referred to Russell on Crimes, but said he would reserve the point. The evidence, however, was not pressed.⁴ Upon an indictment for having forged notes in possession, where the evidence was that the prisoner directed the vendee of the notes to a hole in a bank where they in fact were, it was objected that this possession was insufficient, because the notes were not in the actual possession of the prisoner, nor in his custody, nor in his dwelling house, but a witness having stated at the trial that the prisoner had admitted having "put the notes in an old shoe," the judges held the conviction right. And some thought that if the notes had been in any place under the prisoner's control, or put there by his direction, it would have been enough, and it was the prevailing opinion amongst them that every uttering would include a custody and possession within the statute.⁵ But a letter found in the prisoner's lodgings, but not upon him, he being in custody when it came, cannot be read to show a guilty knowledge.⁶

It is yet to be noticed with regard to a previous or subsequent uttering, that the falsity of the instrument itself must be shown. And therefore, where the forged note was not produced, nor its non-appearance accounted for, proof that the prisoner returned the money after an uttering of a 5*l.* note, and received back the note, was held insufficient, and he was recommended to mercy.⁷ It may be added, that a person who utters notes through the medium of an innocent agent, is as much the principal as though he did the act with his own hand. And thus, where the prisoner gave some forged notes to a boy for the purchase of goods which were brought back to him by the boy, it was held, that he was rightly charged with the offence of forgery.⁸ With reference to the proof of forgery of the note itself, the cashier might have been called, because he was not personally responsible.⁹ But it was not indispensable that he should be examined, and upon more than one occasion it has been held that a person acquainted with the handwriting of that officer might disprove the false signature.¹⁰ So, in the case of the signing clerk, where it could be established *aliunde* that the handwriting produced is not the signature of that officer.¹¹

¹ *R. v. Stewart*, 2 C. & P. 114.

⁷ *R. v. Millard*, Russ. & Ry.

² *R. v. Millard*, Russ. & Ry. 245.

⁸ *R. v. Giles*, Car. C. L. 191.

³ *R. v. Smith*, 4 C. & P. 411.

⁹ *R. v. Newland*, Leach, 311.

⁴ 4 C. & P. 413.

¹⁰ *R. v. Hughes*, East, P. C.

⁵ *R. v. Rowley*, Russ. & Ry. 1002. *R. v. M'Guire*, Id.

110.

¹¹ *Bank Prosecutions*, Russ. &

⁶ *R. v. Huet*. See Leach, 820. Ry. 378.

Now, however, the statute 6 & 7 Vict. c. 85, s. 1, has abolished the incompetency of a witness by reason of interest.

By 16 Vict. c. 2, the signatures of the cashiers impressed upon notes, bank post bills, and bank bills of exchange by machinery, are declared to be as valid as though they should be written.

It had been usual for the bank in cases of forgery which they considered not aggravated, to prefer an indictment for the lesser offence of having the forged note in possession, and thus to subject the prisoner to transportation only. Upon such an occasion it was left to the judges to say—1. Whether this could be done where the proof of having in possession could not be shown without also proving the putting off, which was a capital offence, the transaction being the same. 2. Whether the counsel for the bank might elect under such circumstances. 3. Whether the judges would try the charge for the minor offence before disposing of the capital indictment. 4. Whether, if during the proof of the minor charge, it should turn out that a capital forgery had been committed, the judge must direct an acquittal, and order the prisoner to be tried capitally upon an indictment already found, or upon a new indictment. 5. Whether, if the prisoner were acquitted, by consent, of the higher felony, he must be acquitted of the minor charge upon evidence of his having been guilty of the capital crime. Upon these respective questions the judges held that an acquittal need not be directed, the minor offence not merging in the greater, and that the bank might proceed upon the minor charge, although indictments were found for the capital offence.¹ Under 7 Geo. 4, c. 46, s. 4, a certified copy of the return forwarded to the stamp office is not exclusive evidence. An examined copy is as good, or better.²

The plates of bankers in Upper Canada have been held to be within the protection of the repealed Act, 1 Will. 4, c. 66.³

Indictment. Foreign bills or notes.] The indictment for forging or uttering foreign bills or notes should have a translation of the original. The prisoner was charged with forging a Prussian treasury note, but it was neither translated nor explained by averment on the record, and judgment was arrested upon a case reserved.⁴ So upon the 19th section of 1 Will. 4, c. 66, where the charge was for having in custody illegally certain plates upon which Polish promissory notes were engraved, it was objected that an inaccurate translation had been appended, and that, instead of engrossing *fac-similes* of the notes upon the parchment, the *fac-simile* had been sewed with thread to it, and the judges were of opinion that all the counts in which the *fac-similes* of the notes were not engrossed upon the parchment were bad. And,

¹ *Bank Prosecutions*, Russ. & Ry. 378.

² *R. v. Carter*, Den. C. C. 65. See *Edwards v. Buchanan*, 3 B. & Adol. 788.

³ *R. v. Hannon*, 2 Moo. C. C. 77. Parke, B., and Alderson, B., *dub.*

⁴ *R. v. Goldstein*, Russ. & Ry. 473.

moreover, it was considered that although the statement in the indictment that the notes were for the payment of five florins, without showing what money florins were, nor of what value, was defective, the fault was nevertheless cured after verdict, by 7 Geo. 4, c. 64, s. 11, the offence having been described in the words of the statute.¹

CHAPTER VIII.

OF FORGERY OF DEEDS, BONDS, &c.

By 24 & 25 Vict. c. 98, s. 20, Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, or any bond or writing obligatory, or any assignment at law or in equity of any such bond or writing obligatory, or shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of a witness attesting the execution of any deed, bond, or writing obligatory, or shall offer, &c., any deed, bond, or writing obligatory having thereon any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony, and liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

Deeds, bonds, &c.] There have been some decisions as to the meaning of the word "deed," under the old statutes. For instance, in *Fauntleroy's case*, a power of attorney was held to be a deed.² So, a power of attorney to receive a seaman's wages was held to be a deed, and it made no difference whether the party whose name was fraudulently used had existence or not.³ In like manner, a power of attorney to receive prize money was considered to be a deed.⁴ And, in the same case, it was the opinion of a majority of the judges, that a want of compliance with certain directing forms prescribed by statutes, did not invalidate the instrument, nor make it the less the subject of forgery.⁵ Again, an indenture of apprenticeship has been held to be a deed, and the prisoners were held properly convicted of forging such a docu-

¹ *R. v. Warshaner*, 1 Moo. C. C. 466; 7 C. & P. 416, 423, 428, 429. *R. v. Harris*, 1 Moo. C. C. 470; 7 C. & P. 416. *R. v. Moses*, *Id.* 423. *R. v. Harris*, 428, 429. *Id.* Depending on the decision in *R. v. Warshaner*.

² 1 Moo. C. C. 52.

³ *R. v. Lewis*, East, P. C. 957; Fost. 116; Leach, 451, 607.

⁴ *R. v. Lyon*, Russ. & Ry. 255.

⁵ *Id.*

ment with intent to defraud the stewards of the feast of the Sons of the Clergy.¹ Other cases, especially, of uttering powers of attorney, and where these writings were regarded as deeds, may also be found cited in *Fauntleroy's case*.²

A deed was within the statute 2 & 3 Will. 4, c. 123, s. 3.³ It was held, that such a deed needed not to be set out *verbatim*.⁴

The prisoner was charged with forging and uttering a deed of transfer of ten shares in the London and Croydon Railway Company, with intent, 1st, to defraud A.; 2nd, B.; and 3rd, the company. In July, 1845, one C. transferred, by two deeds of transfer, 100 shares to A. These deeds purported to be executed by A. as transferee, but the deeds were so far false as that the signatures were not those of A. but of the prisoner, and without A.'s cognizance. On the 2nd of August, 1845, by seven deeds of transfer purporting to be executed by A. as transferrer, these shares were transferred to five different persons, and by one deed ten shares purported to have been transferred to B. The name of A. was signed to all these deeds by the prisoner without A.'s cognizance. There was a profit on these shares due to A., but he refused to receive it, and no further call could be made on the shares. The prisoner was held, upon these facts, entitled to an acquittal, because there was no fraud upon the company, nor upon A., nor upon B.⁵

But a prisoner may be convicted of a forgery with intent to defraud, although no person could have been defrauded.⁶ Taking seals and affixing them to a genuine signature, with intent to defraud, is forgery, where the instrument requires a seal.⁷

Indictment.] The indictment states, that A. on, &c., a certain deed [or bond] feloniously did forge with intent to defraud.

There will be a second count for uttering.

Where a bond had this addition in the indictment—"by which A. was bound," judgment was arrested, for A. could not be bound by a forged bond.⁸ The prisoner was indicted for forging an administration bond, on administration granted of the effects of E. S. It was objected that no forgery had been proved, because the statute 22 & 23 Car. 2, c. 10, s. 1, requires the bond to be given by the party to whom administration is granted, and not by the party entitled to administration. The bond, therefore, having been given by the party to whom, in fact, administration was granted, was a good bond. The objection was overruled.⁹

¹ *R. v. Jones*, Leach, 366; East, P. C. 991.

² 1 Moo. C. C. 67, 68.

³ Now 24 & 25 Vict. c. 98, s. 42.

⁴ *R. v. Davies*, 2 Moo. C. C. 177; 9 C. & P. 47. See *R. v. Collins*, 2 Moo. & Rob. 461. A forged deed will be impounded by the court if it transpires in a civil suit.

⁵ *R. v. Marcus*, 2 Car. & K. 356.

⁶ Den. & P. 501, Maule, J.

⁷ *R. v. Collins*, 1 Cox, 57.

⁸ *R. v. —*, 3 Mod. 104.

⁹ *R. v. Barber*, 2 Car. & K. 434; 1 Cox, 62. In this case it was also held that although two signatures to a joint and several bond were genuine, yet, as the third was forged, the prisoner was guilty of forgery.

Fraudulent concealment and falsifying of deeds.] By 22 & 23 Vict. c. 35, s. 24, extended to mortgagees by 23 & 24 Vict. c. 38, s. 8, any seller or mortgagor of land, or of any chattels, real or personal, or choses in action, conveyed or assigned to a purchaser, or the solicitor or agent of such seller, &c., who shall conceal any settlement, deed, will, &c., material to any title or incumbrance from the purchaser, or falsify any pedigree upon which the title depends, to induce him to accept the title, with intent to defraud, shall be guilty of a misdemeanor, and punishable by fine or imprisonment not exceeding two years, with or without hard labour, or both, and shall also be liable in an action for damages for any loss thereby occasioned. And, in estimating the damages, regard shall be had to any expenditure by the purchaser, &c., upon the land. But no prosecution shall be instituted without the sanction of the attorney-general, nor without notice to the person whom it is intended to prosecute.

CHAPTER IX.

OF FORGERY OF WILLS.

Wills.] By 24 & 25 Vict. c. 98, s. 21, Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any will, testament, codicil, or testamentary instrument, shall be guilty of felony, and liable to penal servitude for life, or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

It is no extenuation of the offence that the party whose will has been forged was alive at the time of the forgery,¹ nor that the forgery was of the last will and testament of the living person. As where a laundress proved that the instrument purporting to be her last will was false. The objection was raised, that as without a death a will could have no effect, the crime could not have occurred. But the judges held, that although it should appear impossible for such an instrument as the instrument forged to exist, a forgery might yet be committed by a false writing purporting to be such an instrument, provided it should, upon the face of it, seem to be good and valid.² So, where the will of a non-existing person was fraudulently produced, the same conclu-

¹ *R. v. Murphy*, 10 St. Tr. 183. was argued, but in vain, that the will was ambulatory, and could

² *R. v. Sterling*, Leach, 99. have no validity till death.
R. v. Coogan, East, P. C. 948. It

sion was arrived at;¹ nor did it make any difference that the prisoner had varied the christian name of the supposed testator, as where the will began—"I, Peter Perry," &c., and ended "John +^{his} Perry."² But in the absence of satisfactory evidence, the judges will presume that the will is a will of land, and, under the old statutes concerning wills, this was an important consideration, because, where a false will was produced, signed by two witnesses only, and the prosecutor could not show that the supposed testator had any chattel interest, the conviction was held wrong for want of a proper attestation.³

Indictment.] The indictment charges that A. on, &c., feloniously did forge a certain will and testament, with intent thereby then to defraud.

The second count states that A. on, &c., feloniously did offer and utter a certain forged will, &c., with intent thereby then to defraud the said A., when he so offered and uttered the said last-mentioned will, &c., then knowing the same to be forged.

It has been held sufficient to describe the instrument as either "a certain false, forged, and counterfeited will," or as "a certain paper writing, with a seal thereto affixed, purporting to be the last will and testament," &c., or as "a certain will and testament."⁴ And it will be observed, that an apparent blunder in the will, as that of signing John Perry to a writing which began with Peter Perry, is quite different from an inaccurate mention of the forged instrument itself. Therefore, where the false writing began thus—"James Gibson," and the indictment recited it thus—"I, James Gibson," the variance was held to be fatal.⁵

Evidence.] After having established the falsity of the document, some slight proof of the identity of the party whose will has been forged is necessary. In the case of a seaman's will, the muster book of the Navy Office has been held admissible for the purpose of proving that the supposed testator belonged to a particular ship,⁶ and the assignation book will be received in order to prove the revocation of a probate.⁷ But this latter evidence is not now necessary, although once so considered.⁸ So that where the probate of a will unrepealed was put in by the prisoner, and relied on as a bar, Lord Ellenborough overruled the defence, and the prisoner was convicted. And the authority of *R. v. Vincent*, which had been previously impeached by all the judges, was rejected.⁹ Nine

¹ *R. v. Avery*, 8 C. & P. 596.

² *R. v. Fitzgerald*, Leach, 20.

³ *R. v. Wall*, East, P. C. 953. The stat. 1 Vict. c. 26, s. 9, requires two witnesses only in all cases. As to seamen's wills, see 2 Will. 4, c. 46, s. 33, *post*.

⁴ *R. v. Birch*, Leach, 79. See Stark, Cr. P. 503; East, P. C. 980.

⁵ *R. v. Coogan*, Leach, 448.

⁶ *R. v. Fitzgerald and another*, Leach, 20. *R. v. Rhodes*, Id. 24.

R. v. Jannet, 2 Russ. C. M. 443.

⁷ *R. v. Ramsbottom*, Leach, 25, n.

⁸ *R. v. Vincent*, Str. 481.

⁹ *R. v. Gibson*, Russ. & Ry. 343, n. *R. v. Goodrich*, 3 T. R. 126, cited.

judges held this ruling of Lord Ellenborough to be correct in a subsequent case, and they concurred in denying the authority of *R. v. Vincent*, which the counsel for the defence had urged upon the court.¹

Where a person was charged with uttering a forged will, which it was suggested had been written over effaced pencil marks, an engraver who had examined the paper with a mirror and traced the pencil marks, was admitted as a witness for the prosecution, for the purpose of giving his opinion.² A. was a mortgagor, B. mortgagee, and C. an attorney; A. stated to C. that he was the owner of certain lands, and produced a forged will as his proof, which he gave to C. The money was advanced, and C. acted as solicitor. Upon an indictment against A. for uttering the forged will, it was held that C. must produce it, and also give evidence as to what A. said as to the advance of the money.³ There was a joint charge against three for procuring certain other persons to utter a forged will. The only evidence for the prosecution was of separate acts done at separate times and places by each of the parties charged as accessories. After that evidence was given, one pleaded guilty. It was held that the other two might be convicted.⁴ Where the charge was for uttering a forged will, with intent to defraud a person unknown, in the absence of evidence to show that any person could have been defrauded, the judges were evenly divided upon the question.⁵

¹ *R. v. Buttery and another*, Russ. & Ry. 342.

² *R. v. Williams*, 8 C. & P. 434.

³ *R. v. Avery*, 8 C. & P. 596. See *R. v. Tylney and another*, Den. C. C. 319.

⁴ *R. v. Barber*, 1 Car. & K. 442.

⁵ *R. v. Tylney*, ut supra. Whether a forged document intrusted to

an attorney as an attorney can be produced as evidence on a trial for forgery, qu.?

To forge the seal or signature of the Probate Court is felony, and punishable with penal servitude for life or not less than seven years, or with imprisonment, with or without hard labour, not exceeding three years nor less than one year. 22 & 23 Vict. c. 31, s. 29.

CHAPTER X.

OF FORGERY OF BILLS AND NOTES.

Bills and notes.] By 24 & 25 Vict. c. 98, s. 22, Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange or any acceptance,¹ indorsement, or assignment of any bill of exchange, or any promissory note for the payment of money, or any indorsement or assignment of such promissory note,² with intent to defraud, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.³

And by sect. 25, Whenever any cheque or draft on any banker shall be crossed with the name of a banker, or with transverse lines with the words “and company,” or any abbreviation thereof, whosoever shall obliterate, add to, or alter any such crossing, or shall offer, utter, dispose of, or put off any cheque or draft whereon any such obliteration, addition, or alteration has been made, knowing the same to have been made with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and liable to penal servitude for life or not less than two years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

With regard to bills and notes, many questions have arisen upon the subject of a false or fictitious name. The rule seems to be that whenever such a false name is used with a fraudulent intention, the case comes within the statute; whilst, on the other hand, it is possible for an individual to employ his right name and yet be guilty of forgery. Though, as a general principle, if the real name be placed upon the instrument, the offence will only amount to a cheat, or the transaction may be considered as a debt. And again, the party may make use of an assumed name, and yet be guiltless of the more serious offence of forgery. The prisoner forged an acceptance in the name of Scott, but the witnesses for the prosecution proved that he, the prisoner, had, as far as they knew, gone by the name of Bontien. For the defence, it was shown that the prisoner had always been known by the name of Scott, but that he might have been nicknamed Bont or Bontien. The judges held the conviction wrong, because it did not appear to them but that the prisoner had really gone by

¹ The stat. 18 Geo. 3, c. 18, concerning forging acceptances with intent to defraud corporations, was repealed by 24 & 25 Vict. c. 101.

² By whatever name designated, if it be in law such an instrument. Sect. 39.

³ See ss. 23, 24, *post*, p. 670.

the name of Scott before the acceptance, or that he had assumed the name of Scott upon that occasion for the express purpose of fraud.¹ So, where the prisoner used the name of another person fraudulently, and accepted a bill in that name, but with general views of supporting a false credit, and not with the sole purpose of issuing the specific bill, he was held not to be guilty of forgery.² Whence it is, that if the prisoner should give his right name, he will, of necessity, be acquitted of forgery.³ So it was, again, where the prisoner uttered a right indorsement, with a false assertion that he, the prisoner, was the indorser.⁴ So, where the prisoner indorsed a bill, "per procuration," "Thomas Tomlinson"—"Emanuel White,"—Emanuel White being his real name, it was held not to be a forgery. The judges were unanimous. It was a bare lie. The prisoner said he had the authority and wrote his own name.⁵ But if the real name of the prisoner should appear and no proof of any change of name be given till the time of the fraud, it lies on him to show his assumption of the wrong name on other occasions, and for other purposes.⁶ It is, indeed, for the jury to say whether the name has been assumed with a fraudulent view. As soon as that fact is found against the accused, the judges will very rarely disturb the verdict, and therefore, although the point was once much discussed, it is now past controversy, that to make an instrument in a fictitious name, (*i. e.*, a name by which the forger was not known at the time of the forgery,) with a fraudulent design, is forgery.⁷ And it is no objection that the name indorsed does not correspond with that in the body of the bill.⁸ So again, where the prisoner drew a draft in the name of Vennist, who never kept cash with the banker drawn upon, nor was in any way known to him.⁹ And it is entirely immaterial whether the person whose name is assumed, ever had existence, for the gist of the crime is, the deception through a false medium. So that where Bolland forged an instrument in the name of J. B., of Rathbone Place, he was executed after a consideration of his case. the principal doubt having arisen (as it was understood) upon the fact that no such person as J. B. was in existence at the time of the offence.¹⁰ *A fortiori*, where the name of an existing person is employed.¹¹ If

¹ *R. v. Bontien*, Russ. & Ry. C. & P. 408. A receipt, to the same effect.

² *R. v. Whyte*, 5 Cox, 290. *R. v. Bontien*, *supra*, and *R. v. Burton-upon-Trent (Inhabitants)*, 3 M. & S. 537, were cited.

³ *R. v. Woodward*, cited, Leach, 782. See *R. v. Story*, Russ. & Ry. 81.

⁴ *R. v. Hevey*, Leach, 229; East, P. C. 856; Russ. & Ry. 407, n.

⁵ *R. v. White*, Den. 208; 2 Car. & K. 204. See *R. v. Arscott*, 6

⁶ Leach, 83.

⁷ *R. v. Dunn*, Leach, 57; East, P. C. 962. *R. v. Lewis*, Id. 957.

⁸ *R. v. Parke*, 1 Cox, 4.

⁹ *R. v. Lockett*, Leach, 94; East, P. C. 940. *R. v. Abrahams*, Leach, 96; East, 941.

¹⁰ *R. v. Bolland*, Leach, 83; East, P. C. 958. *R. v. Wilks*, East, P. C. 957.

¹¹ *R. v. Hadfield*, 2 Russ. C. M. 231, citing 6 Ev. stat.

no such person as the individual whose name has been assumed, has ever kept cash with the banker to whom the false cheque is presented ; it is for the prisoner to show that the name at the foot of the cheque is real. The circumstance above stated is *primâ faciæ* evidence that the name was fictitious.¹ And any inquiries made to ascertain the existence of the person whose name has been so assumed, are matters for the consideration of the jury.²

It is, again, unimportant that the prisoner, instead of contradicting himself from the person whose name is fraudulently put forward, endeavours to identify himself as the same individual. As in *R. v. Dunn*, where the prisoner was asked what name should be put to her mark, upon which she replied, "You know my name ; you may write Mary Wallace ;" whereas it was clearly proved that her name was Elizabeth Dunn.³ Nor is it material that the party to whom the forged instrument is tendered, inclines to give credit to the prisoner as well as to the fabricated writing. As, where the prosecutor, deceived by the genteel appearance of the prisoner, took his cheque upon a firm which he knew, but where the prisoner had no effects. Judgment was respited in order that it might be considered whether the tradesman's having given credit to the prisoner, and not to the draft, had not varied the case ; but this was held to be forgery, and the conviction was affirmed.⁴ Then, again, it is of no consequence that the prisoner could have got credit by using his real name, if, in truth, he is the forger or utterer of a counterfeit writing. Thus, the prisoner found a good bill, and being informed that he could not have it discounted unless he put his name on the back, he wrote "John Williams," whereas his name was Taft. But, had he given his right name, the money would have been paid to him, and upon this, Nares, J., reserved the point. The judges, however, held this to be a forging, for the owner of the bill lost all chance of tracing his property, and the person who discounted the bill lost the benefit of a real indorser, should the prior indorsement have accidentally failed.⁵ The same point was subsequently submitted to the judges, in the case of a false receipt indorsed upon a bill of exchange, and their decision was the same.⁶ The same law prevails, if a person writes an acceptance in his own name to represent a fictitious firm. It is the same as though a fictitious person was represented.⁷

Again, it is no defence, that the prisoner, when coming to a strange place, might take what name he should think fit. As where the party came to lodge with a Mrs. W. by the name of Cooke, and was never known to his landlady by any other name ; but it turned out that his real name was Francis, and that he had

¹ *R. v. Buckler*, 5 C. & P. 118.
R. v. King, Id. 123.

² 5 C. & P. 125.

³ East, P. C. 962.

⁴ *R. v. Shepherd*, East, P. C. 967
Leach, 226.

⁵ *R. v. Taft*, Leach, 172. *R. v. Levy*, Id. 173.

⁶ *R. v. Taylor*, Leach, 214.
R. v. Marshall, Russ. & Ry. 76.

R. v. Whaley, Id. 90.

⁷ *R. v. Rogers*, 8 C. & P. 629.

gone by other names. He forged a draft in the name of Cooke, and judgment was respited on the ground of a supposed right on the part of the prisoner to assume any name, but the judges were of opinion that he had been properly convicted.¹ And a similar decision was arrived at, where the prisoner had likewise assumed a false name for the purpose of pecuniary fraud connected with the forgery.² Again, the resumption of a real name fraudulently may be a forgery, although there was once a judgment to the contrary.³ But it seems that the learned judge qualified this decision by basing it upon the particular circumstances of the case, and in fact, the opinion was pronounced too precipitately, the judges, in reality, having adjourned the question to another term, when many inclined to think that forgery had been committed.⁴ But subsequently, in the case of Scott, who called witnesses to shelter himself from the consequences of a fraud, by showing that he had done the act, which was the subject of the indictment, in his real name, the judges held the conviction wrong, but solely on the ground of there not being sufficient evidence that the prisoner had not gone by the name of Scott before the time of accepting the bill in that name, or, that he had assumed the name for that purpose.⁵ Again, supposing that the real name should happen to tally with that of another individual fraudulently personated, whether that individual be or not in existence, a forgery may be committed. As where one Thomas Brown uttered a forged five-guinea note signed "Thomas Brown," representing the drawer, at the same time, as his brother. The judges held this a forgery.⁶ So, where a bill drawn abroad, and payable to H. Davis or order, got into the hands of another H. Davis, who placed his name on the back of the bill, all the judges agreed that this was forgery, although the real name was indorsed.⁷ So, where the prisoner offered a promissory note, signed "William Holland," in payment for some corn, representing to the seller that Wm. H. kept a public-house at Tipton, and that he the prisoner was the payee, it was held that as the payee, he must be cognizant of the particulars of the note, and consequently, as the prosecutor had proved that the note was not the note of the publican, it was considered to be no defence to insinuate that another William Holland lived in the neighbourhood, who might have been the maker of the

¹ *R. v. Francis*, Russ. & Ry. 209. The draft having been dishonoured, the prisoner added "junior" to it and sent it back to the bankers, and then absconded.

² *R. v. Peacock*, Russ. & Ry. 278.

³ *R. v. Aickles*, Leach, 438; per Ashhurst, J. East, P. C. 968.

⁴ The judgment was given by Ashhurst, J., in May, 1787, and the judges considered the question in the following Trinity Term, but no

resolution was come to upon the point, there being a considerable difference of opinion. See East, P. C. 969; Leach, *ut supra*.

⁵ *R. v. Bontien and another*, Russ. & Ry. 260; *ante*, p. 660.

⁶ *R. v. Parkes and another*, Leach, 775. Parkes was discharged by reason of a mistake in the venue.

⁷ *Mead v. Young*, 4 T. R. 28. See also *R. v. Maddock*, 2 Russ. C. M. 500.

note. It lay upon the prisoner to prove that fact, and to show that the note was, in reality, that of the other William Holland.¹ There was a case, however, where the prisoner, D. Walker, a pauper in Liverpool, made a bill signed D. Walker & Co., purporting to be drawn on Devaynes & Co., London,—and it is said, that Chambre, J., ruled that the evidence was not sufficient to go to the jury. The evidence was, that the prisoner drew the bill in question, and that similar bills had been drawn in like manner, and provided for when due, although the drawer was unknown to Devaynes & Co.²

And, moreover, when there is a true name, the addition of a false description for the purpose of giving an instrument additional credit, is not forgery. As where the bill ran thus:—

Two months after date, &c. To Mr. Thomas Bowden,
Baize Manufacturer, Romford, Essex.

Accepted, Thomas Bowden.

Payable when due, at No. 40, Castle Street, Holborn, London.

The words and figures in italics were added by the prisoner. It appeared that no such person as T. B. lived at Castle Street, or ever carried on the business of a baize manufacturer at Romford. But there was evidence to show that there was such a person as Thomas Bowden, and that the acceptance upon the bill which the prisoner was charged with forging, was his. Nevertheless, the jury found that there was no such person as T. B. But Best, J., thinking that there was such a person, respited the judgment, and the conviction was held wrong, although there was no person answering the description or addition, and a pardon was ordered to be applied for.³

Whereas, on the other hand, if there be one answering such description or addition, it is forgery. The prisoner uttered the following instrument:—

Leeds, Oct. 22nd, 1847.

No. 148. 7. 9. Three Months, &c. Value received.—A.B.
To Mr. Wm. Wilkinson, *Halifax.* *Payable, London.*

The name of the drawee and acceptor was correct. There was such a man. He was in the prisoner's employ, but the address "Halifax," and "payable, London," were added by the prisoner. And there were persons at Halifax of the name of Wm. Wilkinson, from none of whom had any authority been received. This was unanimously held to be a forgery. It was an intent to make the acceptance appear to be that of a different existing person.⁴

¹ *R. v. Hampton*, 1 Moo. C. C. 255.

² *R. v. Walker*, 2 Russ. C. M. 326, citing 6 Ev. Stat. 580.

³ *R. v. Webb*, Russ. & Ry. 405.

⁴ *R. v. Blenkinsop*, Den. 276. See, to the same effect, *R. v. Mitchell*, Id. 282, note, where

the question was put to the jury: "Do you find that he (the prisoner) got the second bill with the intention to pass it as the bill of one John Cooper, real or imaginary, other than the John Cooper whose name is on the bill? If so, he is guilty of forgery."

It is no defence to allege, that the uttering depended upon a future investigation. As, where the prosecutor said, that he hoped the bill he was offering would satisfy the bank as a security for a debt which he owed, and the manager replied that it would depend upon the result of certain inquiries. The uttering was complete.¹

The prisoner used the name of Mitchell, who was once employed at the Nine Elms station, and Mitchell, who was called for the prisoner, proved that he once gave him authority to use his name. But the prisoner had connected Mitchell with the bill he had forged, as being at the Nine Elms station, and he admitted his knowledge of Mitchell having left the place. *Blenkinsop's case*, just mentioned, was cited for the prosecution, and the prisoner was found guilty. So that the genuine acceptance of an existing person, used by a person in different circumstances, amounts to the acceptance of a fictitious drawer, so as to constitute a felonious uttering.² The contemplation of the *specific bill*, must, however, have been in the prisoner's mind, in order to constitute forgery, when he has accepted a bill in the name of another.³

Where an error is palpable upon the face of a bill or note, so as to make it plainly defective, it cannot be the subject of forgery. As if it should appear upon a charge of forging an acceptance, that there is no drawer's name to the bill.⁴ So, a paper of the following tenor,—“Please to pay on demand to the bearer the sum of 20*l.* for value received,—as witness my hand, Messrs. Thomas Gully & Co.”—was held not to be a bill of exchange, nor an order for the payment of money.⁵ Or, where a check was declared not to be valid, unless it had the signatures of three parish officers. The prisoner altered it when it had the signature of *one* only. This was an incomplete instrument, although, subsequently, the signatures of all three officers were attached, and the cheque was cashed.⁶ But, where the blot is merely collateral or incidental, a manifest distinction is recognized by the judges. And the 4th section of 1 Will. 4, c. 66, expressly ordained,⁷ that offenders might be indicted under the Act, although the instrument in question did not, in any respect, conform to the statutory provision relating thereto, if it were, in law, the particular instrument described in the indictment. The prisoner drew a bill upon the treasurer of the navy, payable to —, or order, whereas he ought to have drawn upon the commissioners. But the judges held, that the instrument, however inaccurate in this respect as a bill of exchange, might have been an order for the payment of money, had there been a payee mentioned. The conviction was held wrong for want

¹ *R. v. Cooke*, 8 C. & P. 582.

⁵ *R. v. Curry*, 2 Moo. C. C.

² *R. v. Nisbett*, 6 Cox, 320. See 218.

R. v. Webb, Russ. & Ry. 405.

⁶ *R. v. Turpin*, 2 Car. & K.

³ *R. v. Whyte*, 5 Cox, 290.

820.

⁴ *R. v. Butterwick*, 2 Moo. & Rob. 196.

⁷ Now 24 & 25 Vict. c. 98, s. 39.

of this. The 4th section would have cured the first objection, because the instrument was a bill of exchange *quoad* the officers of the navy, but could not help the difficulty respecting the payee, which was a fault affecting the integrity of the writing itself.¹ So, where the place of the payee's abode was omitted, and there was no attestation by a subscribing witness, a conviction for forging the instrument was held improper, for if real, it could not be said to be valid or negotiable, and thus, would not be in law a bill of exchange.² So, a document requiring the drawer to pay to his own order, and indorsed by the drawer, and accepted by the drawee, is not a bill of exchange.³ But it is no defence, that no person is named as drawee in the bill.⁴ So, though there be neither drawee nor acceptor.⁵ As where the prisoner drew a bill upon the commissioners of the navy for pay, although it did not comply with the requisites of the statute 35 Geo. 3, c. 94, the judges held, that he had been rightly convicted of forgery, because the instrument set forth in the indictment was in form a bill of exchange.⁶ An instrument was uttered in the form of —Pay to A. B. "17 or bearer pounds." This misplacing of "pounds" was held to make no difference, and the prisoner was convicted.⁷ Again, where the prisoner uttered a false bill, with an indorsement payable to his own order, and merely as a pledge, all the judges were of opinion that the act amounted to forgery, the bill having been given to obtain credit, although only left as a pledge.⁸ The reason of this decision, or rather the cause of the doubt, was in some measure explained in a subsequent case, where the prisoner uttered a bill, in like manner, without an indorsement, and it was objected, that such an instrument was not a valid bill, and could not, therefore, be the subject of forgery. Lawrence, J., doubted at first, because, without an indorsement, the writing could not be available in the hands of the party to whom it was uttered, and consequently, was not negotiable, and Bayley, J., for a similar reason, concluded the conviction wrong. But Lawrence, J., was afterwards satisfied that the objection would not hold, because had this forged bill been true and genuine according to its purport, the holder of it, for a valuable consideration from the payee, might compel the payee to indorse it.⁹ So, where the charge was for forging the promissory notes of the stewardesses of a provident society, it was objected, that as the regulations for the government of the society had not been confirmed, and filed at the quarter sessions, such a note could not be said to be negotiable, and so, not within

¹ *R. v. Richards*, Russ. & Ry. 193. *R. v. Randall*, Id. 195. And see *R. v. Pateman*, Id. 455.

² *R. v. Moffat*, Leach, 431.

³ *R. v. Bartlett*, 2 Moo. & Rob. 362.

⁴ *R. v. Hawkes*, 2 Moo. C. C. 60, *diss.* Parke, B., Patteson and Coleridge, JJ.

⁵ *R. v. Smith*, 2 Moo. C. C. 295.

⁶ *R. v. Chisholm*, Russ. & Ry. 297.

⁷ *R. v. Boreham*, 2 Cox, 189.

⁸ *R. v. Birkett*, Russ. & Ry. 86. Here the name of H. payee was real, but the names of the drawers were forged.

⁹ *R. v. Wicks*, Russ. & Ry. 149.

2 Geo. 2, c. 25. But the judges were of opinion that this was a valid promissory note.¹ And in order to avoid the evil consequences which would result from directing acquittals where the false instrument produced in evidence may happen to be unstamped, the judges have resolved—that the absence of a stamp is immaterial, for otherwise, securities might be published on improper stamps with impunity. So that the principle soon obtained that the regulations of the revenue laws could not alter the crime of forgery. Moreover, it was mentioned, that the holder of a bill could get it stamped after it was made.² However, upon a future occasion, this latter circumstance was held to make no difference after the passing of 31 Geo. 3, c. 25, which forbade the stamping of an instrument after being drawn. The judges again recognized *Hawkeswood's case*, and repeated their opinion, that the revenue laws could not interfere with the principles of forgery.³

Circumstances, however, of a peculiar nature, may occur in determining what shall and what shall not be forgery. The prisoner uttered a bill drawn upon Williams & Co., and there was a possibility that the figure “3” was on one corner of the bill: the bill would then stand thus:—

Two Months, &c.—

To Messrs. Williams & Co., Bankers,
“3,” Birchin Lane, Cornhill.

The object of the prisoner might have been to create a belief that the Williams & Co. mentioned were the bankers of that name at No. 20, Birchin Lane, under the firm of Williams, Birch, & Co., as he declared that the acceptors were Williams, Birch, & Co.⁴ But he proved in his defence, that three bills on Williams & Co. had actually been paid at 3, Birchin Lane, and as the prosecutors did not show that the figure 3 was not on the bill when the prisoner offered it, the judges held the conviction wrong.⁵

The alteration of a figure, by substituting one of higher import is forgery:—The prisoner was charged with forging a bill of exchange and an acceptance. The bill stood thus,—

London, August 20th, 1836.

“£500.”

“Two months after date pay to my order, the sum of five hundred pounds, value received.—C. Taylor.”

To the Revd. C. H. Jenner,
No. 1, Chesterfield Street, May Fair.

It appeared that the prisoner had liberty from the prosecutor to

¹ *R. v. Box*, Russ. & Ry. 300; 6 Taunt. 325.

² See *R. v. Hawkeswood*, Leach, 257; East, P. C. 955. *R. v. Lee*, Leach, 258, n. See also *R. v. Moffatt*, Id. 431; 1 Taunt. 97.

³ *R. v. Morton*, East, P. C. 955. *R. v. Reculist*, Leach, 703. *R.*

v. Davies, East, P. C. 956. *R. v. Teague*, Russ. & Ry. 33.

⁴ Who usually made their acceptances thus—“Williams & Co.”

⁵ *R. v. Watts*, Russ. & Ry. 436. The jury had found that the acceptance was not that of any London bankers.

fill up a blank acceptance with the sum of 200*l.*, and that he had taken away the bill with those figures upon it: the bill was subsequently found in the hands of another person in the state mentioned in the indictment, and it likewise appeared that some acid had been used upon the paper. This case was argued for the prisoner, but the judges were unanimous, that to fill up the bill with the figures 500*l.*, when the prisoner's authority was limited to 200*l.*, was a false making of a bill for 500*l.*, and the conviction was held right.¹ The alteration of the crossing of a cheque was not forgery, being no part of the draft,² but the stat. 24 & 25 Vict. c. 98, s. 25, has provided against this fraud.³

A clerk was directed to fill up a cheque for a certain sum, instead of which he filled it up with a larger amount, and retained the balance on the score of some claim he made for salary. This was held to be a forgery, upon the authority of *R. v. Hart* and *R. v. Bateman*. The learned judge, in *R. v. Bateman*, left the intent to defraud to the jury, who convicted the prisoner, and the judges held the conviction right on the authority of *R. v. Hart*,—Coltman, J., merely remarking, that he had a doubt whether the claim of the alleged amount of salary ought not to have been left to the jury.⁴ So, where the prisoner having obtained an acceptance for 1,000*l.*, came to the prosecutor and got two bills for 500*l.* under a pretence that the bill for 1,000*l.* was too large in amount to be discounted, but instead of destroying the bill for 1,000*l.* in the prosecutor's presence, altered it from a bill at three to one of twelve months. This was held by Park, J., to be a forgery.⁵ The following case was held by Erle, J., to be an alteration within the Act:—"10th March, 1849.—Please to pay T. P. G. Turberville, three, 3*l.* 12*s.* 6*d.* for sick pay to Brother Isaac Jones. Signed, &c." The word "three" and the figure "3" were alterations made by the prisoner, and forgeries.⁶ It is, however, of course no forgery to procure the signature of a party to a document altered without his knowledge, although the procuration be fraudulent, and the act itself be a fraud.⁷ Nor to induce one to sign a paper upon a misrepresentation of its contents.⁸ It is not forgery, if a person has good ground for believing that he had the consent of another, to write his name to an acceptance.⁹ If the person drawn upon had paid such bills on three or four occasions, it would be a ground for such belief, especially in the absence of any remark or remonstrance.¹⁰ *A fortiori*, if the authority be shown.¹¹ So upon a charge of forging the name of W. S. prior to the alleged forgery, letters were allowed to be read by counsel in order to show that the prisoner

¹ *R. v. Hart*, 1 Moo. C. C. 486. *R. v. Teague*, East, P. C. 979. *R. v. Bateman*, 1 Cox, 186; cited, Den. 285.

² *Simmonds v. Taylor*, Publ. Off., 27 L. J. C. P. 45. Affirmed, in error, Id. 248.

³ *Ante*, p. 659.

⁴ *R. v. Wilson*, Den. 284; 2 Car. & K. 527.

⁵ *R. v. Atkinson*, 7 C. & P. 669.

⁶ *R. v. Turberville*, 4 Cox, 13.

⁷ *R. v. Chadwick*, 2 M. & Rob. 545.

⁸ *R. v. Collins*, Id. 461.

⁹ *R. v. Parish*, 8 C. & P. 94.

¹⁰ *R. v. Beard*, Id. 143.

¹¹ *R. v. Parish*, ut sup.

bonâ fide considered that he had authority to write W. S.'s name to a receipt on a post office order.¹ But it is not a defence in the absence of such authority, that the prisoner believed he should be able to pay the bill, &c., when due.² Nor is it a defence, that the prisoner told A., an innocent agent, that he was at liberty to sign the name of W. S., if the agent does so upon that representation; express words are not necessary, and the prisoner is a principal in such a forgery.³ So, where all the names on a bill were fictitious, it was held no defence to say, that the full intention was to pay the bill when arrived at maturity, the more so, if no such intention were communicated to the person to whom the prisoner uttered the bill.⁴ Unexplained, the circumstance of a party putting into circulation a forged document, leads to the inevitable conclusion of an attempt to defraud,⁵ and that the intent was to defraud the person to whom he pays the bill.⁶ Relationship will not vary the case; a person must not presume on the kindness of a relation, if he forges a bill upon that relation.⁷ Even a guarantee to the prisoner's bankers to a larger amount than a forged note which he has paid to them, will not be evidence sufficient to prevent the case from being submitted to the jury.⁸

A. writes J. S. across a blank stamp, and goes away. B. writes a bill upon the stamp, being confederated with A. in a fraudulent transaction; it seems that this is, nevertheless, not a forgery of the acceptance.⁹ The prisoner forged an indorsement in the name of one executrix to a bill made payable to several executrices; this was held to be within the statute, any indorsement being sufficient.¹⁰

Foreign bills.] It has been held, that foreign securities need not possess the technical properties required by the municipal law of England, and that it is sufficient if, on the face of the whole instrument, they import an undertaking, or order for the payment of money.¹¹ And Richardson, J., who tried the case just referred to, was also inclined to think that the word "purporting" in the Act, appeared rather to refer to the person by or on whose behalf the instrument was issued, than to the form of the instrument itself.¹² The prisoner was tried for forging a foreign bill, which was thus translated:—

¹ *R. v. Clifford*, 2 Car. & K. 202.

² *R. v. Beard*, ut sup. *R. v. Geach*, 9 C. & P. 499.

³ *R. v. Clifford*, ut supra.

⁴ *R. v. Hill*, 2 Moo. C. C. 30; 8 C. & P. 274.

⁵ *R. v. Cooke*, 8 C. & P. 582.

⁶ S. C.

⁷ *R. v. Beard*, 7 C. & P. 143.

⁸ *R. v. James*, 7 C. & P. 553.

⁹ *R. v. Cooke*, 8 C. & P. 582.

¹⁰ *R. v. Winterbottam*, 1 Den.

C. C. 41. *Note*.—It will be presumed that bankers have complied with all statutory regulations concerning their notes. The prisoner must prove the contrary. *R. v. Williams*, 1 Cox, 234.

¹¹ *R. v. Goldstein*, Russ. & Ry. 473.

¹² See *post*, "Indictment," Russ. & Ry. 477; and, in England, this defect is now cured by 24 & 25 Vict. c. 98, s. 39, as to *English* securities.

"No. 6,811, § Due 7 December.

"St. Petersburg, the 4th August, 1834.

"Good for £500 sterling. At four months' date by this bill
"of exchange, to the order of ourselves, the sum of five hundred
"pounds sterling, value in myself, which you will pass according
"to the advice of Stieglitz & Co."

"No. 7,800. Messrs. Brown, Dan, Hamming, Dublin,
"497 Payable, London.

"Accepted for five hundred pounds sterling, payable at Messrs.
"Ransom & Co., bankers, London.

"Brown, Dan, Hamming."

The judges held the conviction for uttering this instrument as a forged bill of exchange, good.¹ If persons cause an engraver to make plates, they will be within 24 & 25 Vict. c. 98, s. 19, although they may not know the nature of the plates; and they need not be all present at the order; indeed it was left to the jury to say, whether the two who gave the order, knew the nature of the instrument; and secondly, whether all three concurred in the order.² One prisoner resided in London, the other on the continent, and they combined to employ an innocent agent to make a plate for the purpose of forgery; the plate was completed, and both were held to be principals.³

¹ *R. v. Szudurskie*, 1 Moo. C. C. 429. Cox, 281. *Secus*, if the maker had been a guilty person and had been

² *R. v. Mazeau*, 9 Car. & P. 677. counselled by others. Per Tindal, C. J.

³ *R. v. Bull and another*, 1

CHAPTER XI.

FORGERY OF UNDERTAKINGS, WARRANTS, ORDERS,
REQUESTS, RECEIPTS, &c.

By 24 & 25 Vict. c. 98, s. 23, Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or other security for the payment of money, or for procuring or giving credit, or any indorsement on or assignment of any such undertaking, &c., or any accountable receipt, acquittance, or receipt for money or for goods, or for any note, bill, or other security for the payment of money, or any indorsement on or assignment of any such accountable receipt,¹ with intent to defraud, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 24, whosoever, with intent to defraud, shall draw, make, sign, accept, or indorse any bill of exchange or promissory note, or any undertaking, warrant, order, authority, or request, for the payment of money, or for the delivery or transfer of goods or chattels, or of any bill, note, or other security for money, by procuration or otherwise, for, in the name, or on the account of any other person, without lawful authority or excuse, or shall offer, utter, dispose of, or put off any such bill, &c., without lawful authority or excuse, knowing the same to have been so drawn, made, signed, accepted, or indorsed as aforesaid, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

And by sect. 26, whosoever shall fraudulently forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any debenture issued under any lawful authority whatsoever, either within Her Majesty's dominions or elsewhere, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years,—or to

¹ The 39th section includes a variety of instruments, which, if in law, wills, &c., undertakings, &c., are to be held such, by whatever name they may be called. There is, however, a curious discrepancy between this clause and the 39th: the words "or for the delivery or transfer of any goods or

chattels, or of any note, bill, or other security, for the payment of money or for procuring or giving credit," and "any accountable receipt, acquittance, or receipt for money, &c., or any indorsement," &c., are omitted in sect. 39, which corresponds in this respect with the original draft of the bill.

imprisonment not exceeding two years, with or without hard labour, and solitary confinement.¹

An order for the payment of money in respect of which forgery may be committed, is such an instrument as purports, upon the face of it, that the individual making it has a right to require the payment of the money therein mentioned. If, therefore, the effect of the writing be a request only, it is not within the statute. The following orders are instances of this rule.

"Messrs. S.,—Please to send 10*l.* by the bearer, as I am so ill, I cannot wait on you. E. W."²

"Mr. Thomas,—Sir, you will please to pay the bearer, Mr. R. P., 3*l.*, &c., and you will much oblige yours, J. B.,

"2, Brown's Buildings, Stanhope Street.

"To Mr. Thomas, Gray's Inn."³

In these cases it was evident that there was nothing compulsory on the face of the writings; consequently, the offence could not amount to forgery.⁴ But a very slight change in the form of the note will alter the character of the transaction, and create the distinction between an order and a request. For example:—

"Port of London, May 1st, 1834.

"Three days after the ship *Mary Ann* sails from Gravesend please to pay to B. or his order the sum of 4*l.* 5*s.*, &c., as per agreement with your obedient servant, G. M., master."

The prisoner wrote in the margin,—“On receiving this cheque, I agree to sail in the ship *Mary Ann*, and to be on board within 16 hours from the date of the cheque, May 1st.” The judges held the conviction right under 1 Will. 4, c. 66, s. 3.⁵ And there is this difference between the word “compulsory” on the face of an order, and an Act of parliament authorizing the order, that in both cases, indeed, the order for payment must appear, but there may be instances where the statute is not strictly complied with, and yet, the instrument in question has been considered the subject of forgery; a proper count applicable to the case, of course, appearing in the indictment.⁶ Thus, “I promise to pay, &c., or such other sum of money, not exceeding the same, as he may incur, and by reason of his becoming one of the sureties to M. M., &c.” This, although not a positive undertaking, was held to be within the Act.⁷ “This is to satisfy, that R. R. as swept

¹ The Act against forgery of partnership firms (6 Geo. 4, c. 56,) was repealed by 24 & 25 Vict. c. 101.

² *R. v. Ellor*, Leach, 323.

³ *R. v. Baker*, 1 Moo. C. C. 231. Gaselee and Park, JJ., diss.

⁴ 1 Moo. C. C. 234.

⁵ *R. v. Bamfield*, 1 Moo. C. C. 416. *R. v. Anderson*, 2 M. & Rob.

469. It was a sailor's shipping note for 2*l.* 15*s.*, payable to A. B., or bearer, five days after the ship should sail. And an indictment for false pretences was held wrong. It should have been for forgery.

⁶ More especially with reference to bills of exchange.

⁷ *R. v. Reed*, 2 Moo. C. C. 62; 8 C. & P. 623.

"the flues, and cleaned the bilges, and repaired four bridges of the "Princess Victoria, J. N., 4*l.* 10*s.*" This order, if genuine, could have authorized the payment of this sum of 4*l.* 10*s.*, and it was held to be a warrant for the payment of money.¹ This case of *R. v. Rogers*, and also *Mc Intosh's case*, were cited where the prisoner was charged with forging a certificate of a lodge. It appeared, however, that the lodge,—the Conqueror Lodge—according to his certificate, being dissolved, had no existence, and that this was so at the time of the forgery. Erle, J., thought the objection as to the non-existence fatal, but left the case to the jury, who convicted the prisoner. He was then charged with obtaining money under false pretences, and again convicted, and sentence was passed on him for that offence, and not for the forgery.²

"Thornton-le-Moor, July 20, 1844.

"Mr. Johnson,—Sir, please to pay to James Jackson the sum of "13*l.* by order of Christopher Sadler, Thornton-le-Moor, brewer, "the District Bank. I shall see you on Monday,—Yours obliged,
"Charles Sadler."

This was held to be an order for the payment of money.³

"Mr. Martin will be pleased to send by the bearer 10*l.*, on "Mr. Hodge's account, as Mr. Hodge is very bad in bed, and "cannot come himself.

"Martin Ralph, foreman, St. Austell Foundry."

This was also held to be a warrant or order for the payment of money.⁴ The indorsement of a shareholder on a railway dividend warrant is a warrant or order, and the conviction of a clerk of the company who had forged the indorsement was affirmed.⁵ Still, there is a distinction between a warrant and an order, so that if the indictment should happen to describe an instrument as an order which is a warrant only, and fails to call it a warrant also, the objection would be fatal. As, where one kept a deposit at his banker's, but never drew cheques. A cheque being presented, the banker paid it, but this instrument being called an order, the prisoner was discharged from the forgery, because there was no power to draw cheques. The instrument was a warrant, not an order.⁶ An indictment charged the forgery of an order, warrant, or request, in *hæc verba*, and then set out the instrument. It was

¹ *R. v. Rogers*, 9 C. & P. 41.

² *R. v. Rouse*, 4 Cox, 7. Erle, J., held that it lay upon the prisoner to show the illegality of the instrument, and that the mutual promises or agreements of the society in question were against 37 Geo. 3, c. 123, s. 1, and 17 Geo. 3, c. 19, s. 25.

³ *R. v. Carter*, Den. 65; 1 Car. & K. 741.

⁴ *R. v. Vivian*, Den. 35, Cole-

ridge, J., *dub.*; 1 Car. & K. 719.

It is no matter whether or not the party signing may have funds in the hands of the party addressed.

⁵ *R. v. Autey*, 7 Cox, 329. And *R. v. Arscott* was distinguished, for there the indorsement was upon an order which the statute did not provide against, whereas *this was itself an order*.

⁶ *R. v. Williams*, 2 Car. & K. 51.

objected, that the instrument was a request, and not an order or warrant, but the court affirmed the conviction.¹ For, by Parke, B., where the indictment sets out the instrument, the descriptive matter may be mere surplusage, and the court can determine its character, and so description is needless.² The following instrument, however, was held to be both a warrant and an order:—

“Mr. Lowe, “London.
 “Bought of C. Dawson, English and foreign fruit merchant
 “and potato salesman. Nov. 9. 2 bushels of apples, 9s.
 “Sir,—I hope you will excuse me sending for such trifle, but I
 “have received a lawyer’s letter this morning, and unless I can
 “make up a certain amount by one o’clock, there will be an action
 “commenced against me, and I am obliged to hunt after every
 “shilling. Yours, &c., F. Dawson.”³

The statute applies to a promise of payment by a third person. John Stone, who also went by the name of R. Phoenix, applied for goods. The credit he asked was promised only upon his father’s guarantee. The prisoner then forged the name of Taylor Phoenix to a guarantee, and obtained the credit. This was held by the judges to be an undertaking within the statute, and also an undertaking for the payment of money by the supposed party himself.⁴

Every bill of exchange is an order for the payment of money, although the converse will not hold.⁵ A dividend warrant falls under the same rule. And so it is in the case of a blank cheque, for the banker can charge his customer with the amount;⁶ and a navy bill.⁷ So a post-dated cheque,⁸ and a forged pass,⁹ and a post-office order.¹⁰ And since the passing of 1 Will. 4, c. 66,¹¹ the following order would probably come within the 4th section of that Act, although before the statute, nine judges held that it was not an order.

“Gentlemen,—Please to pay the bearer on demand £15, and
 “accompt it to your humble servant. C. R. Ravenscroft.

“Payable at Messrs. Masterman & Co., White Hart Court.
 Wm. McInverheny.”¹²

¹ *R. v. Williams*, Den. & P. 61; 20 L. J. M. C. 106.

² Den. & P. 63. Mr. Denison thought that *R. v. Williams*, 2 Car. & K. 51, was overruled by this decision, and referred to *R. v. Newton*, 2 Moo. C. C. 59.

³ *R. v. Dawson*, Den. & P. 75; 20 L. J. M. C. 102.

⁴ *R. v. Stone*, Den. 181; 2 Car. & K. 364.

⁵ See *R. v. Lockett*, Leach, 94; *R. v. Shepherd*, East, P. C. 944; *R. v. Willoughby*, Id.; *R. v. McIntosh*, Id. 942; *R. v. Cartwright*, Russ. & Ry. 106; *R. v. Clarkson*, 1 Cox, 110.

⁶ *R. v. Wright and others*, 1 Lew. C. C. 135.

⁷ Id.

⁸ *R. v. Taylor*, 1 Car. & K. 213.

⁹ *R. v. M’Connell and another*, 2 Moo. C. C. 298; 1 Car. & K. 371. Although a woman presented the pass which directed the money to be paid to W. H. upon his giving a receipt, it made no difference.

¹⁰ *R. v. Gilchrist*, Car. & M. 224.

¹¹ Now repealed.

¹² *R. v. Ravenscroft*, Russ. & Ry. 161. *Diss.*—Mansfield, C. J.; Graham and Wood, BB.

So,

"Holton, Mar. 31, 1853.

"Sirs,—Please to pay the bearis, Mrs. Smart, the sum of "eagth hundred & 50. 4£ ten shillings for me, James Ramsey," was held to be such an order, although not addressed to any one; it being explained in evidence that the order was addressed to a particular firm.¹ A letter of credit, requesting that cash to the amount of 60*l.* might be at the disposal of A., has also been held to be within the 1 Will. 4.² The following writing has also been deemed rightly described as a warrant.

"To Molineux & Co.

"Pay to my order, two month after date, to Mr. John "Smith, the sum of £80, and deduct the same out of my account.

"John Smith,

"Farmer, Hailsham, Sussex."

£80.

No signature was indorsed.³

So again, a document which authorized the bearers to receive certain monies deposited upon accountable receipts in a bank by a friendly society, was held to be an order for the payment of money.⁴ So, an order to pay J. W. so much, provided the said J. W. has sailed in the said ship, is within the Act, although it was objected, 1st, that the order was not absolute; 2nd, that the averment of the condition having been performed did not appear in the indictment.⁵

Essex Provident Society. A cheque was signed by the chairman and three members of the Dunmow sub-committee. This cheque, in the ordinary course of things, should be countersigned by B. the clerk. Three forged signatures only were brought accordingly to B., who countersigned. It was objected that the instrument was not complete, but Lord Denman thought it sufficient.⁶ Again, the statute does not apply exclusively to commercial transactions. The prisoner forged an order for the payment of certain prize money, and the judges held the conviction proper. And, in fact, the objection was not even made in that case. But it was taken upon a subsequent occasion, where the charge was for forging the order of a justice of the peace upon a high constable for the payment of 10*s.*, and although pressed, the court overruled it.⁷ Again, where a justice of the peace was authorized by 48 Geo. 3, c. 75, to reimburse the churchwarden, overseer, headborough, or constable, any expense incurred in burying a dead body cast on

¹ *R. v. Snelling*, 23 L. J. M. C. 8; March, 1844. See *post*, *R. v. Dears*, 219.

² *R. v. Raake*, 2 Moo. C. C. 66; 8 C. & P. 626.

³ *R. v. Smith*, Den. C. C. 79; 1 Car. & K. 700. Amongst other cases cited was that of *R. v. Hussey*, C. C. Court, from the "Law Times,"

⁴ *R. v. Harris and another*, 2 Moo. C. C. 267; 1 Car. & K. 179.

⁵ *R. v. Lonsdale*, 2 Cox, 222.

⁶ *R. v. Lee*, 3 Cox, 80.

⁷ *R. v. Graham*, East, P. C. 945. See also *R. v. Rushworth*, Russ. & Ry. 317.

shore, and such an order was forged, it was objected for the prisoner, that it did not appear upon the face of the order, that the person to whom the repayment had been ordered, was one of the officers mentioned in the statute, consequently that the instrument itself was a nullity. Six learned judges, however,¹ were of opinion, that unless it had appeared on the face of the order, that the payee was not a churchwarden, or other officer, they considered the treasurer bound to conclude, that the justice had satisfied himself of the fact, and they held the conviction right.² Five learned judges held the contrary.³ On the other hand, where it appeared that a justice was empowered to make certain orders under his hand and seal, but that he had neglected to affix his seal, and moreover, that he had addressed his order to a person over whom the statute had given him no authority, the conviction was held wrong.⁴ Hence it appears to be the safest way to pursue the words of the statute which may happen to apply, as nearly as possible.⁵ And a certificate that the prisoner was getting his living by hawking, was considered no undertaking within 1 Will. 4, c. 66.⁶ So, if the instrument be so utterly at variance, not only with the Act which authorizes the supposed order, but also with the common rules of grammar, the indictment cannot be sustained. The order is, in fact, defective upon the face of it.⁷ But it is no objection to show collateral circumstances at variance with the general charge, and which do not appear upon the face of the order. As that the person who signed an order for the payment of money as chairman of the board of guardians was not, in reality, the chairman, the charge being for forging upon the same order the name of another guardian.⁸ It is worthy of attention that although the statute 1 Will. 4, c. 66, fully reached the case of forging an indorsement upon a bill of exchange, it did not comprehend an indorsement upon a warrant or order for the payment of money. Therefore, where instead of charging the indorsement to have been made upon a bill of exchange, it was alleged to have been so written upon an order for the payment of money, the prisoner was held entitled to an acquittal.⁹ So an indorsement on a letter of credit was held not to be an order within the statute.¹⁰ Nor a warrant for wages, signed by the foreman and paid by the cashier.¹¹

Indictment.] The indictment for forging a bill or note states

¹ Wood, B.; Bayley, Holroyd, JJ. Garrow, B.; Best, Richardson, JJ.

² *R. v. Froud*, Russ. & Ry. 389. See Id 391.

³ Abbott, C. J.; Dallas, C. J.; Graham, B.; Park, J.; Burrough, J.

⁴ *R. v. Rushworth*, Russ. & Ry. 317.

⁵ See *R. v. Russell*, Leach, 9.

⁶ *R. v. Mitchell*, 2 Fost. & F. 44. But it was forgery at common law.

⁷ *R. v. Donnelly and another*, 1 Moo. C. C. 438.

⁸ *R. v. Pike*, 2 Moo. C. C. 70. The names of three guardians were necessary to the validity of the instrument.

⁹ *R. v. Arscott*, 6 C. & P. 410.

¹⁰ *R. v. Wilton*, 1 Fost. & F. 391.

¹¹ *R. v. Pilling*, 1 Fost. & F. 324.

that A., on, &c., feloniously did forge a certain bill of exchange [or promissory note], with intent then to defraud.

Second count, for uttering.

Indictment.] The indictment for forging an order, &c. for the payment of money, alleges that A., on, &c., feloniously did forge a certain order, &c., for the payment of money, with intent thereby then to defraud.¹ And if more were stated in the indictment than necessary, the count would, nevertheless, not have been invalid.² Upon an indictment for forging a promissory note, it has been held sufficient to call it "a certain forged promissory note for the payment of 20*l.*," without stating the date.³ In fact, by 24 & 25 Vict. c. 98, s. 42, any instrument may now be described by the name usually known, as a bill of exchange, &c. The word "falsely," it may be observed, is immaterial.⁴ But the allegation as to the forgery must not be put in the alternative, "forge *or* cause to be forged."⁵ The count should conclude with the allegation of intent to defraud, and this intent must appear in all the substantial parts of the indictment. For where the prisoner was charged with uttering a forged magistrate's order, and concluded thus, "and so the jurors say that by colour and means of the said counterfeit order, unlawfully did obtain from W. L. the said sum of," &c., without adding the intent to defraud, nor the averment of guilty knowledge, judgment was arrested.⁶ With reference, however, to the names of the parties intended to be defrauded, a notification to a common intent was sufficient.⁷ So, where the intent laid was to defraud one partner, whereas the firm consisted of two persons, but the prosecutor took the active part of the concern, the conviction was held right.⁸ Not so where the intent was laid to defraud one partner "*and others*," whereas there was only one other partner.⁹ A general intent to defraud, without setting out the manner, is sufficient.¹⁰ Yet, as it seems, a shareholder in a joint-stock bank, who uttered a forged acceptance to the bank, could not be convicted on counts laying the intent to defraud another shareholder, *and others*.¹¹ A count charged that the prisoner did forge a promissory note for 50*l.*, on which promissory note there is an indorsement as follows: "C. J."—with intent to defraud W. R. S. It was objected, that this charge

¹ As to the old cases, see East, P. C. 975, 985. The words "and caused to be forged" are at an end. Lord Mansfield could never see why forge "or cause to be forged" should vitiate the indictment. 1 Burr. 400.

² *R. v. Brewer*, 6 C. & P. 363.

³ *R. v. Burgiss*, 7 C. & P. 490; *R. v. James*, Id. 553.

⁴ Stark. Cr. P. 98.

⁵ East, P. C. 988.

⁶ *R. v. Rushworth*, Russ. & Ry. 317.

⁷ *R. v. Lovell*, Leach, 248, East, 990.

⁸ *R. v. Hanson*, 2 Moo. C. C. 245; Car. & M. 334.

⁹ *R. v. Wright*, 1 Lew. 269.

¹⁰ *R. v. Powell*, 2 Sir Wm. Bl. 787.

¹¹ *R. v. Cooke*, 8 C. & P. 586.

might apply as well to the indorsement as to the note, but the court held, that the words "with intent" must apply to the verb to which the prisoner's name was the nominative, and the prisoner was convicted.¹

The intent in the case of joint-stock banks has been already discussed.² But the averment of general intent in a great measure supersedes these cases.

It is no objection to call an instrument a warrant *and* order for the payment of money.³

A count for altering a bill or note is often introduced, but it is not very necessary. An indictment for forging will be supported by proof of an alteration. And an indictment for altering by falsely making and forging, will be sustained by proof of the alteration without saying that the prisoner falsely made and forged by altering.⁴ And it is no defence to say, that the statute has the word "alter" as well as "forge," therefore, Teague, who altered a country bank note, (described in the indictment as a bill of exchange,) from 10*l.* to 50*l.*, was held rightly convicted, notwithstanding that objection. The indictment charged a forgery, and the proof was of an alteration.⁵ However, a count for forging a bill, will not cover the forgery of an acceptance. And a count for uttering will follow the same rule. There were several counts for forging and uttering a counterfeit bill, and for forging the acceptance, but there was not one applicable to the uttering of the acceptance. The only part of the bill uttered by the prisoner, which was proved to be forged, was the acceptance. It was objected, that the forging or uttering an acceptance was made a distinct offence by 1 Will. 4, c. 66, so that the conviction could not be correct by reason of the omission. And the judges concurred in this opinion.⁶ So, again, it might be desirable to have counts for forging and uttering an indorsement, where the case would admit of it, and the more especially if it be found impracticable to connect the prisoner with the offence charged otherwise than through the medium of the indorsement.⁷ The count must support the legal signification of the instrument. As, where the indictment charged the forging of a promissory note, but set out an instrument which the judges held to be a bill of exchange. The conviction here was deemed improper.⁸ This matter depends upon the evidence, and explanatory averments are not necessary.⁹ If, therefore, the promissory note should turn out to be a bill of exchange, an acquittal would be directed upon the evidence.

¹ *R. v. James*, 7 C. & P. 553.
See *R. v. Burgiss*, *Id.* 490.

² *Ante*.

³ *R. v. Crowther*, 5 C. & P. 316.

⁴ *R. v. Elsworth*, East, P. C. 986.

⁵ *R. v. Teague*, Russ. & Ry. 33; East, P. C. 979.

⁶ *R. v. Horwell*, 1 Moo. C. C. 405; 6 C. & P. 148.

⁷ See *R. v. Hough*, Russ. & Ry.

120.

⁸ *R. v. Hunter*, Russ. & Ry. 511.

⁹ *R. v. Rogers*, *ante*.

Evidence.] First, with reference to witnesses, it may be remarked that the statute 9 Geo. 4, c. 32, s. 2, permitted persons to appear as witnesses in prosecutions for forgery, although they might have an interest in the forged instrument.¹ Then, by 6 & 7 Vict. c. 85, s. 1, no person offered as a witness shall be excluded by reason of incapacity from interest from giving evidence, either in person, or by deposition in any suit civil or criminal. The rule once acted upon that if a witness *might* have been called he *must* have been called, exists now no longer.² Mr. Starkie says, that "the objection that secondary evidence is substituted for the first, does not apply in this case, since there is not such a distinction between one man's knowledge of his own handwriting and the knowledge of another on the same subject as constitutes the former evidence of a superior character to the latter."³ The principal features of the evidence are the falsity of the instrument,—of the plate—the validity of it, if it were genuine (as, for instance, whether it be within the protection of the law); and, lastly, the intent to defraud. Should there be any special averments, as that the signature of a certain instrument operates in a particular manner, (a navy bill, for example as a receipt,) the prosecutor must have been prepared to prove them.⁴ However, it is of course that the prisoner must be connected with the crime imputed to him, and, moreover, there must be some proof to show the identity of the person whose name has been counterfeited. Sponsonby was indicted for forging an indorsement on a bill in the name of Wm. Pearce. Wm. Pearce was the payee, and as the bill never came into his hands, he was considered to be a competent witness to prove the forged indorsement, but another difficulty arose, because as the drawer was not present, it was not clear that the witness was the real Wm. Pearce, the payee. The drawer's letter of advice to his payee was rejected, and the testimony of Pearce refused, and an acquittal ensued.⁵ This case has been questioned, as under the particular circumstances, the payee, Pearce, should have been admitted, but the new statutes have rendered this of no importance.⁶ In another case, where the names both of the drawer and indorsee were forged, it appeared that the prisoner when he

¹ Under the old law, see *R. v. Russell*, Leach, 8; *R. v. Taylor*, Id. 214; *R. v. Thornton*, Id. 634; *R. v. Bunting*, Id. 991; *R. v. Young*, Russ. & Ry. 280, n.; *R. v. Crocker*, Id. 97; Leach, 987; *R. v. Corah*, 2 Russ. C. M. 392; *R. v. Bate*, cited, 8 C. & P. 275. As to the cases where under the old law releases were considered necessary, and where they were dispensed with; *R. v. Usher*, Leach, 48; *R. v. Akehurst*, Id. 150; *R. v. Spon-*

sonby, Id. 332; *R. v. Treble*, Id. 1040; *R. v. Peacock*, Russ. & Ry. 278; *R. v. Mott*, Id. 435; *R. v. Pigeon*, 1 C. & P. 98; *R. v. Wells*, Bull. N. P. 289.

² See *R. v. Downes*, East, P. C. 997, 999; *R. v. Smith*, Id. 1000.

³ Starkie of Ev. part 4.

⁴ But see now 9 Geo. 4, c. 32, s. 2; 6 & 7 Vict. c. 85, s. 1.

⁵ *R. v. Sponsonby*, Leach, 332.

⁶ See East, P. C. 997. Starkie of Evidence, p. 4.

negotiated the bill, which was drawn by A. H., payable to J. S., declared that J. S. was the son of a cheesemonger at Liverpool, and that the signature of A. H. was a forgery. It was here again objected that the drawer was not produced, but Wilson, J., was opposed to the point raised for the prisoner, since he had himself admitted the payee's identity, and the false signature of the drawer, and the indorsement was disproved by the father of J. S.¹ A letter sent by the prisoner to the prosecutor, and left unanswered, is evidence for the jury to consider whether the prisoner did not believe that he had an implied authority.²

Handwriting.] It has been a rule of law for a very considerable time that comparison of hands is inadmissible as evidence. Therefore, it would be of no avail to tender proof of other documents than those mentioned in the indictment, in order to fix the prisoner's handwriting. But this rule does not obtain so strictly in the case of the party whose name is forged. For it is said, that upon one occasion, Bayley, J., desired the person in question to write his name upon a sheet of paper, which was handed to the jury after they had turned round to deliberate.³ Where the prisoner had drawn and indorsed a bill, and his handwriting to the acceptance of the same bill was then proved, Littledale, J., although hesitating at first, afterwards allowed the case to go to the jury, saying that he would reserve the point, but the prisoner was acquitted.⁴

An instrument without a forged indorsement was found in the prisoner's hands. But very soon afterwards the forged name appeared. There was no proof of his handwriting, nor that he could write, but Erle, J., allowed the case to go to the jury.⁵

Uttering.] It was doubted at one time whether evidence of the possession of other forged instruments could be admitted against the prisoner upon a charge of forgery. However, where the prisoner was indicted for forging a bill of exchange, three bills found in his pocket-book were admitted in evidence by Sutton, B., and proof was allowed of their being fabricated. All the judges agreed as to the propriety of introducing this evidence of guilty knowledge.⁶ So, again, other utterings of forged bills with intent to defraud were admitted in evidence by Williams, J., and *Green's case*⁷ was cited for the prosecution, together with *Wylie's case*.⁸

¹ *R. v. Downes*, East, P. C 997.

² *R. v. Beardsall*, 1 Fost. & F. 629.

³ *R. v. Williams*, 1 Lew. C. C. 123.

⁴ *R. v. Musgrave*, Id. 112. The bill was never presented for payment. Id. 138.

⁵ *R. v. James*, 4 Cox, 90. He was acquitted.

⁶ *R. v. Hough*, Russ. & Ry. 120. See *R. v. Ball*, post.

⁷ *R. v. Oddy*, was cited for the prisoner. 20 L. J. M. C. 198.

⁸ *R. v. Wylie*, 1 New Rep. 92. *R. v. Nisbett*, 6 Cox, 320.

So it was in the case of a forged acquittance.¹ But it is not so clear that a party can be convicted of forgery with intent to defraud, merely upon the circumstance of his having forged instruments in his possession. Crocker was tried before Le Blanc, J., for forging a promissory note. It was objected in the course of the inquiry, that there was no evidence of this note having been forged in the county of Wilts, the prisoner not being in Wiltshire, but in Somerset at the time when the note appeared to bear date. But as it was shown that the note was found in the prisoner's lodgings in Wiltshire, the learned judge admitted it. It was then objected that as the note had been kept in the prisoner's possession, and never uttered nor attempted to be made use of, there could not be any intent to defraud. But the learned judge considered that the question of the prisoner's guilt or innocence was entirely for the jury, and he was found guilty. The conviction, however, was held invalid upon another ground.² Nevertheless, two reporters have said that the judges were against the admissibility of the evidence as proof of a forgery in Wilts, but in Russell and Ryan this is doubted, the learned editors declaring, that no such decision on the part of the judges had ever transpired.³ Upon an indictment for uttering a forged bill, it appeared that the bill, with several others, was drawn by the prisoners upon the prosecutor, and that they had been paid into the bankers of the prisoner in Bucks to his credit, but by whom or when was not in evidence. Maule, J., held that there was no case for the jury. There was no proof of uttering in the county where the forgery was charged.⁴ What the prisoner has said concerning bills not in evidence is not admissible.⁵ The act of putting a letter into the post office is an uttering, and the post-office mark upon the letter containing the forged instrument, is evidence of that uttering.⁶ Upon an indictment for uttering a forged cheque in the name of J. W. on a firm of army agents and bankers, a clerk in the former department proved that he knew of no such customer as J. W., and that he had been told by the other clerks that there was no such person. This was held to be sufficient proof to call upon the prisoner to show that there was such a person as J. W., and in the absence of such evidence, it was of itself sufficient for the jury.⁷ A letter also written by the prisoner to a third person, saying that the name of that person is on another bill belonging to the prosecutor, and requesting him not to admit the last-mentioned bill to be a forgery, was allowed in evidence to

¹ *R. v. Phillips*, 3 Cox, 88, Russ. & Ry. 99, n. See *R. v. Rolfe*, B. *R. v. Edwards*, Id. *Smith*, 4 C. & P. 411.

89, n. *R. v. Clarke and another*, cited. *Contra* at Stafford, *R. v. Jackson and others*, Platt, B.

² *R. v. Crocker*, Russ. & Ry. 97; 2 New Rep. 87; Leach, 987. And see *R. v. Radford*, Den. 59.

³ 2 New Rep. 96; Leach, 996;

⁴ *R. v. Line*, 2 Cox, 56.

⁵ *R. v. Cooke*, 8 C. & P. 586.

⁶ *R. v. Perkins*, 1 Lew. C. C. 99, by Park, J., upon the authority of *R. v. Burdett*.

⁷ *R. v. Brannan*, 6 C. & P. 326.

show guilty knowledge.¹ But upon an indictment for forging a receipt, Byles, J., and Martin, B., agreed that other acts of forgery by the prisoner on the same prosecutor should not be given in evidence, although they would not trench upon the rules as to uttering in other cases.² A letter inclosing a forged bill was held to be evidence of uttering, without proving that the prisoner put it into the post.³ It is no defence to allege that there was no probability of a cheque being paid.⁴ Nor needs it to be proved that the supposed maker of a forged instrument had not given others authority to use his name.⁵ By 24 & 25 Vict. c. 98, s. 44, no intent to defraud any particular person need be proved, but it shall be sufficient to prove that the defendant did the act with intent to defraud.⁶

Foreign bills and notes.] The prisoner was indicted for forgery and uttering Polish notes. It was purposed to show that he had very recently been engaged in furthering the fabrication of Austrian notes, but an objection was made that this latter transaction had no concern whatsoever with the Polish forgeries, and that it had taken place a week before the offence which gave rise to the indictment; and, moreover, that no Austrian notes had, in fact, been made. However, the learned judge admitted this evidence for the purpose of showing a guilty knowledge. The count for forging the notes being abandoned, the learned judge doubted whether he had done right in allowing proof of certain dealings between the prisoner and an engraver with regard to Polish cash notes, which were not the subject of the indictment. The prisoner had paid the engraver for certain impressions of these latter notes. The judges considered this case, and being of opinion that the evidence was admissible, affirmed the conviction.⁷

Receipt for money or goods, or order for the delivery of goods.] It is essential, in order to sustain an indictment for forging a receipt, that this instrument should fully maintain the character attributed to it. A confused memorandum from whence it could hardly be collected, whether the acquittance applied to one matter or another, was deemed not to be within the statute of 2 Geo. 2.⁸ And a scrip receipt not filled up with the name of the subscriber was held by the judges not to be an instrument within the protection of the same Act.⁹ So where there was a memorandum stating that "Wm. Chinnery paid to X tomson, the sum of 8l. "Feb. 13, 1812," the judges held that this was no receipt; it was

¹ *R. v. Forbes*, 7 C. & P. 224.

² *R. v. Moore*, 1 Fost. & F. 73.

³ *R. v. M^cQuin*, 1 Cox, 34.

⁴ *R. v. Crowther*, 5 C. & P. 316.

⁵ *R. v. Hurley*, 2 Moo. & Rob. 473.

⁶ It is no excuse that the defen-

dant did not mean *ultimately* to defraud. *R. v. Trinfidd*, 1 Fost. & F. 43.

⁷ *R. v. Ball*, 1 Moo. C. C. 470; 7 C. & P. 426.

⁸ *R. v. Russell*, Leach, 8.

⁹ *R. v. Lyons*, Id. 597.

an assertion that Chinnery had paid the money, but it did not import an acknowledgment by Thompson.¹ And, "received for R. Aickman,—G. Arscott," was held not to be a receipt within the Act; for forging a receipt for money is writing the name of the person for whom it is received.² So under an indictment which charged the prisoner with having forged certain acquittances and receipts, a supposed scrip certificate of the London and South-Western Railway Company was held not to be a receipt and acquittance within 11 Geo. 4 and 1 Will. 4, c. 66.³ But four judges held it to be a receipt.⁴ And Coltman, J., held that it was an undertaking for the payment of money.⁵ And, it seems, that a railway scrip certificate was not within 1 Will. 4, c. 66, and that the forgery of such a document is, therefore, only a misdemeanor.⁶ An authority to the treasurer of a county to pay the expenses of a prosecution is not a receipt within 1 Will. 4, c. 66. Therefore, a forged signature at the back of an order purporting to be such an authority was held not to be within that Act.⁷ There was an order presented for payment of the costs of a prosecutor. The sum allowed was in figures opposite the name of the alleged witness, and an indorsement made as by the witness. This was not a receipt nor acquittance, but merely an authority.⁸ But where either upon the face of the instrument itself, or by proper explanatory averments, it appears that the writing is a legal voucher, a forgery may be made out.

" 18th March, 1773.

" Received the contents above by me,
" Stephen Withers."

It was objected that the particulars should have been set forth, that the bill and the receipt were an entirety, and that it by no means followed that the writing in question was a receipt for money. But the indictment having alleged the receipt to have been given with the name "Stephen Withers," of, &c., for the sum of 1*l.* and 4*s.*, the judges held the conviction right, for the bill itself was only evidence of the fact, and showed it to be a receipt for money as charged.⁹ So again, the word "paid, Sadler," were deemed a sufficient receipt. This was the act of a servant who had received money from her mistress to pay bills, and forged the name of Sadler with a small s, without writing any christian name. The mistress testified to her belief of its being a receipt, and the

¹ *R. v. Harvey*, Russ. & Ry. C. J., *dub.* The rest of the judges 227. *contra.* S. C. 2 Car. & K. 496.

² *R. v. Arscott*, 6 C. & P. 410.

⁶ *Clarke v. Newsam*, 1 Exch.

³ *R. v. West*, Den. 258, by eight judges:—Pollock, C. B.; Parke, B.; Alderson, B.; Coleridge, J.; Coltman, J.; Maule, J.; Rolfe, B.; Williams, J.

131.

⁷ *R. v. Cooper*, 2 Car. & K. 586.

⁸ *R. v. Parker*, 2 Cox, 274.

⁴ Lord Denman, C. J.; Wilde, C. J.; Wightman, C. J.; Erle, J.

⁹ *R. v. Testick*, East, P. C. 925, 977. *R. v. Taylor*, Id. 960, 977.

⁵ S. C. Lord Denman and Wilde,

learned judge (Denman) was of opinion that this was not a mere memorandum of the servant that she had paid Sadler, but, under the circumstances, that it was an acquittance within the statute.¹ An attorney was employed by the executors of a public accountant to settle the accounts of the testator with government. In order to deliver the testator's estates from an extent, he procured fabricated vouchers as from workmen employed, and tendered these papers as receipts to the navy board. It was objected, that that transaction lay between the testator and the workmen, and that the navy board had no concern with the truth or falsehood of the receipt; but the learned judges, having considered the case, were of opinion that the receipts had been knowingly uttered by the prisoner with intent to defraud the king, and the conviction was affirmed.² A receipt for an apprentice fee was held to be within the old statute, 2 Geo. 2.³ It was made a question in the following case, whether the instrument set out in the indictment was a receipt or an order for the payment of money, and the judges held it rightly described as a receipt, and affirmed the conviction.⁴

“Received the 22nd day of May, 1834, of Messrs. Cox & Co.,
“paymasters, royal regiment of artillery, the sum of 13*l.* sterling,
“being a part of subsistence for a detachment of Captain Bayley's
“company, second battalion, royal artillery at Woolwich, for the
“month of June, 1834.

“R. N. Poulden,
“Lieutenant Royal Artillery.”⁴

Moreover, although an instrument upon the face of it may not purport to be a receipt, yet by properly introducing averments, that which would not otherwise be deemed such a receipt, becomes such in law when thus explained. As in the case of a navy bill receipt which appeared thus:—

“Wm. Thornton,
“For receipts,
“Four pence;
“Wm. Hunter.”

Here the judges directed the judgment to be arrested only, because there was nothing in the indictment to explain the import of the words, or to show that they were in any way intended to signify that those persons had received the money, although, in fact, such a form had always been considered as a receipt at the Navy Office.⁵ Mr. Justice Buller thought, in this case, that the second count might be supported, which merely called the instrument a receipt, without adding that it was a navy bill,

¹ *R. v. Houseman*, 8 C. & P. Leach, 366. See also *R. v. Powell*, 180. Id. 77. *R. v. Harrison*, Id. 180.

² *R. v. Thomas*, Leach, 877; East, P. C. 934.

³ *R. v. Jones and another*,

⁴ *R. v. Hope*, 1 Moo. C. C. 414. *R. v. Rice*, 6 C. & P. 634.

⁵ *R. v. Hunter*, Leach, 624.

because it was like writing an indorsement upon a bill of exchange. But to this it was answered, that an indorsement is complete by writing the name on the bill, without more; whereas, the name itself, as stated in the indictment, was no receipt.¹ Again, where the words "settled, J. M.," were placed at the foot of a bill of parcels, but there was no averment to explain the meaning of these words, the court held, upon the authority of *Hunter's case*, that the indictment could not be supported, although the statute 35 Geo. 3,² had declared that the word "settled," amongst other words, should be a receipt within the meaning of that Act.³ So where the receipt stood thus: "1825, received, H. H.," but there was no averment to show the meaning of these initials, the judges were of opinion that the indictment was bad.⁴ But, "received the above rate," was held sufficient without any such averment.⁵ And the word "settled" was deemed, upon another occasion, not to require an explanation.⁶ A pawnbroker's duplicate, given as prescribed by 39 & 40 Geo. 3, c. 99, is an accountable receipt. A pawnbroker, on being summoned, produced before the justice this fabricated instrument. He had not given up all the goods which had been pledged. The court affirmed his conviction.⁷ So a forged paper without signature, thus, "received from Mr. Beudan—due to Mr. Warman, 17s., settled," was held to be a forged receipt within 1 Will. 4, c. 66, s. 10.⁸ So a receipt "6th Jany., 1830, 16*l.* 15*s.* 6*d.* for the high constable, James Hughes," requires no explanatory averments.⁹ The following instrument likewise was held to be an accountable receipt, although the fact of a receipt was not named throughout the document. In substance it was a receipt. "By order of R. F. Pries, we have this day transferred into the names of Messrs. C. & S., 759 quarters and 4 bbls. of wheat, ex. August, Ferdinand, Captain K. a Newstadt. Entered by W. F. Pries, and now lying at our granaries, B. Wall. The wheat is insured against risk of fire by us, Brown & Young, Corn Ex., October 23, 1852."¹⁰ The signature to a post-office order is required to be

¹ *R. v. Hunter*, Leach, 633.

² Cap. 55, s. 7.

³ *R. v. Thompson*, Leach, 910.

⁴ *R. v. Barton*, 1 Moo. C. C. 141.

⁵ *R. v. Maugham*, 8 C. & P. 276.

⁶ *R. v. Martin*, 1 Moo. C. C. 483; 7 C. & P. 549.

⁷ *R. v. Fitchie*, Dears. & B. 175; 26 L. J. M. C. 90.

⁸ *R. v. Inder*, Den. 325; 2 Car. & K. 635. By six judges:—Lord Denman, C. J.; Wilde, C. J.;

Cresswell and Erle, JJ.; Platt, B.; Williams, J. But five judges (Parke, B.; Coltman and Patteson, JJ.; Rolfe, B.; and Wightman, J.) thought that the document did not purport to be the receipt of Warman. If it was taken as the prisoner's receipt it was not forgery. But the offence was obtaining money under false pretences. Den. 326.

⁹ *R. v. Boardman*, 2 Moo. & Rob. 147.

¹⁰ *R. v. Pries*, 6 Cox, 165.

made by the payee. Byles, J., doubted whether this was an order or a receipt, but thought it an order.¹

A stamped agreement recited an arrangement in consideration of the payment of a sum of money thereby acknowledged; it then released the party. This was held to be a receipt or acquittance.² The prisoner signed a document which entitled him to receive a delivery note, and which in the course of the business of the B. Canal Company, would enable him to demand and have the goods described therein delivered, on payment of the charges for carriage. This was held to be a forging of a receipt within the 1 Will. 4, c. 66, s. 10, and Wightman, J., declared he had no doubt on the subject.³ It may be added, that it is no defence to say that the name at the foot of the receipt is a nonentity. The prisoner obtained 4*l.* from his employer for the purpose of getting certain liquid in the way of business, and subsequently tendered the forged receipt, but it was proved that no such firm was in existence as that written at the bottom of the account, and it was objected, that this, at the most, was but obtaining money under false pretences. But it being answered, that the prisoner was clearly accountable for the 4*l.* to his employer, the learned judge directed the jury, that if they thought the forged receipt had been uttered for the purpose of inducing a belief that the 4*l.* had been applied to get the liquid, which was the professed object in view, they might find the prisoner guilty of uttering; and the judges were of the same opinion, and confirmed the conviction.⁴ It is an uttering although the prisoner do not let the receipt leave his hand. He produced a forged receipt and exhibited it to a person for him to look at, but would not part with it. This person was manager for a creditor of the prisoner, and the prisoner's intent, therefore, was to defraud by showing the forged document. It was objected that this was not an act of uttering and publishing, and after conviction, the case was argued before the judges, but they held that the uttering was made out, and sentence was passed.⁵ It will be observed, that the section has the word "utter," consequently an alteration of the receipt will be a forgery. As where the receipt of a high constable was altered from 3*l.* 5*s.* 9*d.* to 3*l.* 15*s.* 9*d.*:⁶ and the addition of material words to the copy of a supposed receipt will in like manner be an alteration within the statute.⁷ A receipt and acquittance would seem to be almost synonymous. One J. M. had deposited 85*l.* in a bank, and he received from the bank an accountable receipt, thus,—

¹ *R. v. Ansell*, 8 Cox, 409. Guilty. Point reserved.

² *R. v. Hill*, 2 Cox, 246.

³ *R. v. Meigh*, 7 Cox, 401.

⁴ *R. v. Martin*, 1 Moo. C. C. 483.

⁵ *R. v. Radford*, Den. 59; 1 Car. & K. 707.

⁶ *R. v. Vaughan*, 8 C. & P. 276. See also *R. v. Hope*, ut supra.

⁷ 5 Esp. 101, by Lord Ellenborough. The copy was produced in evidence upon a suggestion that the original had been destroyed.

" M. F., 266.

" Darlington Bank, Stockton,
" 12 d. 6 m., 1839.

" Received of John Mann, eighty-five pounds to his credit.

" For Jonathan Backhouse & Co.,

" £85. Entered, F. B.

" Fred. Backhouse.

" This receipt not transferable."

The prisoner went to the bank with the receipt, and represented himself to be J. M., and wrote the words J. M. on the face of the receipt, and delivered it to the bankers, who paid him 87*l.* 17*s.* 6*d.*, the sum mentioned in the receipt, with interest. It appeared that this was the usual way of dealing between the bank and their customers. It was objected, that this was an order not for 85*l.*, but for 87*l.* 17*s.* 6*d.*; but the judges held the conviction good, and said that this was an acquittance for 85*l.* and interest.¹ So where the prisoner forged the indorsement of a shareholder on a cheque, he was held guilty of forgery.² The proof should be confined to the particular receipt, unless, indeed, other receipts could be proved to be forgeries.³

The indictment for forging a receipt states that A. on, &c., feloniously did forge a certain acquittance and receipt for money, with intent thereby to defraud. It is necessary, in an indictment for forging a deed to aver that it was sealed.⁴ But it seems, that "sealed and delivered" will suffice without averring the signature. For a deed is presumed to have been signed, although in the case of a mark it is proper to set out the mark; so that where the words, "Mary Wallace, her mark," were added after the mark had been made and attested, it was objected that these words were not in the note when it was subscribed. But nine judges held the conviction right. Perrott, B., and Aston, J., were of opinion that the charge was not well laid.⁵ And where the indictment charged the prisoner with forging the assignment of a lease, the court entertained the objection that the mark was not set out. In fact, the lease could not be assigned without a writing signed by the party,⁶ and the delivery must be averred.⁷

The prisoner was indicted for uttering a bond and writing obligatory. But there was no condition with a penalty nor defeasance attached to the instrument, and it was moved to arrest the judgment, because in the absence of such provisions, this writing could not be called a bond, but was, in fact, a writing obligatory. Never-

¹ *R. v. Atkinson*, 2 Moo. C. C. 215; 1 Car. & M. 325.

² *R. v. Autey*, 26 L. J. M. C. 190; 1 Dears. & B. 294.

³ *R. v. Moore*, 1 Fost. & F. 73.

⁴ *R. v. Newton*, 3 Keb. 388.

⁵ *R. v. Dunn*, East, P. C. 976; Stark. Cr. Pl. 522; Leach, 57.

⁶ *R. v. Goddard*, 3 Salk. 171; Lord Raym. 920.

⁷ *R. v. Smith*, East, P. C. 376. *Contra*, i.e., that the mark need not be set out, but Sir Edward East questions the authority of this decision.

theless, the judges decided against the objection, although, as the prisoner died in Newgate, no opinion was publicly given.¹ The words, "feloniously did falsely forge" a certain writing obligatory are good, although in fact the false bond be not binding on any one.² An indictment for forging and uttering a receipt was held ill upon one occasion, because it not only omitted to give any explanation of certain initials "H. H.," but also failed to show that H. H. had any authority to receive the money for which the receipt had been fraudulently given.³ Yet since the statute, 2 & 3 Will. 4, c. 123, s. 3, it is sufficient to describe a receipt generally as in an indictment for larceny, and it is not an objection to say that a receipt is not the subject of larceny.⁴ Where the receipt of a high constable was forged, it was considered that the act might be laid with intent to defraud any rated inhabitant, by name, of the parish where the rate has been imposed, and others.⁵ A forged request was made to a woman in her maiden name. She, however, married before the date of it. It was held, that an indictment for uttering might well lay the intent to have been to defraud the husband.⁶ It is better in describing an instrument which may be a warrant, order, or request, to call it one warrant, one order, and one request, and not a certain warrant, order, and request. But where it was objected that the instrument was merely a request, and was yet called a warrant, order, and request, the court said in answer, that the instrument was set out *verbatim*, and sustained the conviction.⁷ But where each count set out a good warrant, but called it a warrant and order, the prisoner was acquitted.⁸

Warrant, order, or request for the delivery of goods, &c.] In considering this point, care must be taken not to confound a request of the nature alluded to with an order for the payment of money, for if the document be merely a request, and the indictment represent it as an order, the judges will direct a fresh indictment to be preferred. Thus :

"July 11, 1838.

"Mr. Lang, please to send one piece of lead by the bearer, 12 long 16 wide.

"George Kilby,
"Queenborough."

¹ *R. v. Dunnett*, Leach, 581.
R. v. Hayworth, 1 Lew. C. C. 122.

² *R. v. King*, Holt's C. 326.

³ *R. v. Barton*, 1 Moo. C. C. 141.

⁴ *R. v. Martin*, Id. 483, 485 ;
7 C. & P. 549; *R. v. Vaughan*,
8 C. & P. 276. See *R. v. Powell*,
Leach, 77.

⁵ *R. v. Vaughan*, 8 C. & P. 276.

⁶ *R. v. Carter*, 7 C. & P. 134.

⁷ *R. v. Williams*, 20 L. J. M. C. 106. The request was,

"Sydney St. Dec. 22nd, 1849.

"Mr. Beeran. S— Please to
send by bearer a quantity of basket
nails to clasp, for

"E. Lloyd."

⁸ *R. v. Dixon*, 3 Cox, 289. See,
however, *R. v. Smith, cor.* Cole-
ridge, J. *contra*, 2 Cox, 358.

The prisoner pleaded guilty, but the judges held that this was a request, not an order, and the conviction was held wrong.¹

The following paper was charged in an indictment as an undertaking, and a warrant, and an order for the payment of money :

“Taunton, Fore Street, Feb. 20, 1841.

“Messrs. Seager, Evans, & Co.

“Gentlemen,—I shall feel obliged by your paying Mr. Bennett the sum of 2*l.* 7*s.* 8*d.*, and debiting me with the same; you will please have a receipt, and add the amount to invoice of order in hand.

“I am, &c.,

“T. D. Chappell.

“London, Feb. 24.
“T. Bennett.”

“Distillers, &c., Millbank, Westminster,
“Received 2*l.* 7*s.* 8*d.*

The judges held this to be a forged request, and the conviction wrong. It was not an undertaking, for none was expressed in the document. It was not an order, for it did not purport to be one in form. It was no warrant according to the decided cases, though it might have been otherwise if *res integra*. It was not an authority to pay over, the prisoner having no control over the money. The conviction was considered wrong.² So again :

“Monmouth, June 9, 1842.

“Mr. Fisher, I should feel greatly obliged if you will please to send me by the bearer the sum of 3*l.*, as I have had a large quantity of bones this week, and the man from Coleford is coming in to-morrow with 10 cwt. I have about one ton now.

“Yours, Thomas Davis.

“Mr. P. Fisher, Lanwanne.”

This was laid in the indictment as an order for the payment of money. But the judges held the conviction wrong, because this was not an order, but only a request, the party not having any right nor power to make an order.³

“I hereby authorize my servant man, Abraham Egan, to procure a watch of you.

“To Mr. Thomas Kellitt, Thorn.”

Cresswell, J., admitting the fineness of the distinction, held that the instrument was not properly described as an order and request for the delivery of goods, and directed an indictment to be preferred for obtaining the watch by false pretences.⁴ The register of shareholders bearing the seal of the company, and kept according to 8 & 9 Vict. c. 16, s. 9, is evidence to prove the fact of A. being an individual shareholder without more, and further proof need not be given that such a person might be defrauded.⁵ The proof of the receipt of goods by the prisoner is, by itself, no evi-

¹ *R. v. Newton*, 2 Moo. C. C. 59.

² *R. v. Thorn*, 2 Moo. C. C. 210; Car. & M. 206.

³ *R. v. Roberts*, 2 Moo. C. C. 258; Car. & M. 652.

⁴ *R. v. Egan*, 1 Cox, 29.

⁵ *R. v. Nash*, Den. & P. 493.

dence of uttering an order. He went to the station and inquired for, and got the parcel in question. This was held to be no evidence of uttering.¹ Nevertheless, it must be understood that an order for the delivery of goods is not the less so, because it may likewise be an undertaking for the payment of money. Thus:—"Please to let the lad have a hat, and I will answer for the money."²

The goods mentioned in the forged request need not be specified, as "Sir, please to deliver my work to the bearer."³ A description for legal certainty will be enough. Thus: "Please to let the bearer, William Gaff, have spilshord and grafting tool for me."⁴ So, "Please to let the bearer, A.B., have for — 4 yards of linen."⁵ Therefore, the defendant was acquitted upon an indictment for obtaining money under false pretences.⁶ So again, "Please to give bearer 2 bars of solder, 2 brushes. Mr. Chapman, Lambs Conduit Place."⁷ So, "Please to let W. T. have such things as he wants for the purpose. I have the amount of 27*l.* for M. C. in my keeping for many years." The prisoner had said that M. C. had died, and had left him 50*l.* or 60*l.* in the hands of the person whose name he had forged, and that he wanted mourning.⁸ And the request need not be addressed to any person.⁹ So again, "August 3, 1839, one 16 in. helmet scoop, one 4 qt. kettle, James Hayward." This was held to be a request for the delivery of goods.¹⁰ Therefore, the objection which prevailed in *Clinch's case* as to the want of an address prevails no longer.¹¹ A permit to taste wine at the docks, although not countersigned by the clerk of the company, through which omission the fraud was discovered, was held to be an order within 1 Will. 4, c. 66. And secondly, the court held it to be an order for the delivery of goods, and although the quantity delivered for testing was very small, yet the court would not apply the maxim *de minimis non curat lex*.¹² The rule respecting special averments, used to obtain in the case of warrants, orders, and requests of this nature. So, that where the following paper was alleged in the indictment to be a forged request, without an innuendo to explain it, it was not considered to be an instrument within the stat. 1 Will. 4, c. 66.

"Per bearer.

"88 Aldgate St.

"2¼ superior counterpain.

"J. Davies.

"E. Twell."

In this case the jury said they considered this paper as a request

¹ *R. v. Johnson*, 6 Cox, 18.

² *R. v. White*, 9 C. & P. 282.

³ *R. v. Jones*, Leach, 53.

⁴ *R. v. James*, 8 C. & P. 292.

⁵ *R. v. Evans*, 5 C. & P. 553.

⁶ S. C.

⁷ *R. v. Hussey*, 1 Cox, 345.

⁸ *R. v. Thomas*, 2 Moo. C. C. 16; 7 C. & P. 851.

⁹ *R. v. Carney*, 1 Moo. C. C. 351. And see *R. v. Cullen*, Id. 300.

¹⁰ *R. v. Pulbrook*, 9 C. & P. 37.

¹¹ Leach, 540.

¹² *R. v. Illidge*, Den. C. C. 404; 2 Car. & K. 871.

for the delivery of goods mentioned in it, and such papers were in trade so considered. But the judges directed the judgment to be arrested, for the words "per bearer" did not necessarily import "send per bearer." They might mean, "I have sent per bearer." There was no innuendo to explain them.¹ But now, since the 2 & 3 Will. 4, c. 123, s. 3, it would appear that such an objection would not be efficient. A forged request has been distinctly recognized to be within the provisions of the Act.² [Trim. 2s.] By presenting this, the prisoner obtained what he wanted. But Platt, B., and Patteson, J., said, this was neither an order nor a request, and by Platt, B., you cannot by parole evidence make that a request which is not so on the face of it.³ The course of dealing between A. and B. was this: A. wrote the names of persons in a list with a sum against each name. Upon the sight of this list B., was to furnish goods on A.'s credit to each name on the list, and to the amount set against the names. It was held that this list was a request for the delivery of goods, and that an alteration in one of the sums in it was a forgery within the statute of William.⁴

Indictment.] The indictment states that A. on, &c., feloniously did forge a certain warrant [order, request] for the delivery of goods with intent thereby then to defraud, against the form, &c. The principle of admitting secondary evidence in proof of an instrument after due notice to produce the original is well known. Either the prisoner or his attorney may be warned to produce the matter required. And where it appeared that the prisoner's attorney had made use of a deed in an ejectment, which deed had been returned, it was held that the attorney need not be called to say what he had done with the deed, in order to let in secondary evidence after notice.⁵ Secondary evidence in this case being accordingly given, it appeared that several words which were set out at length in the instrument, had been abbreviated in the draft, as "Oxon" for Oxford, &c. It was objected that there was a variance. But the learned judge said that this point was entirely for the jury, and that they must decide whether the words abbreviated in the draft were inserted at length in the deed itself.⁶ Proof of the signing and sealing of a deed is also evidence of the delivery, if the deed be in the possession of the party to be benefited, but not so if it be in the possession of the person to be bound by it.⁷ The intent to defraud may well be gathered from the transaction itself. The prisoner's asseverations of honest intentions will avail him but slightly if his conduct be not consistent with them. Thus, in the case of uttering a forged stock receipt, although the prosecutor and his brother swore they believed that the prisoner had no design to commit a fraud, yet as it was the necessary effect and consequence of the forgery, if the prisoner could not repay the

¹ *R. v. Cullen*, 1 Moo. C. C. 300; 5 C. & P. 116.

² *R. v. Robson*, 2 Moo. C. C. 183.

³ *R. v. Ellis*, 4 Cox, 258.

⁴ *R. v. Walters*, Car. & M. 588.

⁵ *R. v. Hunter*, 4 C. & P. 128.

⁶ S. C. Verdict, Not guilty.

⁷ *R. v. Hayworth*, 1 Lew. C. C. 122.

money, it was sufficient evidence of the intent for the jury to convict the prisoner, and the judges held the conviction right.¹ The prisoner, in this last case, was acquitted upon the two first counts, because they charged an intent to defraud the governor and company of the Bank of England, whereas it appeared in evidence that one R. M. alone could have been defrauded.²

CHAPTER XII.

FORGERY CONNECTED WITH RECORDS AND PROCESS.

Forgery connected with records and process.] By 24 & 25 Vict. c. 98, s. 27, whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any record, writ, return, panel, process, rule, order, warrant, interrogatory, deposition, affidavit, affirmation, recognizance, *cognovit actionem*, or warrant of attorney, or any original document whatsoever, of or belonging to any court of record, or any bill, petition, process, notice, rule, answer, pleading, interrogatory, deposition, affidavit, affirmation, report, order, or decree, or any original document whatsoever of or belonging to any court of equity or court of admiralty in England or Ireland, or any document or writing, or any copy of any document or writing, used or intended to be used as evidence in any court in this section mentioned, shall be guilty of felony, and liable to penal servitude not exceeding seven nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 28, punishments are ordained against any person who being the clerk of any court, or other officer having the custody of the records of any court, or his deputy, shall utter any false copy or certificate of any record,³ knowing the same to be false; and who, other than such clerk, officer, or deputy, shall sign or certify any copy or certificate of any record as such clerk, officer, or deputy; or shall forge or fraudulently alter, or offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any copy or certificate of any record, or shall offer, &c. any copy or certificate of any record having thereon any false or forged name, handwriting, or signature, knowing the same to be false or

¹ *R. v. Sheppard*, Russ. & Ry. 169.

² Russ. & Ry. *ut supra*.

³ This will include false certificates of convictions.

forged; or shall forge the seal of any court of record, or forge or fraudulently alter any process of any court other than such courts as in the last preceding section mentioned, or shall serve or enforce any forged process of any court, knowing the same to be forged, or deliver or cause to be delivered to any person any paper falsely purporting to be any such process, or a copy thereof, or to be any judgment, decree, or order of any court of law or equity, or a copy thereof, knowing the same to be false, or shall act or profess to act under any such false process, knowing the same to be false.¹

And by sect. 29, the same penalties await those who shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any instrument, whether written or printed, or partly written and partly printed, which is or shall be made evidence by any Act, and for which offence no punishment is herein provided.

It does not appear that the stat. 8 Ric. 2, c. 4, is repealed by 24 & 25 Vict. c. 98, s. 27, but it is virtually superseded by that statute. It declares, that if any judge or clerk falsely enter any pleas, rase any rolls, or charge any verdict to the disherison of any one, he shall be punished by a fine to the king, and by making satisfaction to the injured party. But the stat. 8 Hen. 6, c. 12, concerning the stealing or secreting of records, has been repealed.

A letter was written by the prisoner threatening county court proceedings, not in any way resembling process, but headed with the royal arms, and purporting to be signed by the clerk of a county court. His conviction was held right.² Bramwell, B., thought that the statute applied only to false pretences when there was a genuine process.³ But the same rule was applied afterwards, and *Evans's case* was relied upon,⁴ and Bramwell, B., held himself bound by *R. v. Evans*.⁵

By 1 & 2 Vict. c. 94, s. 19, every person belonging to the public record office, who shall certify any writing as a true and authentic record in the custody of the master of the rolls, knowing it to be materially false; and any person who shall for that purpose counterfeit the signature of an assistant record keeper, or shall forge the seal of the public record office, shall be guilty of felony, and liable to transportation⁶ for life, or not less than seven years,⁷ or to imprisonment not exceeding four years.

¹ Judges, bailiffs of inferior courts, counties, hundreds, honours, manors, &c. By 7 Vict. c. 19, s. 9, the word "judge" in that Act shall mean the county clerk, under sheriff, steward, or other person by or before whom the court shall be holden. By sect. 5, to forge the seal or any process of the court, or knowingly serve or enforce such process, or knowingly deliver a false copy of a summons from the court, or act under it, or to act as a bailiff of such court without authority,

was made felony, and punishable with penal servitude under 20 & 21 Vict. c. 3, s. 2, or imprisonment under 7 & 8 Geo. 4, c. 28, s. 8. This Act is not repealed.

² *R. v. Evans*, Dears. & B. 236; 26 L. J. M. C. 92.

³ S. C.

⁴ *R. v. Richmond*, 28 L. J. M. C. 188.

⁵ S. C.

⁶ Now penal servitude.

⁷ Penal servitude not exceeding three years.

CHAPTER XIII.

FORGERY OF COURT ROLLS.

Forgery of court rolls.] By 24 & 25 Vict. c. 98, s. 30, Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any court roll or copy of any court roll, relating to any copyhold or customary estate, with intent to defraud, shall be guilty of felony, and liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

Indictment.] That A. on, &c., a certain court roll [or copy of a court roll] feloniously did forge with intent to defraud.

Second count—uttering.

CHAPTER XIV.

FORGERY—REGISTRY ACTS.

Registry Acts.] The forgery of memorials, affidavits, &c., under the Registry Acts,¹ is made punishable by 24 & 25 Vict. c. 98, s. 31, by which, whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any memorial, affidavit, affirmation, entry, certificate, indorsement, document, or writing, made or issued under the provisions of any Act passed or hereafter to be passed for or relating to the registry of deeds, or shall forge or counterfeit the seal of or belonging to any office for the registry of deeds, or any stamp or impression of any such seal; or shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of any person to any such memo-

¹ 2 & 3 Ann. c. 4 [West Riding of Yorkshire]; 5 Ann. c. 18 [Investments of such deeds]; 6 Ann. c. 35, s. 26 [East Riding]; 7 Ann. c. 20 [Middlesex]; 8 Geo. 2, c. 6, s. 31 [North Riding of Yorkshire]; 13 & 14 Vict. c. 72.

rial, &c., which shall be required or directed to be signed by or by virtue of any Act, or shall offer, utter, dispose of, or put off any such memorial or other writing as in this section before mentioned, having thereon any such forged stamp or impression of any such seal, or any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

CHAPTER XV.

FORGING ORDERS OF JUSTICES, RECOGNIZANCES, &c.

Forging orders of justices, recognizances, &c.] By 24 & 25 Vict. c. 98, s. 32, whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any summons, conviction, order, or warrant of any justice of the peace, or any recognizance purporting to have been entered into before any justice of the peace, or other officer authorized to take the same, or any examination, deposition, affidavit, affirmation, or solemn declaration, taken or made before any justice of the peace, shall be guilty of felony, and liable to be kept in penal servitude for three years, or to imprisonment for any term not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 34, whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall, in the name of any other person, acknowledge any recognizance or bail, or any *cognovit actionem*, or judgment, or any deed or other instrument, before any court, judge, or other person lawfully authorized in that behalf, shall be guilty of felony, and liable to penal servitude not exceeding seven years nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

CHAPTER XVI.

FORGERY—ACCOUNTANT-GENERAL, JUDGE OF IRISH
LANDED ESTATES COURT, &c.

Forgery—Accountant-general, &c.] By 24 & 25 Vict. c. 98, s. 33, whosoever, with intent to defraud, shall forge or alter any certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument, or writing, made or purporting or appearing to be made by the accountant-general, or any other officer of the Court of Chancery in England or Ireland, or by any judge or officer of the Landed Estates Court in Ireland, or by any officer of any court in England or Ireland, or by any cashier or other officer or clerk of the governor and company of the Bank of England or Ireland, or the name, handwriting, or signature of any such accountant-general, judge, cashier, officer, or clerk as aforesaid, or shall offer, utter, dispose of, or put off any such certificate, &c., knowing the same to be forged or altered, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

Registrar of admiralty.] By 53 Geo. 3, c. 151, s. 12, to forge &c., the name or hand of the registrar of the Court of Admiralty, &c., to any certificate, entry, indorsement, &c., in order to receive the money of the suitors, or any certificate, &c., made by such registrar, &c., or knowingly to alter the same, was made felony.¹

¹ And punishable under 20 & 21 Vict. c. 3, s. 2, with penal servitude not exceeding three years, or under 7 & 8 Geo. 4, c. 28, s. 8, with imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and once,

twice, or thrice, public whipping. See also 3 & 4 Vict. c. 64. The office of receiver of prebends at the alienation office is abolished. 5 & 6 Will. 4, c. 82, s. 1. It was felony to forge his handwriting.

CHAPTER XVII.

FORGERY—BIRTHS, BAPTISMS, MARRIAGES, BURIALS.

Forgery—Births, &c.] By 24 & 25 Vict. c. 98, s. 35, whosoever shall forge or fraudulently alter any licence of or certificate for marriage,¹ or shall offer, utter, dispose of, or put off any such licence or certificate, knowing the same to be forged or fraudulently altered, shall be guilty of felony, and liable to penal servitude not exceeding seven nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 36, whosoever shall unlawfully destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any register of births, baptisms, marriages, deaths, or burials in England or Ireland,² or any certified copy of such register, or shall forge or fraudulently alter in any such register any entry relating to any birth, baptism, marriage, death, or burial, or any certified copy of such register, or of any part thereof, or shall knowingly and unlawfully insert or cause, &c. in any such register, or in any certified copy thereof, any false entry of any matter relating to any birth, baptism, marriage, death, or burial, or shall knowingly and unlawfully give any false certificate relating to any birth, baptism, marriage, death, or burial, or shall certify any writing to be a copy or extract from any such register, knowing such writing, or the part of such register whereof such copy or extract shall be so given, to be false in any material particular, or shall forge or counterfeit the seal of or belonging to any register office or burial board, or shall offer, utter, dispose of, or put off any such register, entry, certified copy, certificate, or seal, knowing the same to be false, forged, or altered, or shall offer, utter, dispose of, or put off any copy of any entry in any such register, knowing such entry to be false, forged, or altered, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

And by sect. 37, whosoever shall knowingly and wilfully insert or cause or permit to be inserted in any copy of any register directed or required by law to be transmitted to any registrar or other officer, any false entry of any matter relating to any baptism, marriage, or burial, or shall forge or alter, or shall offer, utter, dis-

¹ The forgery of a marriage licence is a misdemeanor at common law. *R. v. Dudley*, 2 Sid. 71; East, P. C. 907.

² “Or any part.” So throughout the clause.

pose of, or put off, knowing the same to be forged or altered, any copy of any register so directed or required to be transmitted as aforesaid, or shall knowingly and wilfully sign or verify any copy of any register so directed or required to be transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false, or shall unlawfully destroy, deface, or injure, or shall for any fraudulent purpose take from its place of deposit, or conceal, any such copy of any register, shall be guilty of felony, and liable to be kept in penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

The following was held not to have been an uttering within 1 Will. 4, c. 66, s. 20. A. gave to B. a forged certificate of a pretended marriage between himself and B. in order that she might give it to C.¹

And by 20 & 21 Vict. c. 81, s. 15, it is enacted, that every person who shall wilfully destroy or injure, or cause to be destroyed or injured, any register book of burials, kept according to the provisions of this Act, or any part or certified copy of any part of such register, or shall falsely make or counterfeit, or cause to be falsely made or counterfeited, any part of any such register or certified copy thereof, or shall wilfully insert or cause to be inserted in any registry book or certified copy thereof any false entry of any burial, or shall wilfully give any false certificate, or shall certify any writing to be a copy or extract of any such register book, knowing the same to be false in any part thereof, or shall forge or counterfeit the seal of any burial board, shall be guilty of felony.

A registrar took down the particulars of a birth from a woman, and had made the entry; *she* signed it; the particulars were false. This was not a false statement under sect. 41 of the statute 6 & 7 Will. 4, c. 86, but it was a false entry under the 43rd section, and a felony.²

The prisoner was charged with destroying, defacing, and injuring a register of baptisms. The evidence was, that whilst the clergyman turned his back, the prisoner tore off the lower portion of one of the leaves of the parish register. The part of the leaf was entirely torn off and separated from the residue. The prisoner's defence was that the leaf was torn off by accident, but the jury found that it was done wilfully. The case then went before the judges upon three points:—1st, it was said, that as the register, when produced, had the torn piece pasted to the residue of the leaf, so that it was as legible as before, this could not be a destroying, defacing, or injuring within the statute: 2ndly, the indictment charged three distinct offences, destroying, defacing, and injuring, and one offence only was proved: 3rdly, there was no averment of guilty knowledge. But the judges were against the prisoner upon all the points, and the conviction

¹ *R. v. Heywood*, 2 Car. & K. 352.

² *R. v. Dewitt*, 2 Car. & K. 905.

was affirmed.¹ It makes no difference that the marriage register cannot be the subject of larceny, and so not within the clause, for the provision is, that no greater certainty need be used than in an indictment for stealing it.² In the same case it was decided that the judge could take judicial notice, that the parish of Seighford, in the county of Stafford, was a parish in England, and that the indictment need not aver that fact.³

CHAPTER XVIII.

DEMANDING MONEY UPON FORGED INSTRUMENTS.

By 24 & 25 Vict. c. 98, s. 38, Whosoever, with intent to defraud, shall demand, receive, or obtain, or cause or procure to be delivered or paid to any person, or endeavour to receive or obtain, or to cause or procure to be delivered or paid to any person, any chattel, money, security for money, or other property whatsoever, under, upon, or by virtue of any forged or altered instrument whatsoever, knowing the same to be forged or altered, or under, upon, or by virtue of any probate or letters of administration, knowing the will, testament, codicil, or testamentary writing on which such probate or letters of administration shall have been obtained to have been forged or altered, or knowing such probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

CHAPTER XIX.

FORGERY.—(5 El. c. 14, [repealed.])

By 24 & 25 Vict. c. 98, s. 47, Whosoever shall, after the commencement of this Act, be convicted of any offence which shall have been subjected by any Act or Acts⁴ to the same pains and penalties as are imposed by the Act passed in the fifth year of the reign of Queen Elizabeth, intituled “An Act against Forgers of false Deeds and Writings,” for any of the offences first enumerated in the said Act, shall be guilty of felony, and shall, in lieu of such pains and penalties, be liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

¹ *R. v. Bowen*, 1 Car. & K. 501 ;
Den. 22.

² *R. v. Sharpe*, 8 C. & P. 436.

³ *Id.*

⁴ As the Registry Acts, 2 & 3
Ann. c. 4 ; 5 Ann. c. 18 ; 8
Geo. 2, c. 6, s. 31 ; 7 Ann. c. 30,
&c.

CHAPTER XX.

FORGERY—BANKRUPTCY COURT.

By 24 & 25 Vict. c. 134, s. 205, if any person shall forge the signature of any commissioner, registrar, master, &c., of the court, or the seal of the court, or concur in using them for the purpose of authentication, or knowingly tender in evidence any document with a counterfeit signature or seal, he shall be guilty of felony, and punishable under the provisions of 8 & 9 Vict. c. 113.¹

CHAPTER XXI.

FORGERY OF OTHER LEGAL DOCUMENTS.

Official or public documents.] By 8 & 9 Vict. c. 113, s. 4, if any person shall forge the seal, stamp, or signature of the certificates mentioned in that Act, or of official and public documents, documents of corporations, joint-stock and other companies, or certified copies of documents, byelaws, entries in registers and other books, &c., or knowingly tender in evidence such false instruments, or shall forge the signature of any judge to any order, decree, certificate, &c., or knowingly tender such a false instrument, or if any person shall print a copy of any private Act, or of the Journals of either house of parliament, falsely purporting to have been printed by the printers of the crown, or of either house of parliament, or knowingly tender any such false copy, any such person shall be guilty of felony and punishable with penal servitude not exceeding three years, or imprisonment not exceeding three years, nor less than one year, with hard labour.

Similar punishments are awarded by 14 & 15 Vict. c. 99, s. 17, against persons forging the seal, stamp, or signature of the documents mentioned in that Act, or wilfully tendering such forged documents.

Lunacy.] The same punishments await such as forge the signature of the registrar in lunacy, or his seal, or who knowingly con-

¹ With penal servitude not exceeding three years, under 20 & 21 Vict. c. 3, s. 2, or imprisonment for not more than three years, nor less than one year, with hard labour.

The corresponding section of 12 & 13 Vict. c. 106, s. 273, was not repealed, because the new Act did not take effect till the 11th of October.

cur in using such false instruments, or who knowingly tender in evidence any document with a false signature or seal.¹ The signature and seal of the registrar in lunacy are protected in the same manner.²

Court of Chancery officer.] By 11 & 12 Vict. c. 45, s. 112, to forge the signature of any master or registrar or other officer, or the official seal of the report or other office of the Court of Chancery, subscribed, &c. to any order, &c., or to tender the same in evidence, knowing it to be false, is made felony, and punishable as forgeries under 8 & 9 Vict. c. 113.³

Court of Admiralty.] By 17 & 18 Vict. c. 78, s. 10, to forge the signature or official seal of any commissioner, judge, or other officer of the Court of Admiralty, or other person authorized to administer oaths, or knowingly to tender in evidence any answers, &c., with a false or fraudulent seal, is made felony, and punishable, &c., under 8 & 9 Vict. c. 113.⁴

Probates, &c.] By 20 & 21 Vict. c. 71, s. 28, to forge the signature of any registrar, district registrar, or commissioner for taking oaths, or any seal of the Court of Probate, or knowingly to use or concur in using such, or knowingly to tender in evidence any document with a false signature or seal, is felony, and punishable with penal servitude for life or not less than seven years, or imprisonment not exceeding three years, with or without hard labour.

CHAPTER XXII.

OF PROCEDURE IN FORGERY.

Forging instruments in England or Ireland, purporting to be payable out of England or Ireland.] First, by 24 & 25 Vict. c. 98, s. 40, where the forging or altering any writing or matter whatsoever, or the offering, uttering, disposing of, or putting off any writing or matter whatsoever, knowing the same to be forged or altered, is in this Act expressed to be an offence, if any person shall, in England or Ireland, forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any such writing or matter in whatsoever place or country out of England and Ireland, whether under the dominion of Her Majesty or not, such writing or matter may purport to be made or may have been made,

¹ 15 & 16 Vict. c. 87, s. 33.

² 16 & 17 Vict. c. 70, s. 102.

³ That is, by penal servitude not exceeding three years, (20 & 21

Vict. c. 3, s. 2,) or imprisonment not exceeding three years, nor less than one year, with hard labour.

⁴ See note 3 above.

and in whatever language the same or any part thereof may be expressed, every such person, and every person aiding, abetting, or counselling, shall be deemed to be an offender within the meaning of this Act, and punishable as if the writing or matter had purported to be made or had been made in England or Ireland; and if any person shall in England or Ireland forge or alter, &c., any bill of exchange, or any promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or security, or any deed, bond, or writing obligatory for the payment of money (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for the payment of money together with some other purpose), or any indorsement on or assignment of any such undertaking, &c., in whatsoever place or country out of England and Ireland, whether under the dominion of Her Majesty or not, the money payable or secured by such bill, &c., may be or may purport to be payable, and in whatever language the same respectively or any part thereof may be expressed, and whether such bill, &c., be or be not under seal, every such person, and every person aiding, &c., shall be deemed to be an offender within the meaning of this Act, and punishable as if the money had been payable or had purported to be payable in England or Ireland.

Principal and accessory.] By 24 & 25 Vict. c. 98, s. 49, every principal in the second degree, and every accessory before the fact in cases of felony under the Act, shall be punishable as principals in the first degree. And the accessory after the fact shall be liable to two years' imprisonment, with or without hard labour, and solitary confinement; and every aider and abettor of any misdemeanor under the Act shall be punishable as a principal offender.

The statute of accessories, 24 & 25 Vict. c. 94, does not mention the principal in the second degree.

Trial.] By 24 & 25 Vict. c. 98, s. 41, if any person shall commit any offence against this Act, or shall commit any offence of forging or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case shall be indictable at common law, or by virtue of any Act passed or to be passed, every such offender may be dealt with, indicted, tried, and punished, in any county or place where apprehended, or where in custody, as if his offence had been actually committed there, and every accessory before or after the fact, if the offence be a felony, and every person aiding, &c., if the same be a misdemeanor, may be dealt with, &c., in any county or place where he shall be apprehended or be in custody, as if his offence, and the offence of his principal, had been actually committed in such county or place.

Admiralty.] By 24 & 25 Vict. c. 98, s. 50, all indictable offences mentioned in this Act which shall be committed within the jurisdiction of the admiralty of England or Ireland shall be deemed to be the like offences as if they had been committed upon the land in England or Ireland, and punishable accordingly, and may be dealt with in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, as if actually committed in that county or place; and in any indictment for any such offence, or for accessory, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed on the "high seas;" provided that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.

Costs in misdemeanor.] By 24 & 25 Vict. c. 98, s. 54, the court before which any indictable misdemeanor against this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in felony; and every order for payment shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in all respects as in cases of felony.

Punishments for offences capital before the 1 Will. 4, c. 66, and 24 & 25 Vict. c. 98.] There are several offences, especially with reference to offences against the revenue, which were punishable with death before the passing of 1 Will. 4, c. 66, and yet were not punishable under that Act. The first section then provided that no such forgeries should any longer remain capital, but be punishable under that Act with other and less penalties.

And now, by 24 & 25 Vict. c. 98, s. 48, personation, false representations, false entries, &c., false transfers, false oaths, &c., demands upon the strength of forged documents, also capital before the statute 1 Will. 4, c. 66, offences by any person making or using, or knowingly having in his custody or possession, any frame, mould, or instrument for the making of paper, with certain words visible in the substance thereof, or any person making such paper, or causing certain words to appear visible in the substance of any paper, capital in like manner, shall now, if not punishable under any other provision of the Act, be punishable with penal servitude for life or not less than three years,—or imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

Fine and sureties.] By 24 & 25 Vict. c. 98, s. 51, upon a conviction for a misdemeanor under this Act, the court, in addition to or in lieu of any of the punishments by this Act authorized, may fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in felonies in this Act mentioned the court may require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any of the punishments by this Act authorized; but

no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

Hard labour and solitary confinement.] By 24 & 25 Vict. c. 98, s. 52, hard labour may be added to imprisonment where both are mentioned as punishments.

And by sect. 53, the solitary confinement may be for any portion of his imprisonment, or imprisonment with hard labour, not exceeding one month at any one time, nor three months in one year.

CHAPTER XXIII.

OF FORGERIES RELATING TO THE GOVERNMENT AND REVENUE.

Forgeries relating to the government and revenue.] It appears that the old Acts relating to stamps, as 12 Geo. 3, c. 48, &c., although not expressly repealed, are yet superseded by more recent enactments. And the first to which we shall advert is the 55 Geo. 3, c. 184, s. 7. By that Act if any person shall forge, &c., or cause, &c., any stamp, or die, or any part, relating to any stamp duty, or forge, &c., the impression or any part thereof, upon any vellum, parchment, or paper, or shall stamp or mark, or cause any vellum to be stamped, &c., with a forged stamp, or die, or part, with intent to defraud His Majesty; or if any person shall utter, or sell, or expose to sale any vellum, &c., having thereupon the impression of any such forged stamp, or die, or part, or any such forged impression, or part, knowing the same to have been forged, or if any person shall privately and secretly use any such stamp or die, with a like fraudulent intent, or fraudulently cut, tear, or get off, or cause, &c., the impression of any such stamp, or die, or part, with intent to use the same upon any other vellum, &c., or any instrument or writing charged with duty, he shall, together with aiders and abettors, be guilty of felony.¹ By sect. 8, all the powers, provisions, &c., contained in, and imposed by the Acts of parliament, relating to the duties repealed by the 55 Geo. 3, c. 184, and the several Acts of parliament relating to any prior duties of the same kind, shall be of full force with respect to the duties granted by 55 Geo. 3, c. 184, and to the vellum, &c., charged or chargeable therewith, as far as the same are or shall be applicable in all cases hereby not expressly provided for, and shall be observed, &c., so far as the same shall not be superseded by, and shall be consistent with the present Act, as if they were specially enacted with reference to the duties granted under this Act of 55 Geo. 3.

The statute 52 Geo. 3, c. 143, s. 7, is, amongst others, either superseded or repealed by the 55 Geo. 3, c. 184, and 9 Geo. 4,

¹ *R. v. Palmer*, Leach, 352; East, P. C. 893.

c. 18; but an exception is made when the offences thereby punishable relate to other than the matters specified in such enactment.¹ It is believed that the Act, moreover, of 55 Geo. 3, c. 184, s. 7, contains the provisions now applicable to the forgery of stamps on newspapers. For the 55 Geo. 3, c. 185, and 6 Geo. 4, c. 119, having been in this respect superseded, the Act 55 Geo. 3, c. 184, alone remains to satisfy the provisions of the statute 6 & 7 Will. 4, c. 76, s. 1, concerning newspapers. By that section all the powers, &c., contained in, and imposed by the several Acts of parliament relating to the stamp duties, and not repealed by that Act, shall be of full force and effect with respect to the duties thereby granted as far as the same are or shall be applicable in all cases not thereby (*i. e.* by 6 & 7 Will. 4) expressly provided for with reference to paper.²

Again, by 3 & 4 Will. 4, c. 97, s. 12, knowingly, and without lawful excuse, the proof whereof shall be on the person accused, to have in possession any false, forged, or counterfeit die, plate, &c., or part, resembling, &c., any die, &c., of the commissioners of stamps, or any vellum, parchment, or paper, having thereupon the impression of any such false die, &c., or part, or having thereon any false stamp, mark, or impression, resembling, &c., the stamp, &c., of any such die, &c., with a guilty knowledge; or fraudulently using, joining, fixing, or placing for, with, or upon any vellum, &c., any stamp, &c., which shall have been cut, torn, or gotten off from any other vellum, &c., or fraudulently erasing, cutting, scraping, discharging, or getting out of or from any stamped vellum, &c., any name, sum, date, &c., with intent to use any stamp, &c., than that impressed, or that the same may be used for any deed, &c., subject to stamp duty; or knowingly using, uttering, selling, or exposing to sale, or knowingly, &c., (the proof, &c.,) having in possession any stamped vellum, &c., from, or off, or out of which any such name, &c., shall have been fraudulently erased, &c., are respectively declared to be felonies. And aiders and abettors are likewise included within the same penalty. By sect. 11 of this same Act, if false stamps are found in the possession of vendors, licensed to sell stamps, such vendors, unless they can prove the contrary, shall be deemed to have such stamps with intent to vend them.³ By sect. 15, justices may issue warrants for seizing stamps suspected to be stolen or fraudulently obtained. Sect. 24 gives an appeal to the sessions. It is no defence to urge that the prisoner took off a stamp from the parchment innocently in the first instance, as where he cut off the stamps and part of the parchment, if he afterwards separated the blue paper, tearing the impression from the parchment with a fraudulent intent to use it upon some other writing.⁴ But where there was apparently an absence of intention to defraud, although the Act

¹ Lonsdale, p. 78.

² See Lonsdale, 81, note.

³ *R. v. Field*, Leach, 383.

⁴ *R. v. Smith*, 1 Moo. C. C. 414; 5 C. & P. 107.

does not say that such an intent is necessary to constitute the offence, Lord Abinger summed up very strongly for an acquittal, and the prisoner was accordingly found not guilty.¹ By 55 Geo. 3, c. 185, s. 7, to forge, &c., or cause, &c., any mark, stamp, or die, provided, &c., under the Act, or any former Act, concerning gold or silver plate, made or wrought in Great Britain, for the purpose of marking or stamping any such plate; or forging, &c., or causing, &c., the impression of any such mark, &c., with a fraudulent intent; or making, &c., or causing, &c., any such plate, or vessel, or any ware of base metal with any such forged mark, &c., or transposing, or removing, or causing, &c., from one piece of gold or silver plate to another, or to any vessel, or ware of base metal, any impression made with any mark, &c., provided or made, &c., as aforesaid, or selling, exchanging, or exposing to sale, or exporting out of Great Britain, any such plate or vessel, &c., with a forged mark or impression, or transposed impression, with a guilty knowledge, or wilfully and without lawful excuse (the proof whereof shall lie on the person accused) having the possession of any such forged mark, &c., or privately and secretly using any mark, &c., with intent to defraud, are made felonies, and aiders and abettors are included in the like provisions.

By 9 Geo. 4, c. 18, s. 35, to forge, &c., or cause, &c., any type, die, seal, stamp, mark, plate, or device, or any part provided, &c., by the commissioners of stamps, under the Act, or to counterfeit, or cause, &c., the impression thereof, or any part, upon any playing card or dice, or upon any label, thread, or paper, or forging, &c., the name, handwriting, or signature of any sealing officer or other officer of stamps, to, or upon, any paper, wrapper or material, in which any dice shall be actually inclosed; or forging, &c., or causing, &c., any mark or name, or any part directed to be used by the commissioners of stamps, in order to distinguish the maker of any such cards, &c., and printed and marked on, or affixed to, or making part of the wrapper, label, or paper, in which any playing cards or dice shall be actually inclosed, with intent to defraud; or to utter or sell, or expose to sale, or part with for use in play, any card, die, ace of spades, label, wrapper, or jeu whatsoever, with such counterfeit seal, stamp, &c., knowing the same to be counterfeit; or privately or fraudulently to use any seal, &c. of the commissioners of stamps, with intent to defraud, are respectively made felonies.

This enactment supersedes or repeals the statute 55 Geo. 3, c. 184, s. 7, except so far as the offences thereby made punishable relate to other than the materials specified in such enactments.²

What is an uttering.] The act of delivering a box containing, amongst other things, forged stamps, to the servant of the party himself, and by his own hands, in order that the box might be forwarded to a customer in the country, was held to be an uttering.

¹ *R. v. Allday*, 8 C. & P. 136.

² *Lonsdale*, p. 78.

And, moreover, as all the parts of the stamps so uttered, and which were visible, were like genuine stamps, it was still deemed to be an uttering, notwithstanding that certain parts which were concealed were unlike true stamps.¹ And again, in the same case, it was held, that the indictment need not set out the impression or inscription, or the stamp, and, therefore, that the mention of it as a "certain paper writing with a forged and counterfeit mark;" and again, "a certain mark" and "a certain stamp" was correct.²

Judgment.] The judgment under 55 Geo. 3, c. 184, s. 7, is, that the party be transported for life, or not less than seven years,³ or suffer imprisonment not exceeding four nor less than two years, with or without hard labour and solitary confinement.

Under 3 & 4 Will. 4, c. 97, s. 12, the sentence was transportation for life, or not less than seven years,⁴ or imprisonment not exceeding four nor less than two years. The judgment under 55 Geo. 3, c. 185, s. 7, is the same with that under 55 Geo. 3, c. 184, s. 7, and the incidents are similar; under 9 Geo. 4, c. 18, s. 35, there is the same judgment.

By 2 Will. 4, c. 16, s. 3, every person who shall make, or cause or procure to be made, or shall aid or assist in the making, or shall knowingly have in his, her, or their custody or possession, not being authorized by the said commissioners, and without lawful excuse, the proof whereof shall lie on the person accused, any mould or frame or other instrument having therein the words "excise office," or any other words, figures, marks, or devices peculiar to and appearing in the substance of the paper used by the said commissioners for permits, or with any or part of such words, figures, marks, or devices, or any of them, intended to imitate or pass for the same; and every person, except as before excepted, who shall make, or cause or procure to be made, or aid or assist in the making, any paper in the substance of which the words "excise office," or any other words, figures, marks, or devices peculiar to or appearing in the substance of the paper used by the commissioners of excise for permits, or any part of such words, figures, marks, or devices, or any of them, intended to imitate and pass for the same, shall be visible; and every person, except as before excepted, who shall knowingly have in his, her, or their custody or possession, without lawful excuse, (the proof whereof shall lie on the person accused,) any paper whatever in the substance of which the words "excise office," or any other words, figures, marks, or devices peculiar to and appearing in the substance of paper used by the commissioners of excise for permits, or any part of such words, figures, marks, or devices, or of any of them, intended to imitate and pass for the same, shall be visible; and every person, except as before excepted, who shall, by any art,

¹ *R. v. Collicott*, Russ. & Ry. 212, 229; Leach, 1048; 4 Taunt. 300. or not less than three years: 20 & 21 Vict. c. 3, s. 2.

² Leach, 1048, 1053; 1 Will. 4, c. 66, ss. 1, 26. ⁴ Now penal servitude for life under 20 & 21 Vict. c. 3, s. 2, or not less than seven years.

³ Now penal servitude for life,

mystery, or contrivance, cause or procure, or aid or assist in causing or procuring, the words "excise office," or any other words, figures, marks, or devices peculiar to and appearing in the substance of the paper used by the commissioners of excise for permits, or any or part of such words, figures, marks, or devices, or any of them, intended to imitate and pass for the same, to appear visible in the substance of any paper whatever; and every person, not authorized or appointed as aforesaid, who shall engrave, cast, cut, or make, or cause or procure to be engraved, cast, cut, or made, or aid or assist in engraving, casting, cutting, or making, any plate, type, or other thing in imitation of or to resemble any plate or type made or used by the direction of the commissioners of excise for the purpose of marking or printing the paper to be used for permits; and every person, except as before excepted, who shall knowingly have in his or her custody or possession, without lawful excuse, proof whereof shall lie on the person accused, any such plate or type; shall for every such offence be adjudged a felon, and shall be transported for the term of seven years, or shall be imprisoned, at the discretion of the court before whom such person shall be tried, for any period not less than two years.¹

Paymaster-general.] To forge the handwriting of the paymaster-general appointed under 5 & 6 Will. 4, c. 35, seems to be punishable with penal servitude for life, or not less than three years, or with imprisonment not exceeding two years, with or without hard labour, and solitary confinement.²

Excise.] By 46 Geo. 3, c. 75, s. 8, to forge the handwriting of the receiver-general of excise to any draft, &c., or knowingly to utter the same, was made felony.³

Permits.] By 2 Will. 4, c. 16, s. 3, persons making paper in imitation of excise paper, and forgers of plates or types for permits are guilty of felony, and punishable by penal servitude⁴ not exceeding three years, or imprisonment for not less than two years. And by sect. 4, to forge a permit, or any stamp or mark belonging to it, or knowingly to alter it, is a misdemeanor, punishable with penal servitude not exceeding three years,⁵ or fine and imprisonment.

Customs.] By 16 & 17 Vict. c. 107, s. 28, to forge the handwriting of the receiver-general of the customs, or of the comptroller-general, &c. to any draft or instrument to obtain money from the bank, or to forge any draft, in form of a draft, or utter the same with intent to defraud, is felony, and punishable with

¹ Penal servitude: 20 & 21 Vict. c. 3, s. 2.

² 24 & 25 Vict. c. 98, s. 48; 46 Geo. 3, c. 45, s. 9; 5 & 6 Will. 4, c. 35, s. 7.

³ Now punishable under 24 & 25 Vict. c. 95, s. 48.

⁴ 20 & 21 Vict. c. 3, s. 2.

⁵ Id.

transportation for life.¹ By 16 & 17 Vict. c. 107, s. 304, offences relating to the customs may be tried in any county. And by sect. 305, such prosecutions, whether by suit, indictment, or information, are limited to three years next after the date of the offence. But this does not apply to an indictment found by the grand jury at the assizes,² nor to an indictment, wherever preferred, for a conspiracy to remove goods fraudulently from a bonding warehouse.³

Stamps.] By 46 Geo. 3, c. 76, s. 9, to forge the handwriting of the receiver of the stamp duties, &c., to a draft, &c. upon the bank, or a draft in form of a draft, or knowingly to utter the same, is felony, and punishable with penal servitude for life or not less than three years, or imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

Mediterranean passes.] The proceeding for forging or uttering a Mediterranean pass is almost obsolete, though not abolished. The offence would be punishable under 24 & 25 Vict. c. 98, s. 48. The same may be said of forging certificates of quarantine.⁴

However, by 6 Geo. 4, c. 78, s. 21, if any officer of the customs or other officer charged with the duties of quarantine, shall desert his duty, or permit any person, vessel, goods, or merchandise to depart, or be conveyed out of the lazaret, vessel, &c., without permission from the king or privy council, or shall give a false certificate of the performance of quarantine, he shall be guilty of felony.⁵

Loans. Scrip receipts.] The forgery of scrip receipts in respect of loans is punishable, unless otherwise dealt with, under 24 & 25 Vict. c. 98, s. 48. The uttering of a scrip receipt is complete if it happens after the passing of an Act of parliament, although it might have been signed before. But an indictment, stating that the prisoner forged a scrip receipt, signed C. O., and purporting to have been signed by one "Christopher O," was deemed bad.⁶ Another indictment, however, setting out the tenor only of the instrument, was held sufficient.⁷ And it was likewise held, that a scrip receipt, stating the subscription to have been in respect of so much three per cent. consols, was good for a *new* loan;⁸ and that such a receipt was valid, though the subscribers were entitled not only to the consols, but also to reduced and to long annuities.⁹

Land tax.] By 52 Geo. 3, c. 143, s. 6, to forge a certificate for

¹ Now penal servitude for life :
20 & 21 Vict. c. 3, s. 2.

² *R. v. Thompson*, 16 Q. B.
832.

³ *Id.* Coleridge, J.

⁴ 6 Geo. 4, c. 78, s. 25.

⁵ And punishable under 7 Geo. 4,
c. 28, ss. 8, 9.

⁶ *R. v. Reeves*, Leach, 808.

⁷ Leach, 819.

⁸ *Id.* 816.

⁹ *Id.* 818.

the redemption or sale of the land tax, or knowingly to utter it, is punishable in like manner under 24 & 25 Vict. c. 98, s. 48.

Public works and fisheries.] And so again, with regard to certificates for authorizing exchequer bills to carry on public works and fisheries.¹ But this Act is said to be superseded, as to receipts, by 1 Will. 4, c. 66, s. 10,² and the offence was punishable under this latter statute, and now under 24 & 25 Vict. c. 98, s. 48.

Public pensions and salaries.] With respect to public pensions and salaries, the orders under 4 & 5 Will. 4, c. 24, concerning these, are orders for the payment of money, and the punishment is, therefore, regulated by 24 & 25 Vict. c. 98, s. 48.

Life annuities.] By 10 Geo. 4, c. 24, s. 41, to forge the registers of nominees, or to make any false declarations, warrants, &c. with reference to life annuities, is made penal and punishable in like manner. So it is in the case of forging or uttering registers, certificates, and transfers concerning the national debt.³

Navy pay and prize money.] So to forge any instrument relating to the pay, prize money, bounty, purser's money, &c. of the navy, or any certificate, or any receipt for wages, &c., or the handwriting of any officer of the navy, or marines, &c., or uttering any similar documents,⁴ or to personate any commission, warrant or petty officer, seaman, or commission or non-commissioned officer of marines, or the wife, widow, or relation, executor, administrator, or creditor of any such officer, &c., or any person entitled to any allowance from the compassionate fund of the navy, in order to receive any wages, pay, &c. with intent to defraud.⁵

By 11 Geo. 4 and 1 Will. 4, c. 20, s. 85, fraudulently and deceitfully to take a false oath, in order to obtain probate of any will or letters of administration of the effects of any deceased commission, warrant, or petty officer, or seaman, or commission or non-commissioned officer of marines, or marine, &c. fraudulently to receive or demand any wages, pay, prize money, &c. payable or supposed to be payable for the service of any such officer, &c., or from the compassionate fund of the navy, or any pension to the widow of an officer upon or by virtue of any probate, &c. with a guilty knowledge, is made felony, and punishable as in the case above mentioned under sect. 84. By sect. 86, to subscribe any false petition or application to the treasurer of the navy, or to the paymaster of marines, with a false and deceitful representation that

¹ 3 Geo. 4, c. 86.

² Lonsdale, 87.

³ 2 Will. 4, c. 59, s. 19; 24 & 25 Vict. c. 98, s. 48.

⁴ 11 Geo. 4 and 1 Will. 4, c. 20, ss. 83, 88; 24 & 25 Vict. c. 98,

s. 48. The 2 Will. 4, c. 40, s. 35, repeals certain portions of this Act of 11 Geo. 4.

⁵ 11 Geo. 4 and 1 Will. 4, c. 20, s. 84.

the party is the widow, executor, or nearest of kin of any deceased commission or warrant officer of the navy, or commissioned officer of the marines, or any petty officer or seaman, &c., or to utter or publish any such petition, &c. with a guilty knowledge, in order to procure or enable any other person to procure a certificate from the inspector of seamen's wills or paymaster of marines, and thereby to obtain or enable any other person to obtain without probate, or letters of administration, payment of any wages, &c., or probate, &c., or to receive or demand any wages, &c., with a guilty knowledge, is made felony, and punishable by transportation¹ for fourteen, or not less than seven years, or imprisonment for three years, or not less than one year. By sect. 88, all imprisonments may be with or without hard labour, and solitary confinement. Principals in the second degree, and accessories before the fact, are to be punished as principals in the first degree.² Accessories after the fact are punishable with imprisonment (as above), not exceeding two years.

Army prize money, &c.] By 2 Will. 4, c. 53, s. 49, knowingly and willingly to personate, &c. (or procure the same), the name or character of any officer, &c., supposed to be entitled to any prize money, &c., for or on account of any service performed, &c. by any officer, &c., or to personate, &c. (or aid and procure the same), the name or character of the executor or administrator, wife, widow, next of kin, relation, or creditor of any such officer, &c., in order to receive, or enable any other person to receive, any prize money, &c., due or payable, or supposed so to be, for or on account of any service performed, &c., by any such officer, &c., with intention to receive, obtain, or claim, or to enable any other person to receive, obtain, or claim, from the commissioners of the Royal Hospital, or from any officer, under officer, &c., the payment of any such prize money, &c., with intention to defraud any person or body corporate, or knowingly to take a false oath in order to receive, obtain, or claim any prize money, &c., or demand or receive any prize money, &c., due or payable, &c., upon letters of administration or probate of a will, knowing the will to be forged, or the letters of administration, or the probate of such will, to have been obtained by means of such false oath, with intention to defraud any person or body corporate, are all respectively made felonies, and punishable with transportation³ for life, or not less than seven years.⁴ Accessories after the fact seem to be punishable under 7 & 8 Geo. 4, c. 28.⁵ By sect. 50, all prize money, &c., which shall become payable to the treasurer or deputy treasurer of Chelsea Hospital, as in the Act is

¹ Penal servitude for fourteen and not less than three years.

² *R. v. Potts*, Russ. & Ry. 353.

³ Penal servitude: 20 & 21 Vict. c. 3, s. 2.

⁴ Penal servitude not less than three years.

⁵ Sect. 8, 9. Lonsdale, pp. 55,

36.

mentioned, shall be deemed to be public monies in the hands of any person receiving or detaining the same. Under statutes of a similar nature with these it has been held that the prosecutor must give direct evidence of the taking of the oath, and although the counsel for the prosecution upon one occasion requested that the opinion of the judges might be taken upon the point, the court directed the jury that unless they believed that the prisoner had actually taken the oath, they should acquit him.¹ In forgery, a conviction may take place although the offender has employed a fictitious name, or that of a person who never had existence, but this is not so in personation. Brown was indicted for personating William Wheeler, in order to obtain certain prize money for services on board the *Terpsichore*. But it turned out that there was no such person as William Wheeler on board that ship, nor was there any evidence of the existence of such a person. The judges held the conviction wrong.² So, again, the prisoner was charged with personating Peter M'Cann, in order to gain prize money for services done on board the *Tremendous*. It appeared that there was such a person as Peter M'Cann entitled to prize money, but not Peter M'Cann. The jury found that the prisoner meant to personate Peter M'Cann, but the judges held that he had not been rightly convicted, for there was no person named M'Cann who could be said to have been connected with the ship, and that was a fact necessary to be proved upon the indictment.³ But the objection of non-existence does not stand in the same light with that of the death of a soldier or seaman, who, of course, was once the living person entitled to the prize money, or supposed to have such a claim. In the latter cases the decease of that party before the offence will not make it the less punishable, as where the prisoner was charged with personating J. B., a seaman, for the purpose of acquiring certain prize money. The clerk, however, said he had reason to believe that J. B. was dead, upon which the prisoner went away, but was subsequently apprehended. It was objected for him that the statute applied to existing persons only, and, therefore, that he, who was dead, could not be supposed to be entitled to the prize money which his next of kin were at that time endeavouring to obtain by suing out letters of administration, and *Brown's case* was cited. It was answered, that several convictions had taken place under such circumstances, and the judges were of opinion that the conviction was proper.⁴

West Indies relief commissioners.] So to forge any certificate, &c. of the West Indies relief commissioners.⁵

¹ *R. v. Brady*, Leach, 327. Verdict, Not guilty.

² *R. v. Brown*, East, P. C. 1007. *R. v. M'Annely*, Id. 1009.

³ *R. v. Tannet*, Russ. & Ry. 351.

⁴ *R. v. Martin*, Russ. & Ry. 324.

R. v. Cramp, S. P. Id. 327. Both cases were tried in Kent by Bosanquet, Serjt., and both convictions were affirmed.

⁵ 2 & 3 Will. 4, c. 125, s. 64; 24 & 25 Vict. c. 98, s. 48.

Abolition of slavery receipts.] So again to forge, alter, or utter any receipt connected with the abolition of slavery, was made punishable in like manner, under 1 Vict. c. 84, s. 1.¹

Officers at Chelsea. Prize money.] To forge the hand of any public officer at Chelsea concerned in the paying of prize money is felony, and punishable by transportation for life, or not less than seven years.² And by the same clause it is equally penal to forge, &c., the name of any officer, non-commissioned officer, soldier, or other person entitled to prize money, grant, bounty money, share or other allowance of money, as pensions, or any letter of attorney, bill, ticket, order, certificate, voucher, receipt, will, &c., concerning the payment of prize money, for the purpose of obtaining the same, and it is the same to utter such instruments with a guilty knowledge.³

Half-pay officers' widows' pension.] By 2 & 3 Will. 4, c. 106, s. 3, it is felony to forge any certificate, &c., concerning half-pay officers' and widows' pensions. And it is an offence punishable with penal servitude not exceeding three years, or imprisonment not exceeding four years.⁴ In order to sustain an indictment under these statutes, it is not necessary that the person should ever have had existence, therefore an indictment for forging a letter of attorney relating to a pension merely supposed to be payable, was held good.⁵

Soldiers' and sailors' pensions.] By 2 & 3 Vict. c. 51, s. 9, to forge, &c., or aid or assist, &c., in forging any minute, &c., or other allowance, order, &c., concerning the payment of any pension money under that Act, or to utter the same as true, &c., or forge the name of any pensioner, justice, guardian, parish officer, &c., authorized to sign any such document, in order to obtain or enable any other person to obtain payment of the same, is declared to be felony. And the convict may be transported for such term of years, or suffer such other punishment as the court may adjudge.⁶

The following offences are declared to be punishable with such pains and penalties, as by laws in force any persons convicted of forgery are subject to.⁷

Savings banks.] To forge the registers of birth, baptism, death, or burial, under the Savings Bank Annuities Act, or any copy or

¹ 5 & 6 Will. 4, c. 45, s. 12; 24 & 25 Vict. c. 98, s. 48. See also 5 & 6 Will. 4, c. 51.

² 2 Will. 4, c. 53, s. 49. Penal servitude: 20 & 21 Vict. c. 3, s. 2.

³ See 9 Geo. 4, c. 16, s. 38. Which, as far as it relates to prize money, is probably superseded by this statute.

⁴ 20 & 21 Vict. c. 3, s. 2.

⁵ *R. v. Pringle*, 2 Moo. C. C. 127; 9 C. & P. 408.

⁶ The section as to punishments is rather inartificially drawn, but it would seem that penal servitude for any term short of life, or imprisonment, may be inflicted.

⁷ 16 & 17 Vict. c. 45.

certificate of the same, or the name of any witness to such certificate, or any declaration made under the Act, or any justice's certificate, or officer's certificate, under the commissioners for the reduction of the national debt, of any such declaration having been taken before him, or any certificate of any governor, person acting as such, minister, or consul, or chief magistrate of any province, town, or place, or other person authorized by this Act to grant any certificate of the life or death of any annuitant.

National debt.] Also to forge, &c., certificates of officers of the commission for the reduction, &c., or of any cashier or clerk of the Bank of England or Ireland, or the name of any person in or to any certificate or other instrument for the payment of money for the purchase of any annuity, or sum payable at death, under the provisions of this Act, or in or to any receipt or discharge for any such annuity, or in or to any receipt or discharge for any payment due or to become due therein, or for any sum payable at death, under the provisions of this Act; or authorizing, or purporting to authorize the receipt of any life annuity, or any annuity for years of whatsoever kind, or sum payable at death, granted under this Act, or the Acts hereby repealed,¹ or any payment due or to become due thereon; wilfully to *personate* any true and real annuitant;² wilfully to utter, or deliver, or produce any such forged register or copy, or any such forged certificate or declaration knowingly, &c.;—all these acts are felonies, and punishable as any persons convicted of forgery are by any laws in force liable to.³

Savings banks. Seamen.] So to forge or make false representations in order to obtain deposits or interest under the Act for establishing savings banks for seamen, is made punishable with *penal servitude* not exceeding four years, or imprisonment with or without hard labour not exceeding two years, or, if upon a summary conviction and prosecution, by imprisonment, with or without hard labour, not exceeding six calendar months.⁴ All criminal proceedings are, by sect. 9, to be carried on as under the Merchant Shipping Act, 1852.

Public works, woods and forests.] The surveyor of public works, woods, and forests, or his deputy, is protected by the statute 10 Geo. 4, c. 50, s. 124, and 2 Will. 4, c. 1, s. 1, and the punishment appears to rest under 7 & 8 Geo. 4, c. 28, ss. 8, 9.⁵

¹ 3 Will. 4, c. 14; 7 & 8 Vict. c. 83.

² 16 & 17 Vict. c. 45, s. 31.

³ *Id.* It is difficult to say what sentence should be pronounced. This is a forgery not capital, 1 Will. 4, c. 66, and, therefore, not within the 24 & 25 Vict. c. 98, s. 48. It was not intended that this

should be treated as a forgery at common law, but it would seem to be a stretch of the interpretation statutes to hold it otherwise.

⁴ 19 & 20 Vict. c. 41, s. 6.

⁵ Lonsdale, p. 196. And it is certainly a subject for discussion how far the punishment can be otherwise than at common law.

Wrappers. Playing cards.] By 16 & 17 Vict. c. 107, s. 116, to forge, &c., any wrapper belonging to playing cards, or utter, or be possessed, without lawful excuse, of the same, is felony, and punishable in like manner as forging names or marks provided by the commissioners of inland revenue.¹

Ship's registry.] By 17 & 18 Vict. c. 104, s. 101, to forge, &c., utter, &c., any register book, or certificate, &c., bill of sale, or other instrument relating to a ship's registry, is declared to be felony.² By sect. 179, every shipping master, or other public officer, who grants or issues any money order with a fraudulent intent, shall be deemed guilty of felony, and liable to penal servitude not exceeding four years. By sect. 203, every person forging, &c., uttering, &c., any document regarding seamen's wages and property, or making use thereof, or giving or procuring false evidence or representation, shall be punishable with penal servitude not exceeding four years, or imprisonment, with or without hard labour, not exceeding two years, or, upon summary conviction, imprisonment, with or without hard labour, not exceeding six months.³

Petty Bag Office.] By 12 & 13 Vict. c. 109, s. 20, to forge any seal belonging to the Petty Bag Office, or make or utter such, or use or tender in evidence or utter any such false impression with a guilty knowledge, or to forge any writ, record, &c., of the office, or out of chancery, or tender in evidence, the same as before, unlawfully and falsely to stamp or seal with any seals belonging thereto any writ, &c., or fraudulently tender in evidence the same so falsely sealed, is made felony. And all persons aiding, abetting, or assisting are likewise punishable as felons.⁴

Post office and postage duties.] By 1 Vict. c. 36, s. 33, to forge the handwriting of the receiver-general of the post office, or of that of any person employed by, or under him, to any draft, &c., or to forge, &c., any draft, warrant, or order of such person with a fraudulent intent, is declared to be felony, and punishable with transportation for life;⁵ or by sect. 41, for not less than seven years,⁶ or imprisonment

¹ Penal servitude for life, or not less than seven years, or imprisonment not exceeding two years, with or without hard labour, or solitary confinement.

² And punishable under 7 Geo. 4, c. 28, ss. 8, 9.

³ The better opinion would be, notwithstanding the omission, that the convict would be guilty of *felony*.

⁴ *Id est*, with penal servitude not exceeding three years, (20 & 21 Vict. c. 3, s. 2,) or imprisonment not exceeding two years, with or without hard labour, and solitary confinement. 28 Geo. 4, c. 28, ss. 8, 9.

⁵ Penal servitude for life: 20 & 21 Vict. c. 3, s. 2.

⁶ Penal servitude not exceeding three years.

for a term not exceeding four years, with or without hard labour, and solitary confinement.¹

By sect. 35 of this Act of 1 Vict. c. 36, principals in the second degree and accessories are to be punished as principals, and accessories after the fact (except receivers) may be imprisoned for two years.² The trial may be where the party has committed the offence, or where he is apprehended, or is in custody.³

The 39th section includes these offences within the jurisdiction of the admiralty.

And as to postage duties, by 3 & 4 Vict. c. 96, s. 22, the following acts are declared to be felonies, and punishable with transportation for life,⁴ or for not less than seven years,⁵ or with imprisonment not exceeding four nor less than two years. Again, forging, or causing, &c., any die, plate, or other instrument respecting the postage duties charged under 2 & 3 Vict. c. 52, and this Act. Forging, or causing, &c., the stamp, mark, or impression, or any part of such die, &c., upon any paper made under this Act. Having in possession, or without lawful excuse (the proof whereof shall lie on the party accused), any forged die, plate, or other instrument, or any part resembling, &c., either wholly, or in part, any die, &c., provided under the Act. Stamping or marking, or causing, &c., any paper, or other substance with any such forged die, &c., or part of such die, &c. Using, uttering, selling, or exposing to sale, or causing, &c., or having in possession as aforesaid any paper or other substance, or material having thereon the impression or part of the impression of any such forged die, &c., or part of such die, &c., or having thereon any forged stamp or impression resembling, &c., the stamp, mark, &c., of any such die, &c., with a guilty knowledge. Privately and fraudulently using with intent to defraud the crown, or causing, &c., any die, &c., provided or to be provided as aforesaid. Privately or fraudulently stamping with the like intent, or causing, &c., any paper or other substance, or material, with any such die, &c., knowingly as aforesaid. Having in possession any paper, &c., so fraudulently stamped, &c., as aforesaid.

With respect to postage covers, it is ordained by sect. 29 of the same Act, that whoever shall make, or cause, &c., or aid in making, or shall knowingly have in possession, without lawful excuse (the proof whereof, &c.), any mould or frame, or other instrument having thereon any words, letters, figures, marks, lines, or devices peculiar to, and appearing in the substance of any paper for postage covers, envelopes, or stamps, or any machinery, or parts thereof for working threads into the substance of any paper, or any such thread, and intended to imitate or pass for such words, &c., or whoever shall unlawfully make or cause, &c., or aid in the making of any paper in the substance of which shall be worked or

¹ Sect. 42. 1 Vict. c. 90, s. 5.
Franks are abolished, and, therefore, the 34th section is obsolete.

² See sect. 42.

³ Sect. 37.

⁴ Penal servitude.

⁵ Three years.

appear visible any words, &c., peculiar to and worked into, and appearing visible in the substance of any paper for postage covers, &c., or any part of such words, &c., and intended to imitate or pass for the same, or shall knowingly have in his possession as aforesaid any paper of the like nature, or shall by art, mystery, and contrivance cause or procure, or aid in causing, &c., such words, &c., to be so worked, &c., shall be adjudged a felon, and be transported for seven years,¹ or imprisoned for any period not less than two years.²

Oaths and notarial acts abroad.] By 18 & 19 Vict. c. 42, s. 5, if any person shall forge, or tender in evidence, the forged seal or signature of any British ambassador, envoy, &c., consul-general, consul, &c., to any document in testimony of any oath, affidavit, &c., administered and sworn, &c., shall be guilty of felony, and be liable to penal servitude for four years, or imprisonment, with or without hard labour, not exceeding three years, nor less than one year; such document may be impounded. The venue may be in the county where the prisoner was apprehended, or is in custody; and every accessory shall follow the venue as in the case of the principal offender.

Wills of petty officers and seamen.] By 2 Will. 4, c. 40, s. 33, it is enacted, that the petition for probate of wills, of letters of administration of the effects of any deceased petty officer or seaman, or non-commissioned officer of marines, or marine, or for obtaining a check or certificate in lieu of probate or letters of administration in cases of claims where the deceased's assets shall not exceed 32*l.* and 20*l.* respectively, shall be addressed to the inspector of seamen's wills, and shall be forwarded to the secretary of the admiralty; and if any person shall subscribe, transmit, utter or publish any false petition or application to the said inspector, knowing the same to be false, in order to obtain, or to enable any other person to obtain, any check or certificate in lieu of probate or letters of administration as aforesaid, every person so offending shall be deemed guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported³ for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year. Principals in the second degree and accessories before the fact, are probably punishable as principals in the first degree, and accessories after the fact are liable to be imprisoned for two years.

¹ Penal servitude.

³ Penal servitude not exceeding

² Buying such paper, &c., is a fourteen nor less than three years. misdemeanor.

CHAPTER XXIV.

OTHER FORGERIES AFFECTING COMMERCIAL PERSONS OR COMPANIES.

Insurance companies.] Securities belonging to insurance societies have been made the subjects of attention with reference to forgery by several statutes: as the London Royal Insurance Companies, by 6 Geo. 1, c. 18, s. 13. The punishment, as far as bonds and orders for the payment of money are concerned, seem to have been under 1 Vict. c. 84, ss. 1, 3, and now under 24 & 25 Vict. c. 96, ss. 20, 23; and with reference to any other offence therein, under 24 & 25 Vict. c. 98, s. 48. By 54 Geo. 3, c. 133, s. 10, and 54 Geo. 3, c. 144, s. 11, to forge the name or handwriting of any underwriter to any contract of insurance or declaration of return of premium, or fraudulently to alter such declaration after the signing thereof, for the purpose of obtaining an allowance from the commissioners of spoiled stamps, is made punishable, for the first offence, with a penalty of 500*l.*, and for the second, with transportation for seven years.¹ Accessories after the fact are punishable under 7 & 8 Geo. 4, c. 28.

Dutch Bay Hall Company.] The statute 12 Car. 2, c. 22, s. 4, (however obsolete, yet unrepealed,) protected the seals of the Dutch Bay Hall Corporation, at Colchester. For the third offence of counterfeiting them, the offender shall suffer as a felon.² The statute 4 Geo. 3, c. 37, s. 15,³ related to the English Linen Company, and the offence of forging their common seal was punishable under 1 Will. 4, c. 66, ss. 1, 26.⁴ The forging of their bonds and bills was punishable under 1 Will. 4, c. 66, ss. 4, 10, respectively.⁵ The British Society for extending the fisheries was protected by 26 Geo. 3, c. 106, s. 26, and the offender liable to transportation for seven years;⁶ principals in the second degree and accessories being punishable under 7 & 8 Geo. 4, c. 28, ss. 8, 9.

¹ Penal servitude for three years. 20 & 21 Vict. c. 3, s. 2.

² Penal servitude as above; and 7 & 8 Geo. 4, c. 28, ss. 8, 9. See 49 Geo. 3, c. 109.

³ An Act, however obsolete yet

not repealed, although sect. 16 is repealed.

⁴ See now 24 & 25 Vict. c. 9, s. 48.

⁵ See now 24 & 25 Vict. c. 98, ss. 20, 22.

⁶ Penal servitude for three years.

PART VI.

Of Offences relating to the Coin.

CHAPTER I.

OF COUNTERFEITING COIN.¹

Counterfeiting coin.] The statute 2 Will. 4, c. 34, caused a material change in the laws relating to the coin. It consolidated the old law, and, amongst other Acts, repealed so much of the 25 Ed. 3,² as made the counterfeiting of the king's money high treason. The coin protected by the 2 Will. 4, c. 34, was the king's current gold, silver, and copper coin. The principal felonies under that Act were counterfeiting, colouring, impairing the money, buying and selling counterfeit coin for less than the denomination—importing it from beyond the seas, uttering it, or having an illegal possession of such false money; and being found improperly engaged with coining tools in various ways, which will be mentioned in their order. Means for facilitating the detection of offenders are provided, and the mode of proving a former conviction in the case of uttering is particularly directed. But this Act has yielded to that of 1861, although the same law is, for the most part, renewed.

By 24 & 25 Vict. c. 99,³ s. 2, whosoever shall falsely make or

¹ By 12 & 13 Vict. c. 41, an Act providing a new silver coinage, all Acts relating to coin, and not repugnant to this Act, are extended to it.

² Stat. 5, c. 2.

³ By 24 & 25 Vict. c. 99, s. 1, in the interpretation of and for the purposes of this Act, the expression "the Queen's current gold or silver coin" shall include any gold or silver coin coined in any of Her Majesty's mints, or lawfully current, by virtue of any proclamation or

otherwise, in any part of Her Majesty's dominions, whether within the United Kingdom or otherwise; and "the Queen's copper coin" shall include any copper coin and any coin of bronze or mixed metal coined in any of Her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty's said dominions; and "false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's cur-

counterfeit any coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement.

By sect. 3, whosoever shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or of silver, or by any means whatsoever, wash, case over, or colour any coin whatsoever resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, or shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or of silver, or by any means whatsoever, wash, &c., any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin; or shall gild, or shall, with any wash or materials capable of producing the colour or appearance of gold, or by any means whatsoever, wash, &c., any of the Queen's current silver coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the Queen's current gold coin; or shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or silver, or by any means whatsoever, wash, &c., any of the Queen's current copper coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for

rent gold or silver coin" shall include any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered, so as to resemble or be apparently intended to resemble or pass for any of the Queen's current coin of a higher denomination; and "the Queen's current coin" shall include any coin coined in any of Her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty's said dominions, and whether made of gold, silver, copper, bronze, or mixed metal; and where the having any matter in the custody or possession of any person is mentioned in this Act, it shall include, not only the having of it by himself in his personal custody or possession, but

also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it in any dwelling house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit or for that of any other person.

The Act to commence Nov. 1, 1861, sect. 43. There is now no limitation of time for proceeding, as formerly.

These provisions (8 & 9 Will. 3, c. 23, s. 4, and 7 Ann. c. 25,) were repealed by 2 & 3 Will. 4, c. 34. *R. v. Phillips*, Russ. & Ry. 369. *R. v. Willan*, East, P. C. 186.

any of the Queen's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement.

Before this Act, the jury used always to be called upon to say whether the counterfeit coin bore any reasonable likeness to the real money,¹ but now the intent to produce bad money is sufficient when manifested by the production of base metal, however imperfect. It is not to be supposed that the moneyers of the mint are exempt from the operation of the Act. For if they were to make the coin of baser alloy, or of lighter weight than usual, they would certainly be guilty of felony, though a mere mistake would not affect them.²

Evidence.] By the 29th section it is provided, that it shall not be necessary to call any moneyer or other officer of his Majesty's mint for the purpose of proving the false or counterfeit state of the coin mentioned in the indictment, but that the evidence of any other credible witness shall be sufficient. Moreover, by 6 & 7 Vict. c. 85, s. 1, it is no longer a disqualification that the witness tendered has been guilty of a crime, and, therefore, the old difficulties upon this subject are at an end.³ And as the offence is now not treason, but felony only, one witness is sufficient. Indeed, the statute 1 & 2 Ph. & M. c. 11, s. 3, now repealed, had before provided for the sufficiency of a single witness in cases relating to the coin.

Indictment.] That A., on, &c., feloniously and falsely did make and counterfeit one piece of coin resembling, and apparently intended to resemble and pass for certain of the Queen's gold coin called a sovereign, against the form, &c.

Three persons were charged with coining, two with colouring, and one for counselling the others. The proof against the accessory was that he visited the women once or twice a week, that whilst he was with them, the rattling of copper money was heard, that, upon one occasion, he was counting something just after he went out, that he endeavoured to escape from apprehension, and that several pieces of bad money were found upon him. The judges held this evidence insufficient to warrant a conviction.⁴

Here it will be observed that four kinds of gilding, silvering, &c., are forbidden:—1st, any coin whatsoever in order to look like gold and silver coin; 2nd, any silver, copper, or metal for the purpose of coining false gold and silver coin; 3rd, any silver

¹ *R. v. Wilson*, Leach, 285; *Id.* 365, note (a). *R. v. J. & P. Welsh*, *Id.* 364. *R. v. Varley*, *Id.* 76; East, P. C. 164; Sir Wm. Bl. 682. *R. v. Harris and another*, Leach, 135.

² See 1 Hale, 213; East, P. C. 166; 1 Hawk. c. 17, s. 55.

³ See Leach, 829.

⁴ *R. v. Isaacs*, 1 Russ. C. M. 61; 2 Russ. C. M. 729, n.

coin, so as to look like gold coin; and 4th, copper coin, so as to appear in the similitude of gold or silver coin.

It will, moreover, be noticed, that no such provision as that in the 2nd section is to be found by which unfinished counterfeits are brought within the law, as though they were completed for circulation. And the reason seems to be, that the cases decided before the 2 Will. 4, c. 34, rendered such an enactment unnecessary, whereas, in the instance of *counterfeiting*, the determinations of the judges were favourable to the prisoners, and thus the need for the provision alluded to was evinced. The following are the leading cases adverted to above. A party was taken in the act of steeping round blanks, composed of brass and silver, in *aqua fortis*. None of the blanks were in a finished state, but by rubbing they would perfectly resemble silver coin. The jury found that these blanks would not pass current in the state they were in at the time of the arrest, and a large majority of the judges were of opinion that the conviction was right, it being observed, that a contrary construction would prevent any conviction until a wash was discovered, which, in the first instance, would produce a perfect bright shilling or sixpence, and that the colouring of blanks was within the clause of 8 & 9 Will. 3,¹ (now repealed.) It was therefore determined, not only that the offence was complete before the counterfeit money was ready for circulation, but likewise that the mode of attempting the fraud was a colouring within the Act.² And, as to the colouring, it had been previously held, that the process of extracting latent silver from the body to the surface of the base metal by the power of *aqua fortis* was a colouring within the words "materials producing the colour of silver."³ An indictment charged the prisoner with gilding sixpences with materials capable of producing the colour of gold. The proof was, that the prisoner actually used gold for this colouring. It was urged for him that the prisoner had used gold, and not merely materials capable of producing the colour of gold. The counsel for the crown proposed that the latter words might be altogether rejected. A verdict of guilty being taken, the judges held the conviction good and the indictment proved, but Littledale, J., and Parke, B., held that the indictment was bad.⁴

Indictment, sect. 3.] That A., on, &c., feloniously did gild [or silver] [or with a certain wash capable of producing the colour and appearance of gold [or silver] did feloniously wash and colour with a certain wash, as above], certain of the Queen's current gold coin called a sovereign [or a shilling], resembling or apparently intended to resemble and pass for certain of the Queen's current gold coin called a sovereign [or a shilling], against the form, &c.

¹ C. 26, s. 4.

² *R. v. Case*, Leach, 154, n.

³ *R. v. Lavey and another*,
Leach. 153.

⁴ *R. v. Turner*, 2 Moo. C. C.

42.

Impairing, &c.] By 24 & 25 Vict. c. 99, s. 4, whosoever shall impair, diminish, or lighten any of the Queen's current gold or silver coin, with intent that the coin so impaired, diminished, or lightened may pass for the Queen's current gold or silver coin, shall, in England or Ireland, be guilty of felony, and in Scotland of a high crime and offence, and liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

Defacing the coin.] By 24 & 25 Vict. c. 99, s. 16, whosoever shall deface any of the Queen's current gold, silver, or copper coin, by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and liable to imprisonment not exceeding one year, with or without hard labour.

And by sect. 17, no tender of payment in money made in any gold, silver, or copper coin so defaced by stamping, as in the last preceding section mentioned, shall be allowed to be a legal tender; and whosoever shall tender, &c., any coin so defaced shall, on conviction thereof before two justices, be liable to forfeit and pay any sum not exceeding 40s.: provided, that it shall not be lawful for any person to proceed for any such last-mentioned penalty without the consent, in England or Ireland, of Her Majesty's attorney-general for England or Ireland respectively, or in Scotland of the lord advocate.

Indictment.] That A., on, &c., feloniously did diminish and lighten certain of the Queen's current gold coin, that is to say, ten sovereigns, with intent that the same so diminished and lightened should pass for the Queen's gold coin, against the form, &c.

In an indictment for diminishing it must be averred that the coin was unlawfully diminished.¹

Copper coin.] By 24 & 25 Vict. c. 99, s. 14, whosoever shall falsely make or counterfeit any coin resembling, &c., the Queen's copper coin; and whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any instrument, &c., adapted for the counterfeiting any of such coin; or shall buy, sell, &c., or offer, &c., any false or counterfeit coin resembling, &c., such coin, at or for a lower rate or value than the same imports or was apparently intended to import, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and liable to penal servitude not exceeding seven nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

¹ 5 T. R. 27, n.

Foreign gold and silver coin.] By 24 & 25 Vict. c. 99, s. 18, whosoever shall make or counterfeit any kind of coin not being the Queen's current gold or silver coin, but resembling, &c., any gold or silver coin of any foreign prince, state, or country, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and liable to penal servitude not exceeding seven nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

Foreign coin, other than gold and silver coin.] By 24 & 25 Vict. c. 99, s. 22, whosoever shall falsely make or counterfeit any kind of coin not being the Queen's current coin, but resembling, &c., any copper coin, or any other coin made of any metal or mixed metals of less value than the silver coin of any foreign prince, state, or country, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and liable for the first offence to imprisonment not exceeding one year, and for the second offence to penal servitude not exceeding seven nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

Indictment—Copper coin.] The indictment for counterfeiting copper coin states that A., on, &c., — pieces of false and counterfeit money, each of the same being made and counterfeited to the likeness of a piece of good legal and copper money of the realm called a halfpenny, then unlawfully and feloniously did make, coin, and counterfeit, against the form, &c.

CHAPTER II.

OF ILLEGAL UTTERINGS AND THE ILLEGAL POSSESSION
OF COIN.

Uttering counterfeit gold or silver coin.] By 24 & 25 Vict. c. 99, s. 9, whosoever shall tender, utter, or put off any false or counterfeit coin resembling, &c., any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England or Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and liable to imprisonment not exceeding one year, with or without hard labour, and solitary confinement.

By sect. 10, whosoever shall tender, utter, or put off any false or counterfeit coin resembling, &c., any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, and shall, at the time of such tendering, &c., have in his custody or possession, besides the false or counterfeit coin so tendered, &c., any other piece of false or counterfeit coin, resembling, &c., any of such coin, or shall, either on the day of such tendering, &c., or within the space of ten days then next ensuing, tender, &c., any false or counterfeit coin resembling, &c., any of such coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and liable to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 11, whosoever shall have in his custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

But the second offence after conviction is felony.

By sect. 12, whosoever, having been convicted, either before or after this Act, of any such misdemeanor or crime and offence as in sections 9, 10, and 11, or of any felony or high crime and offence against this or any former Act relating to the coin, shall afterwards commit any of the misdemeanors or crimes and offences in any of the said sections mentioned, shall, in England or Ireland, be guilty of felony, and in Scotland of a high crime and offence, and liable to penal servitude for life or not less than three

years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

And by sect. 15,¹ whosoever shall tender, &c., any false or counterfeit coin resembling, &c., the Queen's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin resembling, &c., such coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and liable to imprisonment not exceeding one year, with or without hard labour, and solitary confinement.

We have now come to the well-known offence of uttering counterfeit coin. We find that the simple act of uttering is a misdemeanor. If another false piece be found in the prisoner's possession besides that which he has uttered, or if he should utter a false coin of the realm twice on the same day, or once again within ten days next ensuing, his act is a misdemeanor, but punishable with a double portion of imprisonment. A second offence of any one of those mentioned after conviction becomes felonious, and is very seriously punishable. The fact of having three pieces of false coin is considered sufficient, if the guilty knowledge of the falsity and the intent to utter any one of them combine to warrant a conviction for misdemeanor, and a heavier term of imprisonment than for having two pieces, or for uttering twice within ten days, may result. The second offence of this nature is likewise a felony, and punishable as under sect. 12.

An indictment under 15 Geo. 2, c. 28, (now repealed,) charged a second uttering to have taken place on the *said 14th day of February*, and as evidence of uttering at any time before the finding of the indictment would support the charge of a single uttering, it was objected, that it should have been expressly alleged that both utterings were *on the same day*. But the judges held, that as it must have been proved that the utterings were on the same day, they must take the fact to have been so, and, consequently, that the 14th day of February was the same day.² This case might now apply if the utterings within ten days were to take place on the same day, and an indictment were to be drawn similar to that above mentioned. But the case where it was decided that the facts of uttering twice on the same day should be united in the same count as a single charge, is still of use, and if the second uttering be within ten days, this decision is equally applicable. Owing to the distribution of the charges of uttering into two several counts, the judges held, that the more severe sentence could not take effect.³ Nor can one judgment upon a conviction for two separate utterings in two counts under 2 Will. 4, c. 34, be supported. There might be consecutive judgments of one year's

¹ This was not an offence at common law. *R. v. Cirwan*, East, P. C. 182; Leach, 834, n.

² *R. v. Martin*, Leach, 923.

³ *R. v. Tandy*, Id. 833; East, P. C. 182.

imprisonment upon each count.¹ A person uttered a counterfeit crown, and on a subsequent day a counterfeit shilling. It was held that proof of the last uttering might be given to show the guilty knowledge, and the prisoner was held rightly convicted.²

The following determinations appear to apply to utterings of gold, silver, and copper coin. The prisoner was charged with the common trick of "ringing the changes," by taking a bad shilling out of his mouth and pretending it was the same which the person he intended to cheat had just given him. The indictment stated an uttering, and it was objected, that it should have said that the defendant uttered the shilling in question as and for a good shilling. But the court held a different opinion, saying that the words of the Act 15 Geo. 2, c. 28, were in the disjunctive, utter, *or* tender in payment, that the prisoner could not have been properly charged with uttering this bad coin as and for good money, because he evidently uttered it as *bad* money, and, accordingly, that, as he had tendered the shilling in payment, the indictment was right.³ The name of the person to whom the bad coin is uttered, if known, should be mentioned in the indictment. And Holt, C. J., said, that if the uttering were to more than one person, the names ought to be laid severally. The chief justice, nevertheless, tried a woman for putting off ten gilt counterfeit pieces to divers persons unknown, and she was convicted. Sir Edward East observes, that "this must be governed by the same rule which prevails in the case as stealing the property of persons unknown."⁴

Two persons were charged under the Act of 2 Will. 4, with uttering. Upon the prisoner were found two bad shillings, and upon one J. L. sixteen such were found. The jury found that the prisoner knew of J. L.'s possession of the bad money, that he knew the coin found on J. L. and himself to be counterfeit, and that both the parties had one common intention of uttering. The judges held this conviction right, the possession of J. L. being in law the possession of the prisoner, who was thus involved in the charge of having three or more bad pieces of money in his possession.⁵ Where two persons jointly prepare bad coin, and yet utter it apart in different places, but with a common intention to share the proceeds, they may be jointly convicted, for they are joint utterers.⁶ And the question in these cases of joint uttering

¹ *R. v. Robinson*, 1 Moo. C. C. 413. And note, that the words, "common utterer of false money," are now dispensed with. The cases therefore, which have arisen on indictments concerning that point may, for the present, be laid aside. See *R. v. Smith*, Russ. & Ry. 5; Leach, 856. *R. v. Levy*, Russ. & Ry. 7, cited. *R. v. Booth*, Id. *R. v. Michael*, Id. 29; Leach, 938.

² *R. v. Foster*, 24 L. J. M. C. 134; Dears. 456.

³ *R. v. Frank*, Leach, 644. As to association for the purpose of uttering, see *R. v. J. and S. Else*, Russ. & Ry. 142. *R. v. Hurse*, 2 Moo. & R. 360.

⁴ East, P. C. 180.

⁵ *R. v. Rogers*, 2 Moo. C. C. 85, 2 Lew. C. C. 118, 297; Car. & M. 259. *Semle*, S. C. Nom. *R. v. Williams*. *R. v. Gerrish and another*, 2 Moo. & Rob. 219.

⁶ *R. v. Hurse*, 2 Moo. & Rob. 360.

seems to be whether the one was so near the other as to render effectual help in getting rid of the counterfeit coin.¹

There was an indictment for uttering a *groat*. The inspector of the mint called the piece of false money a *groat*, but all the other witnesses called it a fourpenny piece. The proclamation was not produced, and the inscription on the coin was fourpence. It was held, that as the jury could identify the circumstance in their own minds, that a groat and fourpenny piece were the same, without the intervention of evidence, the prisoner had been rightly convicted.²

Indictment.] That A., on, &c., unlawfully did tender and utter to one B., one piece of false and counterfeit coin resembling and apparently intended to resemble and pass for certain of the Queen's current coin called —, he the said A. at the time he so tendered and uttered the said piece of false and counterfeit coin, well knowing the same to be false and counterfeit, against the form, &c.

The evidence for the second offence cannot, evidently, be sustained, if there be an absence of intention to defraud. And, therefore, although a person may know the piece of coin he is giving away to be counterfeit, yet, if he could not possibly intend to commit a fraudulent act, the charge must fail, as where the prisoner passed off a piece of false money by way of charity.³ Not so where the prisoner gave money to a woman as a price of intercourse, with a guilty knowledge.⁴ If the prisoner should place a piece of bad money upon the counter, and upon being told it is bad, quits the shop, this is an uttering.⁵

Indictment.] That, heretofore, to wit, at a sessions, &c., holden on, &c., before —, by the oath of twelve good and lawful men of the county aforesaid then and there impanelled, it was presented that A., on, &c., did tender and utter, [first conviction,] as by the record, &c., and which said judgment, &c., and the jurors, &c., do further present that the said A., after being so convicted as aforesaid, afterwards, to wit, on, &c., [describe the second offence,] against the form, &c. Where a record of conviction was tallied as of the quarter sessions, and went on to state the offence as within the jurisdiction of *this court*, Gurney, B., at the assizes, held it a fatal variance.⁶

This second offence must be properly described, and it is usual to set out the names of the persons to whom the coin has been tendered, although Holt, C. J., once tried a woman for putting off

¹ *R. v. Jones*, 9 C. & P. 761.

⁵ *R. v. Welch*, 20 L. J. M. C.

² *R. v. Connell*, 1 Car. & K. 101; Den. & P. 78.

³ *R. v. Page*, 8 C. & P. 122. Of this case Lord Denman and Coltman, J., have expressed a doubt. 1 Cox, 251.

⁶ *R. v. Pigot*, 1 Cox, 124. A variance as to the name of the magistrates before whom the trial was had was likewise held fatal. *R. v. Bissett*, *Id.* 148.

⁴ *R. v. —*, 1 Cox, 250.

counterfeit coin to divers persons unknown, and she was convicted.¹ And, according to the opinion of Lord Denman, care must be taken in setting out the name, especially where two prisoners are concerned, lest an ambiguity should be introduced in case one should be acquitted and the other found guilty.² Sir Edward East observes, that the same rule prevails as in the case of stealing property from persons unknown.³ With respect to the particularities which should be adopted in alleging the first judgment, it may be said, that the words "as by the record thereof doth more fully appear," must be carried on throughout the indictment, whenever it becomes necessary to refer to the record. So that, where under the old Act of 15 Geo. 2,⁴ it became necessary to show prior convictions, and the second conviction was set out without a *prout patet*, the judges were of opinion that the defect was fatal.⁵ It was also objected that there was no allegation of the former judgment and convictions being unreversed, but the judges were satisfied with setting aside the conviction upon the first objection, and they added, moreover, that no judgment for the misdemeanor could be given upon the record as it stood.⁶

Two persons were tried for uttering counterfeit coin, they having other counterfeit coin in their possession. One was convicted and the other acquitted. An indictment stated that C. P. (the prisoner who had been convicted), together with one T. P. (who had been acquitted), was, in due form of law, convicted, &c. The record of C. P.'s conviction stated, in addition, the acquittal of T. P. It was held, that the indictment did not import that T. P. had been convicted, and that there was no variance.⁷ The allegation of guilty knowledge was deemed sufficient under the following allegation. It was charged that the prisoner did utter a counterfeit half-crown to E. H., knowing the same to be false and counterfeit. Here E. H. could not be said (although the last antecedent) to have been the person affected by the guilty knowledge. And although it was not stated that the prisoner uttered, "*then and there, knowing,*" &c., yet it was said that the *scienter* should be taken to apply to the time of the uttering.⁸ At all events, it was good after verdict.⁹ An indictment alleged, that the prisoners on the same day one other piece of false and counterfeit resembling, &c., did utter. The word coin was omitted after counterfeit, but supplied afterwards. It was held, that the words "of false and counterfeit" might be rejected, and then the charge would be, one other piece, resembling, &c. a piece of the Queen's current silver coin.¹⁰ Evidence of uttering a

¹ East, P. C. 180.

² 2 Moo. C. C. 221.

³ East, P. C. *ut supra*.

⁴ C. 28, ss. 2, 9.

⁵ *R. v. Turner*, 1 Moo. C. C. 47.

⁶ *Id.* 49, 50.

⁷ *R. v. Page*, 9 C. & P. 756; 2 Moo. C. C. 219. The words, "By

due course of law tried and convicted," were deemed sufficient, without stating either plea or verdict. *Id.*

⁸ *R. v. Page*, 9 C. & P. 756.

R. v. Jones and another, *Id.* 761.

R. v. Page, 2 Moo. C. C. 219.

⁹ 2 Moo. C. C. *ut supra*.

¹⁰ *R. v. Jones*, 9 C. & P. 61,

counterfeit shilling on a day subsequent to the prisoner's uttering a counterfeit crown-piece is receivable to show guilty knowledge.¹ And having a quantity of counterfeit coin, each piece wrapped up in a separate piece of paper, and distributed in different pockets, is some evidence of an intent to utter.² In order to facilitate the proof of the required conviction, it is provided by sect. 37 of the Act now under consideration, that a copy of the previous indictment and conviction, purporting to be signed and certified as a true copy by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous indictment and conviction, without proof of the signature or official character of the person appearing to have signed or certified the same.³ The evidence of a joint uttering should show the parties in near association with each other, so as to be capable of rendering mutual aid and assistance. So that if A. and B. agree together for a fraudulent purpose, and each go different ways, but utter the false money quite apart from each other, the offences are several and not joint.⁴ So where two were indicted for uttering and having in possession a counterfeit shilling, it was held that the one could not be convicted of uttering upon evidence of his having other bad money in his possession for the purpose of uttering, although he had been the associate of the other prisoner. And with respect to the other prisoner, although she was held rightly convicted of a single offence of uttering, it was also held, that her conviction for having bad money in possession was wrong, as it proceeded merely upon the evidence of her having kept company with the man,⁵ who had large quantities of false coin in his custody, but who was not present with her when she committed the offence of uttering.⁶ But where two went together to a shop, and one remained outside whilst the other uttered, the former having bad pieces of money in her possession, it was considered a joint offence. And upon an indictment stating that the two prisoners had uttered a counterfeit shilling, having another counterfeit in their possession, it was held immaterial to show which was the piece uttered, no good money having

¹ *R. v. Foster*, 24 L. J. M. C. 134; Dears. & P. 456.

² *R. v. Jarvis*, 25 L. J. M. C. 30; 7 Cox, 53.

³ A fee of 6s. 8d. is to be taken.

⁴ *R. v. Manners*, 7 C. & P. 801.

⁵ The prisoners were husband and wife.

⁶ *R. v. J. and G. Else*, Russ. & Ry. 142. *R. v. Page*, 1 Russ. C. M. 82. But note, that the distinction between felony and misde-

meanor was not sufficiently adverted to in these cases, so that Talfourd, J., directed the jury to convict under similar circumstances, and the judges supported the view, approving of Mr. Greaves's observations in his edition of Russell, and overruling *R. v. Else* and *R. v. Page*, 1 Russ. C. M. 83, note (b). *R. v. Greenwood*, 21 L. J. M. C. 127; Den. & P. 453.

been found upon them.¹ If some good pieces had been found, the objection in their power would have been unanswerable.² The principle is, whether one is so near to the other as to help that other in getting rid of the bad money.³ As, by giving a sign. The prisoner was fifty yards off, and gave a sign.⁴ There must, however, be previous concert, *and* presence. Evidence of a prior understanding and concert will not be sufficient without a presence actual or constructive.⁵

Uttering false foreign coin as the Queen's coin, or as foreign coin.] By 24 & 25 Vict. c. 99, s. 13, Whosoever shall, with intent to defraud, tender, utter, or put off as or for any of the Queen's current gold or silver coin, any coin not being such current gold or silver coin, or any medal or piece of metal or mixed metals, resembling in size, figure, and colour the current coin as or for which the same shall be so tendered, &c., such coin, medal, or piece of metal or mixed metals so tendered, &c., being of less value than the current coin as or for which the same shall be so tendered, &c., shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and shall be liable to imprisonment not exceeding one year, with or without hard labour, and solitary confinement.

By sect. 20, Whosoever shall tender, utter, or put off any such false or counterfeit coin resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and liable to imprisonment not exceeding six months, with or without hard labour.

By sect. 21, Whosoever, having been so convicted as in the last preceding section mentioned, shall afterwards commit ~~the~~ like offence of tendering, &c., any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and liable to imprisonment not exceeding two years, with or without hard labour, and solitary confinement; and whosoever, having been so convicted of a second offence, shall afterwards commit the like offence of tendering, &c. any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and liable to penal servitude for life, or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

And by sect. 23, Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall have in

¹ *R. v. P. and E. Skeritt*, 2 C. & P. 427.

² *Id.* 429, per Garrow, B.

³ *R. v. Page and Jones*, 1 Russ. C. M. 82.

⁴ *R. v. Hayes and another*, 1 Cox, 362; 2 Cox, 68. *R. v. Page* was cited.

⁵ *R. v. West and another*, 2 Cox, 237, Cresswell, J.

his custody or possession any greater number of pieces than five pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, or any such copper or other coin as in the last preceding section mentioned, *i. e.* 22, shall, on conviction thereof before any justice, forfeit and lose all such false and counterfeit coin, which shall be cut in pieces and destroyed by order of such justice, and shall for every such offence forfeit and pay any sum of money not exceeding 40s. nor less than 10s. for every such piece of false and counterfeit coin which shall be found in the custody or possession of such person, one moiety to the informer, and the other moiety to the poor of the parish where such offence shall be committed; and in case any such penalty shall not be forthwith paid, it shall be lawful for any such justice to commit the person who shall have been adjudged to pay the same to the common gaol or house of correction, there to be kept to hard labour for the space of three months,¹ or until such penalty shall be paid.

By sect. 5, Whosoever shall unlawfully have in his custody or possession any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution, or otherwise, which shall have been produced or obtained by impairing, diminishing, or lightening any of the Queen's current gold or silver coin, knowing the same to have been so produced or obtained, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment. Illegal possession.] That A., on, &c., unlawfully had in his custody and possession three pieces of false and counterfeit coin resembling and apparently intended to resemble and pass for certain of the Queen's silver coin called —, with intent then to utter and put off the same, he the said A. well knowing the same to be false and counterfeit, against the form, &c.

CHAPTER III.

OF ILLEGAL DEALINGS WITH FALSE COIN.

By 24 & 25 Vict. c. 99, s. 6, whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused) shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold

¹ Calendar months.

or silver coin at or for a lower rate or value than the same imports or was apparently intended to import, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement; and in any indictment for any such offence as in this section aforesaid it shall be sufficient to allege that the party accused did buy, sell, receive, pay, or put off, or did offer to buy, sell, receive, pay, or put off, the false or counterfeit coin at or for a lower rate or value than the same imports or was apparently intended to import, without alleging at or for what rate, price, or value the same was bought, sold, received, paid, or put off, or offered to be bought, sold, received, paid, or put off.

By sect. 7, whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall import or receive into the United Kingdom from beyond the seas any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and liable to penal servitude for life, or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 8, whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall export, or put on board any ship, vessel, or boat, for the purpose of being exported from the United Kingdom, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and liable, at the discretion of the court, to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

And by sect. 19, whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall bring or receive into the United Kingdom any such false or counterfeit coin resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false and counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and liable to penal servitude not exceeding seven nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By 16 & 17 Vict. c. 48, s. 1, the provisions of 2 & 3 Will. 4, c. 34, are, with some exceptions, extended to the colonies, and as that Act is only repealed as far as the United Kingdom is concerned, it survives as to the colonial possessions. By sect. 2, if any person shall import into the colonies any false or counterfeit coin resembling the gold or silver coin, with a guilty knowledge, he shall be liable to transportation for life, or for not less than seven years, or to imprisonment not exceeding four years. But

734 *Offences respecting Implements for False Coin.*

by sect. 3, if there be any local provision in the colony, the Act is not to extend to it. And again, by sect. 4, the local legislatures of the colonies may alter or repeal any of the provisions extended or not made applicable by this Act to the colonial possessions.

Buying and selling, &c.] Under a clause not dissimilar to this, it has been held that the contract must be proved as laid. So that proof of the sale of five bad shillings for half-a-crown was held to be a variance in an indictment for paying and putting off of five counterfeit shillings for two shillings.¹ But it is sufficient if the evidence be substantially in keeping with the charge. Thus the following contract was held to be sustained by the evidence produced. The indictment charged the putting off of "a counterfeit sovereign and three counterfeit shillings for the sum of five shillings," and the proof was that the prisoner agreed to sell the bad sovereign at 4s., and the three bad shillings for 1s., and two good half-crowns appeared to have been paid. The court decided that there was here no variance.²

Indictment under sect. 6.] That A. on, &c., feloniously did sell to one B. ten pieces of false coin, resembling ten pieces respectively of the Queen's current gold coin called sovereigns, at and for a lower rate and value than they and each of them imported, to wit, for the sum of 10s. each, against the form, &c.

Under sect. 7, that A. on, &c., feloniously did import into the United Kingdom pieces of false and counterfeit coin, resembling the Queen's current gold coin called —, he the said A. well knowing the same, when he so imported them, to be false and counterfeit, against the form, &c.

The same form will apply under sect. 8, using the word "exporting."

CHAPTER IV.

OF OFFENCES RESPECTING IMPLEMENTS FOR MAKING FALSE COIN.

By 24 & 25 Vict. c. 99, s. 24, Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any puncheon, counter puncheon, matrix, stamp, die, pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be adapted and intended to make

¹ *R. v. Joyce*, Car. C. L. 184.

² *R. v. Hedges*, 3 C. & P. 410.

or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any of the Queen's current gold or silver coin, or of any coin of any foreign prince, state, or country, or any part or parts of both or either of such sides; or shall make or mend, &c., any edger, edging or other tool, collar, instrument, or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any such coin as in this section aforesaid, knowing the same to be so adapted and intended as aforesaid; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any press for coinage, or any cutting engine for cutting by force of a screw or of any other contrivance, round blanks out of gold, silver, or other metal or mixture of metals, or any other machine, knowing such press to be a press for coinage, or knowing such engine or machine to have been used or to be intended to be used for or in order to the false making or counterfeiting of any such coin as in this section aforesaid, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 25, whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly convey out of any of Her Majesty's mints any puncheon, counter puncheon, matrix, stamp, die, pattern, mould, edger, edging or other tool, collar, instrument, press, or engine used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal, or mixture of metals, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

And by sect. 27, if any person shall find or discover in any place whatever, or in the custody or possession of any person having the same without lawful authority or excuse, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current gold, silver, or copper coin, or any coin of any foreign prince, state, or country, or any instrument, tool, or engine whatsoever, adapted and intended for the counterfeiting of any such coin, or any filings or clippings, or any gold or silver, bullion, or any gold or silver dust, solution, or otherwise, which shall have been produced or obtained by diminishing or lightening any of the Queen's current gold or silver coin, it shall be lawful for the person so finding or discovering and he is hereby required to seize the same, and to carry the same forthwith before some justice; and where it shall be proved, on the oath of a credible witness before any justice, that there is reasonable cause to suspect that any person has been concerned in counterfeiting the Queen's current gold, silver, or copper coin, or any such foreign or other

coin as in this Act before mentioned, or has in his custody or possession any such false or counterfeit coin, or any instrument, tool or engine whatsoever adapted and intended for the making or counterfeiting of any such coin, or any other machine used or intended to be used for making or counterfeiting any such coin, or any such filings, &c., or any such gold or silver in dust, solution, or otherwise as aforesaid, it shall be lawful for any justice, by warrant under his hand, to cause any place whatsoever belonging to or in the occupation or under the control of such suspected person to be searched, either in the day or in the night, and if any such false or counterfeit coin, or any such instrument, tool, or engine, or any such machine, or any such filings, or any such gold or silver in dust, solution, or otherwise as aforesaid, shall be found in any place so searched, to cause the same to be seized and carried forthwith before some justice; and whensoever any such false or counterfeit coin, or any such instrument, tool, or engine, or any such machine, or any such filings, or any such gold or silver in dust, solution, or otherwise as aforesaid, shall in any case whatsoever be seized and carried before a justice, he shall, if necessary, cause the same to be secured, for the purpose of being produced in evidence against any person who may be prosecuted for any offence against this Act; and all such false and counterfeit coin, and all instruments, tools, and engines adapted and intended for the making or counterfeiting of coin, and all such machines, and all such filings, clippings, and bullion, and all such gold and silver in dust, solution, or otherwise as aforesaid, after they shall have been produced in evidence, or when they shall have been seized, and shall not be required to be produced in evidence, shall forthwith be delivered up to the officers of Her Majesty's mint, or to the solicitors of Her Majesty's treasury, or to any person authorized by them to receive the same.

The following evidence was given upon an indictment for having illegally in possession a mould for coining of the obverse side of half-a-crown. The mould and other materials for coining and several suspected persons were found in a house belonging to the prisoner, but he was not captured at the time. An attack, however, was made upon the police, and it was attempted to destroy the coining materials. The prisoner then came to the house, notwithstanding a warning from within that "the police were there." He was then taken. About thirteen days before, he had passed a bad half-crown, but it did not appear that the half-crown belonged to the mould found in his house. This evidence was held admissible, and all the prior facts mentioned were deemed proper to be left to the jury on the charge of felony.¹

A resemblance of the instrument to the coin to a common intent is sufficient. And therefore the words, "figure, stamp, or apparent resemblance," will be satisfied if the imitation be such as will impose on the world. It is, indeed, a common principle in the law concerning the *crimen falsi* that such a resemblance is sufficient. Therefore, where the puncheon was proved to be

¹ *R. v. Weeks*, 8 Cox, 455; 30 L. J. M. C. 142.

capable of making an old shilling current, although without a counter puncheon it could not make the figures, the judges held upon an indictment for having a puncheon in possession upon which was impressed the figure of the head side of a shilling, that the conviction was right, for an exact figure was not within the intention of the legislature, but only such a similitude as might be capable of deceiving an ordinary observer.¹ So where a collar was the tool found in the prisoner's custody, which could not be used without a screw, the judges held it to be an edging tool within the old Act 8 & 9 Will. 3.² And now the word "collar" is expressly mentioned. And the judges came to that opinion although the collar was an instrument of more modern invention than the time of Will. 3.³

A die sinker at Birmingham was employed by the prisoner to sink two dies for counters for two whist clubs, &c. The counters were to resemble shillings. The die sinker gave notice to the mint, and when the order was executed, the prisoner was taken and charged as a principal with making a die which would impress the figure, &c., of a shilling. It was objected for the prisoner that as the die sinker had acted under the directions of the mint in making the tool, no felony had been committed. The prisoner should have been indicted for a misdemeanor by inciting the die sinker to commit a felony. On the other hand it was urged that the die sinker was an innocent agent, and that the prisoner was consequently well convicted as a principal, and of this opinion were the judges, with the exception of Cresswell, J.⁴

Indictments under sect. 24.] That A. on, &c., one puncheon [mould], upon which there was made and impressed the figure of one of the sides, that is to say, the — piece of a piece of the Queen's current gold coin called a sovereign, and feloniously and falsely did make, against the form, &c. That A. on, &c., one puncheon in which and upon which there was impressed, &c., feloniously and without lawful excuse did then have in his possession.

Evidence.] The metal of which the mould is composed not being particularly specified in the new Act as it was in 8 & 9 Will. 3, the old cases upon that point are no longer of so much value as formerly. As where it was held that under an indictment for having in possession a die made of iron and steel, proof of a die made of either material would suffice.⁵ It will be remarked, that

¹ *R. v. Ridgelay*, Leach, 189; East, P. C. 171.

² C. 26, s. 1, &c.

³ *R. v. Moore*, 1 Moo. C. C. 122; 2 C. & P. 235.

⁴ *R. v. Bannen*, 2 Moo. C. C. 309; 1 Car. & K. 295. So was *R. v. Valler*, where the Danish consul directed a plate to be engraved in

order to detect an intended fraud on the part of the prisoners. The person making the plate was an innocent agent, and the prisoners were rightly indicted as principals. *R. v. Valler and others*, 1 Cox, 84.

⁵ *R. v. Phillips*, Russ. & Ry. 369. *R. v. Oxford*, Id. 382.

the clause of 2 Will. 4, has both the expressions "upon which there shall be made or impressed," and "which will make or impress." An indictment under 8 & 9 Will. 3, charged, that the prisoner had in his custody a mould upon which was "made or impressed," &c. The proof was, that the instrument was rather one which was calculated to *make or impress*, it having the resemblance of a shilling inverted, and the question was reserved. But the judges, although they thought that "make and impress" would have been more accurate, were of opinion that the conviction should stand, because, in fact, the stamp of the current coin was certainly impressed on the mould in order to form the cavity thereof.¹ And as the words "any part or parts" are in the clause, it was deemed enough to show, upon an indictment under 2 & 3 Will. 4, c. 34, s. 10, for making a mould intended to make and impress the figure and apparent resemblance of the obverse side of a shilling, that the mould and *a part* of the impression was made by the prisoner.² But upon a count for having in possession such a mould impressed with such a resemblance without saying "part thereof," it was held that in this case the jury must be satisfied that the whole of the obverse side of the shilling had been impressed at the time when the prisoner had the mould in his possession.³ And if it is not a mould at all, *à fortiori*, the prisoner must be acquitted, although there may be a perfect impression on one side.⁴ The words in the statute as to mould, resembling *part* of the obverse of a coin, relate to cases where several moulds put together would make the obverse. So that if a mould be made to resemble the obverse of a coin partly defaced by wear, the indictment should be for having in possession a mould "upon which said mould was made and impressed the figure and apparent resemblance," &c.⁵ Yet, the words "then and there," before "made and impressed," were deemed necessary in this particular case. For want of them, the first indictment against the prisoner was held bad upon demurrer, but upon a fresh indictment containing these words, the charge was held rightly laid.⁶ If a die be made so as to counterfeit money, not for distribution in this country, but only to try the experiment, before sending out the apparatus abroad, the offence is complete. It is an act done with intent to commit, and proximately connected with, a felony.⁷

¹ *R. v. Lennard*, Leach, 90; See *R. v. Bell*, Fost. Cr. L. 430.

² *R. v. Foster*, 7 C. & P. 494.

³ *R. v. Foster*, Id. 495.

⁴ *R. v. Macmillan*, 1 Cox, 41.

⁵ *R. v. Richmond*, 1 Car. & K. 240.

⁶ Id.

⁷ *R. v. Roberts*, 1 Jur. (N. S.) 1094; 7 Cox, 39, in the case of silver half dollars of Peru. These were dies, having engraved thereon the obverse and reverse sides of the coin. See *R. v. Williams*, referred to, 7 Cox, 43.

CHAPTER V.

OF PROCEDURE IN COINAGE OFFENCES.

False coin may be cut.] By 24 & 25 Vict. c. 99, s. 26, where any coin shall be tendered as the Queen's current gold or silver coin to any person who shall suspect the same to be diminished otherwise than by reasonable wearing, or to be counterfeit, it shall be lawful for such person to cut, break, bend, or deface such coin, and if any coin so cut, broken, bent, or defaced shall appear to be diminished otherwise than by reasonable wearing, or to be counterfeit, the person tendering the same shall bear the loss thereof; but if the same shall be of due weight, and shall appear to be lawful coin, the person cutting, &c., the same, is hereby required to receive the same at the rate it was coined for; and if any dispute shall arise whether the coin so cut, &c., be diminished in manner aforesaid, or counterfeit, it shall be heard and finally determined in a summary manner by any justice, who is hereby empowered to examine upon oath, as well the parties as any other person, in order to the decision of such dispute; and the tellers at the receipt of Her Majesty's exchequer, and their deputies and clerks, and the receivers-general of every branch of Her Majesty's revenue, are hereby required to cut, break, or deface, or cause to be cut, broken, or defaced every piece of counterfeit or unlawfully diminished gold or silver coin which shall be tendered to them in payment of any part of Her Majesty's revenue.

Venue.] By sect. 28, where any person shall tender, utter, or put off any false or counterfeit coin in one county or jurisdiction, and shall also tender, utter, or put off any other false or counterfeit coin in any other county or jurisdiction, either on the day of such first-mentioned tendering, uttering, or putting off, or within the space of ten days next ensuing, or where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against this Act, every such offender may be dealt with, indicted, tried, and punished, and the offence laid and charged to have been committed, in any one of the said counties or jurisdictions, in the same manner in all respects as if the offence had been actually and wholly committed within such one county or jurisdiction.

Proof.] By sect. 29, where, upon the trial of any person charged with any offence against this Act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer, or other officer of Her

Majesty's mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness.

By sect. 30, every offence of falsely making or counterfeiting any coin, or of buying, selling, receiving, paying, tendering, uttering or putting off, or of offering to buy, &c., any false or counterfeit coin, shall be deemed to be complete, although the coin so made or counterfeited, or bought, &c., shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected.

By sect. 31, it shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence, or any high crime and offence, against this Act, and to convey or deliver him to some peace officer, constable, or officer of police, in order to his being conveyed as soon as reasonably may be before a justice of the peace or some other proper officer, to be dealt with according to law.

By sect. 32, no conviction for any offence punishable on summary conviction under this Act shall be quashed for want of form, or be removed by *certiorari* into any of Her Majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a valid conviction to sustain the same.

By sect. 33, all actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall, in England or Ireland, be laid and tried in the county where the fact was committed, and shall, in England, Ireland, or Scotland, be commenced within six months after the fact committed, and not otherwise; and notice in writing of such action and of the cause thereof, shall be given to the defendant or defender one month at least before the commencement of the action; and in any such action brought in England or Ireland, the defendant may plead the general issue, and give this Act and the special matter in evidence, at any trial to be had thereupon, and in Scotland the defender may insist on all relevant defences; and no plaintiff or pursuer shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant or defender; and if in England or Ireland, a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, or if, in Scotland, the verdict shall be for the defender, or if the pursuer shall abandon the action, or the court shall dismiss it as irrelevant or improperly laid, in every such case the defendant or defender shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant or defender has by law in other cases; and though a verdict shall be given for the plaintiff or pursuer in any such action, such plaintiff or pursuer shall not have costs against the defendant or defender,

unless the judge before whom the trial shall be shall certify his approbation of the action.

By sect. 34, all high crimes and offences, and crimes and offences against this Act, which may be committed in Scotland, shall be proceeded against and tried according to the rules and procedure of the criminal law of Scotland; and all proceedings by this Act made competent before any justice or justices, and all and every the powers and authorities by this Act given to or conferred upon any such justice or justices, shall, in Scotland, be competent before and may be exercised by any sheriff, magistrate, or justice of the peace.

And by sect. 35, in the case of every felony punishable under the Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act, shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour.

The 36th section provides for the admiralty jurisdiction.

By sect. 38, a person convicted of misdemeanor under this Act may be fined and required to find sureties, and a person convicted of any felony under this Act may be required to find sureties. In either case the limit of time is one year. Sect. 39 sanctions the addition of hard labour to imprisonment and solitary confinement, not exceeding one month at one time, nor three months in one year, under sect. 40. By sect. 41, summary proceedings in England are directed to be taken under 11 & 12 Vict. c. 43, and in Ireland under 14 & 15 Vict. c. 97. By sect. 42, where a prosecution is ordered by the treasury, the court shall allow the costs of the prosecution, and also in cases not so conducted, if there be a conviction, but not otherwise, such costs shall be allowed, and the order for payment made as in cases of felony.

PART VII.

*Of Offences against the Person and of Surety of the Peace.*¹

CHAPTER I.

HOMICIDE. MURDER.

Murder is the felonious destruction of life with malice. If it be accompanied by the greater offence of high treason, the charge of murder does not merge in that of treason, in like manner as a misdemeanor sinks into a felony when the two charges are concurrent; therefore it is not a ground for acquittal upon an indictment for murder, that the party was at the time of committing the offence, in the prosecution of a treasonable act.

Malice is either express or implied. The proof of express malice has the effect of preventing any favourable construction which a provocation by the murdered man might otherwise by possibility produce, and which would rebut the implication of malice.² Implied malice arises in all cases of homicide, which amount, in point of law, to murder,³ so that if the defendant can offer any excuse for his conduct, it lies upon him to show the extenuating circumstances.⁴ The judges, however, will not presume general malice from isolated facts, such as lurking in the neighbourhood.⁵

By 24 & 25 Vict. c. 100, s. 8, every offence which before the commencement of the Act, 9 Geo. 4, c. 31, would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried, and punished as principals and accessories in murder. Petit treason therefore exists no longer.

¹ The stat. 24 & 25 Vict. c. 100, upon this subject, is not to extend to Scotland: sect. 78. The statute to commence Nov. 1, 1861: sect. 79.

² East, P. C. 224.

³ East, P. C. 231. *R. v. Legg*, Kel. 27.

⁴ *R. v. Greenacre*, 8 C. & P. 35.

⁵ *R. v. Wilson*, 1 Lew. C. C. 112.

Revenge is a strong ingredient in murder. As, when after a quarrel the prisoner returned with a sword in half-an-hour, and seeking a fresh occasion for renewing the dispute, stabbed the deceased to the heart, after having received from him two blows on the shoulder with a cudgel. His threats of vengeance, and consequent provocation, induced the judges to agree that the case was one of murder.¹ The words, also, "Damn you! I will have your blood," are said to have weighed much with the judges in the case of *Major Oneby*, particularly when coupled with an offer of reconciliation on the part of the deceased. A dispute had arisen, but the parties had ceased from hostilities, and had sat down again, and then, subsequently, *Oneby* insisted upon fighting with the deceased in a room alone, and killed him. Here the judges considered the act of the prisoner to have been deliberate, and his malice express.² And thus, again, if a man have no design against any life in particular, but declares that he will kill the first man he meets, and he kills one accordingly, here, at all events, express malice, if not a general feeling of revenge, enters into the transaction, and the offence is murder.³ So, if a person manifest a determination for mischief, although he say nothing, yet if he commit a deadly act immediately afterwards, his case will be one of murder. This is the case of the man who threw a bottle at A., and then drew his sword. It was held to be no extenuation, that A. returned the bottle at the prisoner, which inflicted a wound; his stabbing of A. was therefore ruled to be murder, for his drawing showed that he intended to follow up his blow.⁴ This last was an instance of implied malice.⁵ Again, where in a fight of two minutes, the deceased was found to have been stabbed in several places by the prisoner, Bayley, J., left it to the jury to say whether the prisoner had used the knife privately from the beginning, if so, the crime was murder, and the jury found him guilty of murder.⁶ Even in the case of a man who killed an adulterer in his wife's bed, it was said, that *if he had postponed his vengeance*, he would have been guilty of murder.⁷ And the same law has been recognized in the case of a man who saw a person in the act of committing an unnatural offence with his son⁸ although the man did not see the act done, and Park, J., summed up for a conviction for murder, but the jury found a verdict of manslaughter.⁹

Cruelty.] Cruelty is another feature in homicide, of an aggravated character, and deliberate malice will, under such circum-

¹ *R. v. Mason*, East, P. C. 239; 531. *R. v. Whiteley*, 1 Lew. C. C. Fost. 132. 173; see 1 Hale, 451.

² *R. v. Oneby*, 2 Str. 766. See 1 C. & P. 437.

³ See Lord Raym. 1489.

⁴ *R. v. Mawgridge*, Kel. 128.

⁵ Str. 771. See also Russ. & Ry. 43.

⁶ *R. v. Anderson*, 1 Russ. C. M.

⁷ *R. v. Manning*, Tho. Raym. 212. *R. v. Maddy*, 1 Ventr. 158; *Semble*, S. C. before Jones, J., *Id.* 159.

⁸ *R. v. Fisher*, 8 C. & P. 182.

⁹ S. C. And see *R. v. Royley*, Cro. Jac. 296; 1 Ventr. cited, 159.

stances, presumed against the accused. As, where one deals unlawfully and wilfully with a helpless person.¹ So, where one carried his sick father from town to town, in a severe season, against his will, and thereby caused his death.² And again, where a woman left a child in an orchard, covered only with leaves, so that a kite came upon and killed it,³ or in a hog-sty,⁴ or on a barren heath. And also where parish officers shifted a child from parish to parish, whereby it perished for want of sustenance,⁵ whereas the crime might be reduced to manslaughter if the child were left at a gentleman's door.⁶ So, if a man be put in a strong room against his will, being a prisoner, and through the unwholesomeness of the place he catch a bad distemper, his keepers will be guilty of murder.⁷ So, if from a continuance of rigorous and cruel usage, a disease makes its appearance which ends in death, whether the fatal result proceed from active severity or passive negligence, the law will imply malice.⁸ Upon which ground it is, that a master who neglects to provide proper nourishment for his apprentice, is guilty of murder if death ensue.⁹ The wife, in this case, was acquitted, it not being her duty to have provided food.¹⁰ And herein consists the distinction: where the duty exists, the neglect amounts to murder; where the duty is absent, the negligence is manslaughter.¹¹ Still, if the wife had used active severity, so as to amount to ill usage, she would have been included in the conviction. Upon a similar principle, a married woman who omitted to supply her illegitimate child with food, was held not guilty of murder, it not having been shown that the husband had supplied her with food for the purpose of maintaining the infant, and that she had wilfully neglected to give it.¹² So, if a master neglect to provide proper medicines for his apprentice, he is at all events guilty of manslaughter, although the law is otherwise as to a servant,¹³ and although there be an invalid indenture of apprenticeship, yet if the prisoner should be proved to have starved the deceased as his apprentice, he will not be allowed to turn round and say that no relation of master and servant existed.¹⁴

¹ *R. v. Walter*, Car. & M. 164.

² *East*, P. C. 225.

³ *Id.* 226.

⁴ *Id.*

⁵ *R. v. Walter*, Car. & M. 164; *R. v. Stockdale*, 2 Lew. C. C. 220.

In this case a count charged the child's death to have arisen from exposure to cold, but the medical men attributed death to a contusion, though they said that cold might have accelerated death;—*Patteson*, J., held that as the count charged the exposure, it could not be supported.

⁶ Car. & M., *ut supra*.

⁷ 9 St. T. 218, by *Carter*, B. *R. v. Huggins*, 2 Str. 856, 864; 2 Ld. R. 1574.

⁸ *R. v. Self*, Leach, 137; *East*, P. C. 226.

⁹ *R. v. Squire and ux.* 1 Russ. C. M. 190.

¹⁰ *Id.* per *Lawrence*, J.

¹¹ *R. v. Bubb and another*, 4 Cox, 455.

¹² *R. v. Saunders*, 7 C. & P. 277.

¹³ *R. v. Smith*, 8 C. & P. 153.

¹⁴ *R. v. Davies*, 1 Russ. C. M. 491.

So, if an infirm person be treated with such gross negligence as that the jury can justly infer that death was contemplated, it is murder. Merely to prove it, such a case would amount to manslaughter.¹ Imprisonment is evidence of a duty to supply food, otherwise the allegation of a duty to supply food should appear in the indictment.² Excessive correction savours of cruelty, and the danger to the prisoner will be much augmented if the weapon he uses is an improper instrument, for though it is impossible to say how far correction with an ordinary weapon might, if pushed to excess, justify a conviction for murder, it is agreed that the use of one which is unusual imports a mischievous disposition, and that the party employing it must abide the event. For in this latter case, the question is, whether the violence perpetrated was done with an intent to kill. A bar of iron has been considered an improper instrument, and death having ensued, the judges held a master guilty of murder who, in a passion, struck his apprentice with it.³ So, with a great staff.⁴ Again, when a park-keeper struck a boy who was trespassing (but made no resistance) two blows, and tied him to his horse's tail, and then struck him again, upon which the horse ran away and the lad was killed, the prisoner was held to have had "premeditated malice," and was executed.⁵ So, a blow with a sword may be considered to be equally improper, where a master had so struck his servant for refusing to deliver up a key, he would probably have suffered, but for some errors in the indictment.⁶

The compelling of a child to work for an unreasonable time, whereby consumption ensues, is only manslaughter.⁷

Sudden Quarrel.—Provocation.—Affray.] It is not to be supposed, however human infirmity may be regarded, that every case of sudden quarrel or provocation must be, of necessity, extenuated in the event of death. The resolution concerning Mawgridge⁸ affords a proof of this. A. and B. fell out, and A. offered B. a pot of ale to strike him. B. struck, and A. killed B. This was held to be murder.⁹ So, if a person should retreat purposely to a wall in order to kill his adversary, it is murder if he kill him.¹⁰ And the question is, whether the provocation, at the time of the fatal assault, was so intense as to overpower the understanding of the person. Has there been time for cool reflection to intervene? Have thought, contrivance, and design been imported into the transaction?

¹ *R. v. Marriott*, 8 C. & P. 425.

² *R. v. Edwards*, Id. 611. *R. v. Goodwin*, 1 Russ. C. M. 563, referred to with approbation by Lord Campbell, 21 L. J. M. C. 202.

³ *R. v. Grey*, Kel. 64.

⁴ 1 Hale, 474; Norw. As. 1670.

⁵ *R. v. Halloway*, Cro. Car. 131.

⁶ *R. v. Keite*, Ld. Raym. 138. He was convicted of manslaughter.

⁷ *R. v. Cheeseman*, 7 C. & P. 455.

⁸ *Ante.*

⁹ 2 Ld. Raym. 1496.

¹⁰ Kel. 58.

If these latter incidents appear to have been pre-eminent, the offence amounts to murder.¹ So, if A. use a deadly weapon pre-meditatedly, in a contest, he becomes guilty of murder, should death ensue. If he uses it in a scuffle without such intention, the offence is manslaughter.² A soldier, as he was running towards an affray, was accosted by a woman who said, "You will not murder the man, will you?" To which he replied, "What is that to you, you bitch?" upon which the woman gave him a box on the ear. He then struck her with the pommel of his sword on the breast, and upon her running away, pursued and stabbed her in the back. Holt, C. J., thought that this was murder, for the soldier had returned a blow for the box on the ear, which, of itself, could not have justified the killing. Other circumstances, however, appearing more favourable to the prisoner, he was only convicted of manslaughter.³

So, where a soldier, after a general scuffle, went out into the yard of a public house, and fetching thence a pitchfork, wounded a person with whom he had previously been struggling, and thereby occasioned his death, the judges were in doubt whether he was not guilty of murder, for the jury had found that he had said of the deceased during the contest, "Damn him! I will murder him;" that he did not labour under any apprehension of personal danger, and that he did not see his comrade bleeding at the time of the fatal stroke, a circumstance which had happened, and which might have provoked him. It was, perhaps, a fact in the prisoner's favour, that only one minute had elapsed between his departure and return with the pitchfork. It was determined that he should be recommended for a pardon, having been convicted of murder, on condition of his serving abroad for his life.⁴ So, where a party had purposed to enlist with one C. and the prisoner, who were soldiers, but afterwards repented, upon which a quarrel ensued, and a crowd collecting, C. drew his sword, and stood in the doorway of the inn declaring that no one should go out,—the prisoner presently finding that the innkeeper's son had got hold of the arm in which C. held his sword, stabbed the latter in the back. It was held, that this would have been murder had the son died, for neither C. nor the prisoner had any right to enlist recruits, nor to prevent the rescue of the party who enlisted, and no blow had been inflicted upon the soldiers.⁵

Drunkenness.] Drunkenness is no excuse for homicide, but it is occasionally taken into consideration, especially where provocation has been given by a blow, to determine whether the prisoner

¹ *R. v. Hayward*, 6 C. & P. 157. Verdict, Guilty of murder.

² See *R. v. Smith*, 8 C. & P. 160.

³ *R. v. Stedman*, East, P. C. 234.

⁴ *R. v. Rankin*, Russ. & Ry. 43.

⁵ *R. v. Longden*, Russ. & Ry. 228.

acted from passion or from malice, and likewise to account for any expressions of the prisoner.¹

Duels.] Duels fall under the head of inexcusable provocation in cases where the meeting for a fatal purpose is deliberately postponed.² For if the duel takes place upon a sudden heat, it is otherwise.³ A very slight circumstance will alter the character of the transaction. As where Lord Morley objected to fighting at the moment of a quarrel, because of the disadvantage he would labour under from high shoes. This was considered evidence of malice, for it showed that deliberate reflection had taken place.⁴ The seconds are also implicated in the same crime, although it was doubted for some time whether the seconds of the party killed were guilty of more than a high misdemeanor.⁵ And so likewise all who give countenance to the duel, by aid or encouragement, are guilty of murder if death ensues, although mere presence will not be sufficient to implicate them.⁶ Thus, again, the second of the deceased person may be convicted of murder upon an indictment charging him with being present, aiding, and abetting the person who killed his, the prisoner's, principal.⁷

Hence it is that the seconds may refuse to give evidence upon the trial of the principals; but it has been held, that if they consent to be sworn, they must disclose all they know, although their testimony may be prejudicial to themselves.⁸ It may be observed here, that a casual meeting between B. and C. at a place where C. has previously agreed to meet A. in a hostile manner, will not implicate B. in the crime of murder, nor of manslaughter, if C. be killed by A., and B. take no share in the transaction. And this, although B. knew that a quarrel exists between A. and C.⁹

Homicide in the prosecution of an illegal act.] The law is so careful of human life, that it will hold persons responsible as murderers for a fatal accident, although the blow may have been given by mistake, if it were, in the first instance, levelled wilfully against some other person, and in the prosecution of an unlawful purpose. Those, therefore, who engage in illegal designs are liable as principals in the second degree, for a homicide committed by one of

¹ *R. v. Thomas*, 7 C. & P. 817. By Patteson, J., in *R. v. Cruse and ux.*, 8 C. & P. 546. *R. v. Pearson*, 2 Lew. C. C. 144. "A man may be so drunk as not to be able to have an intent." *R. v. Monkhouse*, 4 Cox, 55.

² *R. v. Taverner*, 1 Ro. Rep. 360; 3 Bulstr. 171; Kel. 28.

³ *R. v. Kirk and another*, 12 Mod. 304.

⁴ *R. v. Bromwich*, 1 Lev. 180. *R. v. Lord Morley and Bromidge*,

1 Sid. 277; 2 Ld. Raym. 1496, citing Crompt. 23, 25.

⁵ 1 Hale, 443; East, P. C. 242. *R. v. Young and another*, 8 C. & P. 644.

⁶ 8 C. & P., *ut supra*, and Id. 652.

⁷ *R. v. Cuddy*, 1 Car. & K. 210.

⁸ *R. v. England*, Leach, 767. And see several cases to the same effect, Id. 769.

⁹ *R. v. Lord Mohun*, Holt's Ca. 479.

their party. And if it were arranged between A. B. and C. that B. and C. should commit a burglary, and that, in case of resistance, they should proceed to murder, there is reason to believe that, in case of murder, A. would be an accessory before the fact. Thus, with reference to the general principle of combination for an unlawful object, where two soldiers had been denied beer at an unseasonable hour, but afterwards contrived to rush into the house, and whilst one was engaged in scuffling with the landlord, the other stabbed him with a sharp instrument,—it was held to be murder in both, for there was reasonable evidence of the prisoners having come the second time with a deliberate intention of using violence, in case their demand for beer had not been complied with, and the struggle with the landlord made no difference, because he had a right to use reasonable force in removing the soldier from his house at that hour of the night.¹ The law is the same in the common case of affrays with poachers, although no blow be struck by any one of the party, except the actual murderer.² And where two poachers had surrendered to gamekeepers, who did not announce in what capacity they had made the capture, and then, upon the call of the two, a third came up and killed one of the keepers, it was held murder in all, although the two did no act except to summon their comrade.³ So, where Lord Dacre and others agreed to hunt in a park, and to kill all who might resist,—upon the death of the keeper at the hands of one of the company, it was ruled to be murder in all, although Lord Dacre was a quarter of a mile from the spot when the blow was given, and knew nothing of it.⁴ And upon another occasion, it was held to be no defence that one of the park-keepers fired first, there being an original intent to murder in case of resistance.⁵ So, where persons came to a place to seize goods illegally by force, and a gentlewoman coming out of the house unarmed, was killed by a stone thrown by one of the parties, it was held murder in all.⁶ So, in the well-known case of the unlawful distress, if the stroke had been levelled at any one, either wilfully or by mistake, it would, undoubtedly, have been murder.⁷ So, upon a hue and cry, all the robbers who resisted their pursuers were held guilty of the murder of one of them, although they were at a distance from the actual slayer in the same field.⁸ Two go forth to rob a person, and death ensues; both were guilty of murdering the person robbed.⁹ In *R. v. Price and others*, where an assault was made by

¹ *R. v. Willoughby*, East, P. C. 288, per Buller, J.

² *R. v. Edmeads*, 3 C. & P. 390.

³ *R. v. Whithorne*, 3 C. & P. 394.

⁴ *Le Seignior Dacre's case*, Mo. 86; Palm. 35. And see East, P. C. 256; Sav. 67; Leach, 374.

⁵ *R. v. Wormal and others*, 2 Ro. Rep. 120.

⁶ The statute *De Malefactoribus in Parcibus*, 21 Ed. 1, st. 2, is re-

pealed, but this makes no difference as to the general law.

⁷ *R. v. Mansell and Herbert*, Dy. 128.

⁸ *R. v. Jackson and others*, 1 Hale, 464. *R. v. Howell*, 9 C. & P. 437.

⁹ *R. v. Jackson and another*, 7 Cox, 357; and *R. v. Howell* was cited.

six persons on one man, Byles, J., thus directed the jury. The person who stabbed was guilty of murder, even though he might have intended only bodily harm. If the five others designed that death should ensue, it was murder in them. So, if there was a common intent to use the knife. If no common design, yet if they were present abetting the act, it was murder in all. If none of these circumstances could be verified, the five should be acquitted, and the stabber alone convicted. If the jury could not say which struck the blow in this latter case, all should be found not guilty.¹ In order, however, to entail the guilt upon the parties, the killing must be in furtherance of the unlawful act. Therefore, where a fray took place between a landlord and his assistants, who were about to make a distress, and the prisoners who were hired by the tenant to oppose it, and in the course of the fray a boy, quite unconcerned in the affair, and who was standing at his father's door, was slain by a person unknown, the majority of the judges held it not to be murder, for, as far as the evidence went, it seemed to be a killing by accident, and quite independent of the original purpose.² So, where a smuggler engaged with others in a struggle with the king's officers, shot one of his accomplices, it was held that this would have been murder in the whole party, had the special verdict found that the gun had been discharged against the officers, but in the absence of that finding, *non constat*, but that the killing was premeditated against the accomplice only, in which case the hand which did the act would alone be guilty.³ So, when two were beating one, and a stranger remonstrated, upon which one of the assailants stabbed the stranger, the judges held that the other assailant was not guilty of the murder, because the killing was collateral, and did not ensue upon the act of assault.⁴ So, where one saw his master fighting, and took his part, here although the master was, under the circumstances, guilty of murder, yet the servant having joined suddenly, and without premeditation, was held to have committed manslaughter only.⁵ Just so it is, that if a man take a pistol out of his pocket and commit a murder, independently of the original unlawful design, the confederate will not be involved in the more serious charge.⁶ Two brothers were fighting, and a third person laid hold of one of them who stabbed him; it was held, that the offender would have been guilty of murder had death ensued, and no further violence had been used than what was necessary to prevent the fight; if any excess had been committed, the offence would have been reduced to manslaughter.⁷ A woman put skewers into the womb of another woman, in order to procure abortion, and the woman died of the

¹ In *R. v. Price and others*, 8 Cox, C. C. 96.

² *R. v. Hubson and others*, East, P. C. 258; Leach, 6. Nom. *R. v. Hodgson*. See *R. v. Macklin and others*, 2 Lew. C. C. 225.

³ *R. v. Plummer*, 12 Mod. 627; Kel, 109. *R. v. Tomson*, Id. 66.

⁴ Anon, 8 Mod. 164.

⁵ *R. v. Salisbury*, Plowd. 100.

⁶ *R. v. Duffey and another*, 1 Lew. C. C. 194. See also *R. v. Borthwick and others*. 1 Dougl. 207.

⁷ *R. v. Bourne*, 5 C. & P. 120.

injury : this was held to be murder,¹ and it makes no difference that life might have been saved had certain means been used. The prisoner caused a premature birth by her criminal conduct towards a woman, and the child died by reason of exposure ; the possibility of saving the child had no bearing upon the matter.² The prisoners were charged with intoxicating a person, and then ill-using him so that he died. The object was to get the man, who was a sheriff's officer, out of possession. The indictment was for manslaughter, and the court held that, if it were necessary to prove that the prisoners knew that the liquors given would cause death, the case would amount to murder. It was not the less manslaughter because the prisoners drove the deceased about in a carriage, not to kill him, but to keep him out of possession.³ Then, killing by mistake will amount to murder or manslaughter, according to the particular circumstances of each case.⁴ A. advised B. to poison his wife ; B. did so, but the woman recovered. She, however, gave her daughter some of the poisoned food, and the child died. It was held that A., although accessory to the malicious attempt against B.'s wife, was not guilty of the death of the child. But B. was guilty of murder.⁵ One Agnes Gore put poison into some medicine prepared by an apothecary. The apothecary vexed by the evil results which had attended his medicine, declared he would take it himself, and, cutting off a piece (it was an electuary), eat it, and died of the poison. Agnes Gore was held guilty of murder.⁶ Catherine Michael gave to S. S. some laudanum to administer to an infant, and she was adjudged guilty of murder, although a child, who happened to find the laudanum on a mantel-piece, administered it to the infant instead of S. S., who did not intend to administer it, and although the child gave more than a teaspoonful, the quantity directed by C. M. to be taken.⁷ C. was indicted as a principal in murder. C. got some arsenic, and persuaded B. to administer it. Being absent when the poison was given, it was contended that C. was not within the statute 11 & 12 Vict. c. 46,⁸ and that the Act did not apply to murder, but the objection was overruled . . .⁹ A. was privy to a plot to murder B. by means of an explosive machine which killed C. This proof was held sufficient to go to the jury as evidence of his murdering C. and of being accessory.¹⁰ But the indictment must be drawn with care. There was an indictment against the prisoner for causing poison to be taken by B., with intent to murder B. The evidence was, that B. took

¹ *R. v. Tinckler*, East, P. C. 230.

² *R. v. West*, 2 Car. & K. 784.

³ *R. v. Packard*, Car. & M. 236.

⁴ *R. v. Lewis*, 6 C. & P. 161 ; Fost. 262 ; Kel. 111. *R. v. Saunders*, Plowd. 474 ; 1 Hale, 441.

⁵ *R. v. Archer*, Plowd. 475.

⁶ *R. v. Gore*, 9 Rep. 81 (a).

⁷ *R. v. Michael*, 2 Moo. C. C. 120. See *R. v. Williams*, Den.

39. An application to inspect the stomach will be entertained on the prisoner's behalf *before trial*.

R. v. Spry and another, 3 Cox, C. C. 221.

⁸ See now 24 & 25 Vict. c. 94.

⁹ *R. v. Chadwick*, Greaves Cr. Law Acts (1861), p. 10.

¹⁰ *R. v. Bernard*, 1 Post. & F 240.

the poison, but that it was intended for another, and the indictment was held to be bad. But an indictment was preferred stating the intent to have been "to commit murder," and the prisoner was convicted.¹ A woman threw a piece of iron at her child in order to frighten him, but unhappily caused thereby the death of another child, who chanced, by coming into the room, to meet the stroke: this was held to be manslaughter.²

Lastly, it may be added, that the killing must take place, not only in pursuance of the unlawful act, but also during the continuance of that undertaking, that is, if it be sought to affect the whole party with the crime of murder. Because a fresh confederation or provocation may be the means of changing the features of the transaction very materially. As where A. with several followers, and probably, upon a claim of title, ejected B. from a house. Threedays afterwards, B. with others, came armed, with an intent to re-enter, and one of them cast fire into a thatched house adjoining the mansion, upon which a gun was fired by one of A.'s party, which killed one of B.'s party. It was held that this was manslaughter only in A. and his friends, because here was a fresh and sudden provocation, though had the death happened during the illegal entry of A. he would, in all likelihood, have incurred the guilt of murder.³

Homicide by resisting officers.] The act of killing an officer being, of course, unlawful, all those who may be present, and who offer resistance, must be considered as aiding and abetting. The doubts which have been entertained upon this subject of killing an officer, have arisen, principally, as to the validity of the warrant of arrest, and sometimes, as to the mode of executing it. It may be observed that the fact of the person charged by a warrant, or against whom process may be out, being an innocent man, will make no difference, should the instrument which authorizes his capture be regular, and the mode of executing it correct. A man, however innocent, therefore, who resists to death a legal arrest, will be guilty of murder.⁴

Our remarks here will be chiefly confined to the arrest in civil suits, inasmuch as we have fully treated upon arrest in criminal cases in the early portion of this work.⁵ There is an instance of both the objections above adverted to, with regard to the warrant and the mode of its execution, in a case where the county clerk of Somerset had signed an attachment in his own cause, and the officer whom the sheriff had directed to execute the process was killed by the person attached. It was said for the prisoner, that this process was illegal, and consequently void, but the judges held that the county clerk had only acted ministerially, and not as judge in his own cause. It also appeared that the outer door, through which the deceased entered, was divided into two parts, the lower part being closed and the upper open. The officer put his hand over the latch to open it, upon which a struggle ensued, and then

¹ *R. v. Ryan*, 2 Moo. & Rob. 213. Hale, P. C. 444; East, P. C. 259.

² *R. v. Conner*, 7 C. & P. 438. ⁴ East, P. C. 300.

³ *Case of Drayton Basset*, 1 ⁵ Ante.

the deceased having prevailed, and got beyond the doorway, he was almost immediately shot. The judges were of opinion that the prisoner had been properly convicted.¹ And it is to be observed, that if the writ itself be correct, a defect in the proceedings upon which it was founded will not vary the guilt of him who resists it. It is enough, if a jurisdiction appear over the subject matter of the process.² The writ and warrant were held sufficient, without showing the judgment or decree. In this case the writ of execution, the injunction for delivering possession, and the writ of assistance, were read in evidence, but not the decree.³ So again, where an escape warrant had been obtained unduly, and even by perjury, it was held to be murder in a party who killed the officer.⁴ And these cases are quite different from such as show an error in the process itself, for that circumstance alleviates the offence, and reduces it to manslaughter.⁵ With reference to the mode of arresting, as every man's house is held to be his castle, "for safety and repose," it is not competent in civil suits for an officer to break the outward door.⁶ This is a privilege which the occupier and his family become entitled to, by virtue of their ordinary residence in a place. It will be recollected that we are now speaking of civil suits, for in criminal matters, and, as it should seem, upon an escape warrant,⁷ the regular course of justice must not be impeded by any external guard. And the privilege will not prevail if there be an escape and fresh pursuit.⁸ Nor will it extend to shelter a stranger who takes refuge in the house of another.⁹ Although it may be added, that if a door be broken in search of a stranger, and he be not found, the peril rests with the invader.¹⁰ And a magistrate's warrant sets aside all these niceties. It has been stated that the filling up of a blank warrant in cases of felony, was so far authorized as to place the person who might execute it within the fullest protection of the law.¹¹ But this is not so in civil matters, and therefore, where the warrant had been filled up after it was sealed, a killing of the officer was ruled to be manslaughter only.¹² Even this decision seems, nevertheless, to be limited to cases where the writ has been sent out of the office before its completion. So that where the names of the officers to whom a writ of *Hab. fac. poss.* was directed, were interlineated after the writ was sealed, and while it remained in the hands of the under-sheriff, the judges held a conviction, under 9 Geo. 1, c. 22, s. 1, for shooting, right.¹³ Yet, whether the matter be civil

¹ *R. v. Baker*, Leach, 112; East, P. C. 323.

² *R. v. Rogers*, East, P. C. 310; Fost. 311. *R. v. Mackalley*, 9 Rep. 61 (b).

³ East, P. C. 310 (n).

⁴ *R. v. Curtis*, Fost. 135.

⁵ East, P. C. 312. See *R. v. Mead and another*, 2 Stark. N.P.C. 205.

⁶ *Lee v. Gansel*, Cowp. 1; East, P. C. 323.

⁷ East, P. C. 310.

⁸ East, P. C. 324.

⁹ Id. 323.

¹⁰ Id. 324.

¹¹ *Ante*.

¹² *R. v. Stevenson*, 10 St. Tr. 462.

¹³ *R. v. Harris*, Leach, 929. See

Burslem v. Fern, 2 Wils. 47.

Housin v. Barrow, 6 T. R. 122.

R. v. Stevenson and others, East,

326.

or criminal, a notification of the business on hand must be made by the officer, unless, indeed, the circumstances of the particular case should point out his authority, and this intimation must be met by a refusal, either direct or indirect, to open the door, before the persons without can proceed to extremities.¹ So where an arrest is made in the street or elsewhere, openly, or in a house, the entry being undisturbed, some notice must still be tendered, as a staff of office, or words denoting the authority to arrest, or naming the party aloud upon hue and cry, and in the daytime this notice is the more easily given, because a mere ensign of office will suffice.² And if there be evidence to show that the prisoner knew the party to be an officer, no notice at all need be proved.³ But when a bailiff pushed abruptly into a chamber, and was met by the party he intended to take, with a sword, and thus perished in the surprise of the moment, it was held, that as no notice had been given, the case could not amount to murder.⁴ In criminal cases it is not necessary to produce the warrant for arresting the party, but in civil process, although the bailiff must not part with his warrant, he must if it be demanded, show and explain it.⁵ Lastly, with reference to the time of arrest, it is no excuse to say that the officer came at an unreasonable hour, for there might not otherwise be a convenient opportunity for doing justice to the creditor.⁶ But save for treason, felony, and a breach of the peace, it is not competent to execute process on a Sunday.⁷

The second point is the guilt of those who aid and abet a fatal assault committed upon the officers who execute civil process, or apprehend by virtue of a magistrate's warrant. As a general principle these persons are guilty of murder, the point in their favour, independently of the invalidity of the warrant, being their separation or dissent from the violence of their companions. Several may be engaged in an affray: some of these may continue active in the brawl, until a deadly blow has been given; others may retire previously from the contest. In such a case the former only are guilty of murder.⁸ If there be no such retirement, all aiders and abettors are equally guilty with the party who gives the stroke.⁹ Again, some may be ignorant of the presence of a constable, and others may aid and abet with a knowledge of that fact, and then the latter only incur the guilt of murder, unless, indeed, all had united for the purpose of an unlawful tumult, in which case the idea of a sudden affray would be lost.¹⁰ And it is moreover possible that the assailants might not generally know the officers, but yet might have reason to be cognizant of the

¹ East, P. C. 324; Fost. 136.

² East, P. C. 315. *R. v. Gordon*, Id. 319. To the same effect is *R. v. Mackalley*, 9 Rep. 61 (b). *Case of the Sissinghurst Rioters*, 1 Hale, 462.

³ *R. v. Pew*, Cro. Car. 183.

⁴ 1 Hale, 470; cor. Glynn, C. J.; East, P. C. 314.

⁵ East, P. C. 319.

⁶ *R. v. Mackalley*, 9 Rep. 68. Objection 1. See *R. v. Hagan*, 8 C. & P. 167, *post*.

⁷ East, P. C. 325.

⁸ *R. v. Wallis*, 1 Salk. 334.

⁹ *Benson v. Offley* (appeal), 2 Show. 510.

¹⁰ *R. v. Tyler and another*, 8 C. & P. 616.

presence of the ministers of justice; and if so, their ignorance would seem to be no defence to an indictment for murder.¹ Intimidation is no defence, if some act be done by the prisoners. The duty of persons so circumstanced is to leave the unlawful assembly as soon as they can consistently with their personal safety.² And it will not avail the prisoners to say that the mob had no particular object in view.³

And, if a person interpose who was not originally mixed up with the quarrel, he must abide the consequence of any violent act on his part. As, if a bailiff be engaged in his regular duty, and a stranger suddenly interfere and kill him, this is murder.⁴ Still, in favour of human life, if the defendant can prove that he merely stepped in to keep the peace or prevent mischief, and that the occurrence took place, as it were, by misadventure, he will, at all events, be discharged from the heavier crime.⁵ Even the principal in a transaction, as an arrest or an affray, if he disavow the acts of his friends in time, or if these acts be entirely independent of his own conduct, will not be held answerable for their violence. As, if A. remain quite passive under an arrest, and B., without previous concert, kill the bailiff, A. is not guilty of any offence.⁶ So, where one out of many others submitted to an arrest, and then one of the pursuers upon a hue and cry was slain by a confederate, it was held that the person in custody was not guilty of murder.⁷

There is one other point: can a third person plead the illegality of a warrant, the execution of which he has opposed with bloodshed? The better opinion seems to be, that he cannot make such a defence with success, but some difference of opinion has prevailed. A man was impressed without a warrant; three or four persons seeing the capture demanded the warrant, and denying the authority of the paper which was shown to them, a scuffle arose, which ended in the death of one of the officers. It was held by eight judges against four that this was manslaughter, although Kelyng, C. J., expressed himself strongly to the contrary.⁸ A woman was arrested illegally by a constable; several persons, thereupon, attacked the officer, but became pacified for the moment, and retreated. However, they advanced again, and the constable calling D. to his assistance, the latter was killed before any stroke had been inflicted upon the assailants. Seven judges against five held this to be manslaughter, on the ground, that an illegal imprisonment was a sufficient provocation to all people, and a warranty for their interference. The five judges said, it might be a

¹ *R. v. Yong*, 4 Rep. 40 (a); East, P. C. 315, 316; 1 Hale, 463.

² *R. v. Tyler and another*, 3 C. & P. 616. Verdict, "Guilty of murder."

³ *R. v. Tyler*, ut supra.

⁴ Kel. 87; East, P. C. 318. See *R. v. Sir C. Stanley*, Kel. 86.

⁵ 1 Sid. 160; East, P. C. 318.

⁶ *R. v. Sir C. Stanley*, Kel. 87; *R. v. Sir H. Ferrers*, Cro. Car. 371.

See *Anon.* at Hertford, East, P. C. 296.

⁷ *R. v. Jackson and others*, 1 Hale, 464.

⁸ *R. v. Huggett*, Kel. 59; 1 Hale, 465; i. e. that the case was murder.

provocation to a prisoner, but not to a stranger, and here, the prisoners were entire strangers to the woman.¹ But Mr. Justice Foster observes upon this case, that there was time for cool reflection between the first and second attack, and that the assailants seemed to be pacified; so that the second assault seemed rather to have been grounded upon resentment, or a principle of revenge, than any hope or endeavour to assist the woman.² Mary Adey killed an officer who was taking the man she cohabited with, under an illegal warrant. The act was done in a transport of passion, and although three judges thought it murder, a special verdict was found, and the matter came, upon argument, before the judges. No opinion was publicly given, but whether the prisoner escaped from gaol during the riots of 1780, or whether, as it is said, the judges thought the case manslaughter and so the prisoner was discharged, does not seem to be quite clear.³

Killing by officers.] When an officer, during his capture, commits a homicide, it should appear, in order to justify an extremity so serious, that he had a good excuse for his conduct; as, where in an affray with smugglers, a revenue officer was twice knocked down, upon which he shot the deceased. Being indicted for murder, he was acquitted.⁴ However, it will not avail to allege a slight interruption, nor will any act of resistance sanction a killing, especially if the necessity of the occasion be exceeded; and *a fortiori*, if the officer kill after the resistance has ceased, and there has been time to cool, he will be guilty of murder; or, again, if he kill, meeting with no resistance.⁵ And the same consequence will ensue if he take life under an insufficient authority, for he is then no legal officer.⁶ In the case of *Reason* and *Tranter*, who were tried for killing Mr. Luttrell, it was agreed, that a disproportionate revenge would entail the crime of murder upon officers, and that an assault with a walking cane, which drew a little blood, would not justify an unrelenting attack upon the striker, especially the act of shooting him on the ground. Still, a determined attempt at rescue on his part would alter the case, and might even reduce the killing to justifiable homicide.⁷ Nevertheless, this seems to have been one of the cases in which the officers almost transgressed the necessity of the occasion. So, if a constable encounter a bailiff in the execution of his duty, and kill him, he will be guilty of murder.⁸ But the greater number of charges against officers has arisen in cases where their authority has been altogether disputed. This matter has been frequently discussed upon impressments. It was usual with the admiralty to intrust the press warrant to a par-

¹ *R. v. Tooley and others*, 2 Ld. Raymond, 1296.

² Fost. 315.

³ *R. v. Adey*, Leach, 206, 212.

⁴ *R. v. Marsh and others*, 3 Mod. 66.

⁵ East, P. C. 297.

⁶ East, P. C. 312.

⁷ Fost. 292; 1 Str. 499; but not so well reported in Strange.

⁸ 1 Hale, 460; East, P. C. 305.

A case at Exeter before Heath, J., upon an assault and rescue.

ticular officer, and he, in his turn, confided the execution to a commissioned officer, whose name and office appeared in the body of the warrant; consequently, if the person intrusted with the impressing ventured to kill a seaman who endeavoured to escape, he was guilty of murder, if he had no warrant.¹ And it made no difference that the mariner drew a knife, in order to resist, after his capture and detention; for in the absence of the warrant, the conduct of the officer was entirely illegal.² So, again,—leaving the question of pressing,—a ship's sentinel has no authority to kill persons approaching the vessel, unless it be in order to preserve the crew. The prisoner was under orders to keep off all boats, and was furnished with arms and ammunition; certain boats pressed upon the ship, upon which the sentinel fired, and killed a man. The jury found, that the shot had been fired under a mistaken impression of duty, but the judges held that the case was one of murder, although under the particular circumstances they recommended that a pardon should be applied for.³ So, when a constable shot at a man who was stealing wood in a coppice, he was convicted of shooting with intent to do grievous bodily harm, although he could not have otherwise made an arrest, and although by reason of former convictions for wood-stealing, but which were *unknown to the constable*, the man's offence amounted to felony, the conviction was sustained.⁴

By 1 Geo. 1, st. 2, c. 5, s. 3, officers happening to kill, maim, or hurt persons who continue for more than one hour in an unlawful assembly after proclamation, are indemnified for their conduct.

And by 3 & 4 Will. 4, c. 53, s. 8, vessels engaged in smuggling which do not bring to upon a signal, may be fired at, the captain or other person being indemnified from any indictment or other proceeding, in consequence thereof.

Murder of infants.] We will now advert to the murder of infants. It seems to be necessary that the child should have an independent circulation, before it can be the subject of a murderous assault; therefore if a man strike a woman with child, so as to cause the death of the child, he is neither guilty of murder, nor of manslaughter.⁵ But it is not essential, if the child be wholly born, that it should have breathed;⁶ whilst, on the other hand, the fact of the child's breathing is, of itself, insufficient, as it might have died before its birth.⁷ However, it was at one time made a question, whether a child, connected with the mother by the umbilical cord, but wholly produced into the world, was the subject of murder if strangled intentionally by its mother.⁸ The jury must be satisfied

¹ *R. v. Browning*, East, P. C. 312.

² *R. v. Dixon*, East, P. C. 313. *R. v. Browning*, Id. 312; and see Fost. 154. *R. v. Borthwick*, 1 Dougl. 207.

³ *R. v. Thomas*, 1 Russ. C. M. 614. *R. v. Withers*, see East, P. C. 295.

⁴ *R. v. Dadson*, 20 L. J. M. C. 57; Den. & P. 35.

⁵ 1 Hale, 433. *R. v. Enoch*, 5 C. & P. 539. *R. v. Poulton*, Id. 329. *R. v. Wright*, 9 C. & P. 754.

⁶ *R. v. Brain*, 6 C. & P. 349.

⁷ *R. v. Sellis*, 7 C. & P. 850.

⁸ *R. v. Crutchley*, 7 C. & P. 814.

of the full birth,¹ and then it seems, that the offence is murder;² and the point was seriously considered by the judges, in Michaelmas Term, 1848, when they unanimously held the conviction, under such circumstances, right, although the child was still attached to the navel string.³

The term "quick with child," means having conceived.⁴

Other cases of murder.] The prisoner shot a man who was dressed in white, and who pretended to be a ghost; here, the deceased had only been guilty of a misdemeanor, and it was therefore adjudged murder to kill him, but the prisoner was reprieved.⁵

Suicide.] If two persons encourage one another to commit suicide, and one fails in the attempt, the deceased will be *felo de se*, and the survivor a principal in the murder; for suicide is murder by the English law. In a case of this kind, the prisoner was recommended for a pardon, because it did not appear but that the deceased might have fallen into the water at the last moment by accident, although it was clear that both had gone out at night for the purpose of self-destruction.⁶

The absence of the person abetting suicide will make no difference, if his advice be followed; as in the case of poisoning.⁷ Drunkenness, so as to negative the idea of consciousness, is evidence to show that there was no attempt to commit suicide, at least not in point of law.⁸

Civil trespass.] So, as in the case of the ghost, a mere trespasser cannot be put to death without subjecting the slayer to an indictment for murder. It was held some years since, by Holroyd, J., that a civil trespass would not excuse firing at the trespasser. Nevertheless, the taking forcible possession of a close was held to be more than a trespass, and the entering of a dwelling by force, especially at night, was deemed a matter of aggravation; still, said

¹ S. C.

² *R. v. Reeves*, 9 C. & P. 25.

³ *R. v. Trilloe*, 2 Moo. C. C. 260.

⁴ *R. v. Wycherley*, 8 C. & P. 262. As to the proof necessary to support an allegation of the child being a bastard, see *R. v. Poulton*, 5 C. & P. 329. And as to the old statute, 21 Jac. 1, c. 27, (repealed,) respecting the concealment of the death of bastards, see East, P. C. 228, 229.

⁵ *R. v. Smith*, 1 Russ. C. M. 546.

⁶ *R. v. Dyson*, Russ. & Ry.

523. *R. v. Alison*, 8 C. & P. 418. And see *R. v. Russell*, 1 Moo. C. C. 356.

⁷ *R. v. Vaux*, 4 Rep. 44 (a). But see *R. v. Leddington*, 9 C. & P. 79, *contra*, Alderson, B., where it was held that the prisoner could not be tried as accessory before the fact, the advice to commit suicide having been followed. The 7 Geo. 4, c. 64, only extends to such persons as were previously liable to be tried either with or after the principal, and an accessory before the fact to suicide was not triable at common law.

⁸ *R. v. Moore*, 3 Car. & K. 319.

the learned judge, a man is not authorized to fire upon every invasion or intrusion.¹ *A fortiori*, if he have time to reflect; as where A. having threatened to shoot trespassers, upon seeing one, went back to his house, and got a pistol and shot the trespasser; he was held guilty of murder.²

Wanton carelessness.] Wanton carelessness may amount to murder; as if a workman were to throw down stones recklessly in a public street, especially after being warned.³ So, if a driver will dash forward after timely notice of the danger likely to ensue.⁴ So, if a man were purposely to let loose a vicious animal, it might be only to frighten;⁵ but, *à fortiori*, if it were to be done maliciously, he would be guilty of murder.⁶ So, where a boy who had been warned not to come near to a shop, did come and throw a sharp instrument at an apprentice, which killed him, it was ruled manslaughter, although there was no malice against the apprentice, and Hullock, B., said that the charge might have been for murder.⁷

The plague.] Respecting the plague, Lord Hale inquires, "What, if a person goes abroad with an intent to infect another, and another is thereby infected and dies, whether that be not murder by the common law might be a question."⁸

False accusation.] One J. Kidder was convicted and executed upon the testimony of two persons, who had conspired with others for the purpose of obtaining a reward. In this case, the judges, although much disposed to hold the offence murder, abstained nevertheless from so doing, by reason of the danger of deterring witnesses from giving evidence in capital prosecutions, if it must be at the peril of their lives.⁹

Death from fear of immediate violence.] If a person through fear of immediate violence throw himself into danger, as if, in order to escape a blow, he cast himself into a river, and be drowned, the aggressor will probably be guilty of murder.¹⁰ So where the prisoner beat his wife, and threatened to throw her out of the window, upon which, through terror, she threw herself out and died of the bruises occasioned thereby, three judges expressed their

¹ *R. v. Meade and Belt*, 1 Lew. C. C. 184.

² *R. v. Moir*, 7 C. & P. 179, cited.

³ See *R. v. Hull*, Kel. 40.

⁴ See 1 Hale, 476.

⁵ Lord Hale speaks of such a case at St. Albans, where the owner wished only to make sport, and was hanged for the consequences, but he

adds that it was but a hearsay. 1 Hale, 431.

⁶ East, P. C. 265.

⁷ *R. v. Langstaffe*, 1 Lew. C. C. 162.

⁸ 1 Hale, P. C. 432.

⁹ *R. v. Macdaniel and others*, East, P. C. 333; Leach, 44; Fost. 121. Foster, J., was evidently against the conviction.

¹⁰ *R. v. Pitts*, Car. & M. 284.

opinion, that although there was reason to believe that the death had happened through the blow inflicted before her fall, yet, that the husband was answerable for the consequences of the fall, if it took place through his threats. The jury, however, conceived that the wife's intemperance was the cause of her death, and they gave a verdict of acquittal.¹ So, where the prisoner had several times committed assaults upon the deceased, in consequence of which a fatal mortification ensued, it was doubtful whether the indictment for murder could not have been sustained, but an objection arising upon the record itself, judgment was arrested.²

Extreme youth.] Where the youth of the offender has been very tender, it has been a matter of serious consideration with the judges, whether a sufficient mischievous disposition has appeared to warrant an execution. A boy of ten years old was convicted before Chief Justice Willes of the murder of a girl of five years of age, but the chief justice respited the execution, lest the punishment of such a child by death should be deemed to savour of cruelty; but the judges held, that the circumstances of the case showed so much cunning, as that the boy ought to suffer as an example to others, and the convict would have been hanged but for the interposition of the secretary of state.³ The judges also held, that the boy's declaration before a magistrate of his guilt had been properly received.⁴

Other cases.] The responsibility of judges and officers in ordering execution will be found in a future page, when we come to treat of justifiable and excusable homicide.⁵

It is no defence that wounds, if properly treated, might have been cured.⁶ Nor, that the deceased refused to submit to a surgical operation which might have saved him.⁷ Nor, that the operation might have caused death, being rendered necessary by the felonious act.⁸ Nor, that the brandy administered necessarily after severe kicks might have entered into the lungs, and so have caused death.⁹ A bill for murder being preferred, the grand jury cannot find a true bill against A. for murder, and another against B. for manslaughter. There must be a new bill against B., but the bill is good as a bill for murder against A.¹⁰

Judgment.] By 24 & 25 Vict. c. 100, s. 1, whosoever shall be convicted of murder shall suffer death as a felon.

By sect. 2, upon every conviction for murder the court shall

¹ *R. v. Evans*, 1 Russ. C. M. 489.

² *R. v. Ladd*, Leach, 96.

³ *R. v. York*, Fost. 70.

⁴ S. C.

⁵ *Post.* East, P. C. 334; 1 Hale, P. C. 497.

⁶ *R. v. Reading*, 1 Keb. 17. *R. v. Rew*, Kel. 26.

⁷ *R. v. Holland*, 2 Moo. & Rob. 351.

⁸ *R. v. Pym*, 1 Cox, C. C. 339.

⁹ *R. v. M'Intyre*, 2 Cox, 379.

¹⁰ *R. v. Bubb and another*, 4 Cox, 455.

pronounce sentence of death, and the same may be carried into execution, and all other proceedings upon such sentence and in respect thereof may be had and taken, in the same manner in all respects as sentence of death might have been pronounced and carried into execution, and all other proceedings in respect thereof might have been had and taken, before the passing of this Act, upon a conviction for any other felony for which the prisoner might have been sentenced to suffer death as a felon.

By sect. 3, the body of every person executed for murder shall be buried within the precincts of the prison in which he shall have been last confined after conviction, and the sentence of the court shall so direct.¹

CHAPTER II.

OF MANSLAUGHTER.

Manslaughter.] Manslaughter is a felonious killing without malice, before the blood has time to cool.² It includes a very large portion of violent deaths, for the law, which is as compassionate to human infirmity as the merciful consideration of juries, has contrived to extenuate many killings occasioned by hasty and riotous conduct; and deaths caused by careless accident, or negligence, are also viewed in the same mitigated aspect. Whilst, therefore, the law is borne out in its stern demand for inquiry into the death of a subject, and for punishment, unless a strong case can be made out in excuse, it is attended, in the absence of malice, with a more favourable construction of the offence; and thus we have the term "manslaughter" to represent various illegal homicides which are less than murder. This principle will be found to prevail throughout the decisions. Thus, if a parent punish a child with an instrument calculated to do great bodily harm, or with cruelty, it will be murder; but if the punishment be inflicted to an improper excess only, with a weapon comparatively harmless, and, of course, without a malicious intent, it will only be manslaughter. As, when a father beat his son with a rope, for theft, and with undue severity, so that he died, it was ruled manslaughter.³ And the same law obtains with reference to the rela-

¹ See as to the new law of conspiring to murder, *post*, and as to the indictments, *post*.

² *R. v. Taylor*, 2 Lew. C. C. 215, Taunton, J.

³ *Anon.* East, P. C. 261.

tion between master and servant; as, where a master took up a clog and threw it at his boy, and killed him.¹ So, where a shepherd boy permitted some sheep to escape through negligence, upon which the prisoner took up a hedge stake and threw it at the lad, thereby fracturing his skull, and causing his death. Here the jury negatived the intent to kill, and thus the charge of murder was got rid of, but the stake being an improper instrument, they found that he was guilty of manslaughter.² In one case, the judges were apparently doubtful as to a child's stool being such an instrument as would inflict a grievous bodily harm, and so aggravate the offence. A mother-in-law, by way of correcting her daughter for a trivial fault, threw such a stool at her. It struck the girl, who was only ten years old, on the temple, and caused her death shortly afterwards. The special verdict negatived the intent to kill. After lying twelve months in prison, the woman was pardoned, without any communication from the judges on the case.³ Very near to this point is the case of one who beat a trespasser. There is, however, this distinction, namely, that in the latter case there is no justification for the slightest blow, and therefore death, under such circumstances, must amount to manslaughter.⁴

Administering poison.] A. gave his wife sulphate of potash to procure abortion. She died. He was held rightly convicted of manslaughter.⁵

Starving.] Again, if a master treats his apprentice harshly, withholding from him that care to which he is entitled, so that his health suffers through the neglect, this will be a case of manslaughter, unless there be evidence of malice, as personal violence, want of food, &c., in which latter event it would be murder.⁶ But the indictment must, upon these occasions, allege a duty to supply food.⁷ So, again, where there is a separation between man and wife, and a fixed allowance regularly paid, and the husband is acquainted that his wife is houseless, and, in fact, the wife dies for want of shelter, it seems that he will be guilty of manslaughter; but he is not *primâ facie* bound, under such circumstances, to afford her shelter.⁸ Yet if she be labouring under a fatal disease,

¹ *R. v. Turner*, Comb. 407, 408.

² *R. v. Wiggs*, Leach, 378, n. And see *R. v. Keite*, 1 Ld. Raym. 138.

³ *R. v. Hazel*, Leach, 368.

⁴ 1 Hale, 473. So is *R. v. Hopley*, 2 Fost. & F. 202. [Severe beating.]

⁵ *R. v. Gaylor*, Dears. & B. 288.

⁶ *R. v. Self*, Leach, 137. And see 1 Russ. C. M. 648, citing

R. v. Wade, O. B. 1784, as to the question whether there can be any middle course between a verdict of "guilty of murder" and acquittal in such a case. See also *R. v. Smith*, 1 Russ. *ut supra*, 546; Leach, 137, n., citing *R. v. Patmore*, O. B. 1789.

⁷ *R. v. Edwards*, 8 C. & P. 611. See *R. v. Crumpton*, Car. & M. 597.

⁸ *R. v. Plummer*, 1 Car. & K. 600.

and the want of shelter can be shown to have accelerated her death, his guilt accrues.¹ So, where he supplies food and clothing for a child, and knows that they are withheld, he is guilty of this crime in case of death.²

Sudden provocation, quarrel, &c.] In cases of sudden provocation, if the intent to murder be negatived, and there be no implied malice, a deadly stroke will only induce the penalties of manslaughter.³ In fact, any intentional breach of the peace (and it would be difficult to point out such a breach without intention if death ensues) will bring with it the crime of manslaughter.⁴ As, where after a quarrel between the deceased and the prisoner, the latter was found at a bench with a knife in his hand, working at his trade; fresh words having passed, the deceased assaulted the prisoner, and they began to fight, and then the prisoner gave a stab with the knife which he held in his hand. The judges held this to be manslaughter.⁵ So, upon an affray between soldiers and keelmen, where a soldier killed by mistake a person who seemed to be a keelman, the judges held clearly that this was but manslaughter.⁶ If A. be riding, and B. whip A.'s horse out of the road, it is said, that should A. kill B. it is only manslaughter.⁷ So, in the case of the pickpocket taken in the fact, and drowned by being ducked in a pond, the prisoner, who had been robbed, and who threw him in, was adjudged guilty of manslaughter only, by reason of the sudden provocation, and the encouraging clamour of the multitude.⁸ So, where a blow was given by A. to B. of a character so slight as scarcely to reduce the killing of A. by B. by reason of it to manslaughter, yet, as it was accompanied by words and gestures on A.'s part of great aggravation, it seems to have been considered manslaughter on account of the additional provocation.⁹ So, where a creditor placed a man with his sword undrawn at his debtor's chamber door whilst he sent for a bailiff, upon which the debtor, after some words, killed him, it was held, upon the statute of stabbing, (now no longer in existence,) that the restraint of liberty was a sufficient provocation to reduce the offence to that of felony at common law.¹⁰ Nevertheless, it would be a mistake to suppose that every blow will, of necessity, reduce the killing to manslaughter.¹¹ Thus, where one was playing music

¹ See also upon the subject of neglect, *R. v. Crumpton*, Car. & M. 597. *Kessal*, 1 C. & P. 437. *R. v. Thomas*, 7 C. & P. 817. And see 1 Hale, 482.

² *R. v. Bubb and another*, 4 Cox, 455. So is *R. v. Saunderson*, ante.

³ *R. v. Kirkham*, 8 C. & P. 115.

⁴ *R. v. Harrington*, 5 Cox, 231.

⁵ *R. v. Snow*, Leach, 151. *R. v. Taylor*, 5 Burr. 2793. *R. v. Mitton*, East, P. C. 411. *R. v.*

⁶ *R. v. Brown*, Leach, 148.

⁷ 1 Hale, 456.

⁸ *R. v. Fray*, East, P. C. 236.

⁹ *R. v. Sherwood*, 1 Car. & K. 556.

¹⁰ *The Protector v. Buckner*, Sty. 467.

¹¹ *R. v. Lynch*, 5 C. & P. 324, by Lord Tenterden.

in a thoroughfare, and a policeman pushed him gently to make him go on, in order to get rid of the crowd which was collecting, it was considered that a blow from a dangerous weapon would amount to murder if the policeman died from the effect of it, but manslaughter only if the policeman were to knock the music-player down first.¹

So, in sudden duels, the principle above mentioned with regard to provocation prevails. As, where Sir Charles Pyn was killed in an unpremeditated combat; and it was held to make no difference that his adversary took him up after death by the nape of the neck, saying, "Damn you! you are dead."² And the vengeance expressed after the fact may be referred to the same transport of passion which prompted the whole transaction. As, in a quarrel between French prisoners, the deceased, being suspected of dishonesty, and a clamour being raised, the prisoner pushed him down, upon which he struck the prisoner rather violently, and then the latter pushed him down again, and when he was down stamped upon his stomach, and afterwards kicked him. The blows on the stomach were considered to be the cause of death, and the jury convicted the prisoner of murder, but the judges held the case to be manslaughter.³ So, in *Kessel's case*,⁴ the point in favour of the prisoner was, his having the knife in his hand. Had he retreated for the purpose of drawing it, he would have been guilty of murder. It was all one act, whereas, if a previous intent to do mischief be proved, that circumstance will be most unfavourable to the prisoner, and may cause his conviction for murder.⁵

A common boxing match is within these rules, or, "fighting up and down;"⁶ or a wrestling match, if carried on in anger.⁷ And it is no answer to allege that the prisoner was excited by taunts.⁸ And all persons present are equally guilty of manslaughter, if the death be caused by blows given in the fight.⁹ And, here again, if any undue advantage be taken by one of the combatants, the offence will amount to murder.¹⁰ Again, if upon the receipt of gross abuse a blow be struck with a weapon not likely to kill, it will be but manslaughter should death ensue. As where a man snatched up a broomstaff, and throwing it at a woman, struck her head and killed her. Here it was greatly doubted whether this could possibly amount to murder, and a pardon was recom-

¹ *R. v. Hagan*, 8 C. & P. 167.

² *R. v. Walters and others*, 12 St. Tr. 113. *R. v. Lord Byron*, 11 St. Tr. 1177.

³ *R. v. Ayes*, Russ. & Ry. 166.

⁴ *Ante*, p. 763. See *R. v. Stedman*, East, P. C. 234.

⁵ 7 C. & P. 817, *ante*.

⁶ *R. v. Thorpe*, 1 Lew. C. C. 171.

⁷ *R. v. Canniff*, 9 C. & P. 359.

⁸ *R. v. Ward*, East, P. C. 270.

⁹ *R. v. Murphy*, 6 C. & P. 103. *Secus*, if the ring be broken and the deceased be assaulted by others. Id. 104.

¹⁰ *R. v. Whitely*, 1 Lew. C. C. 173.

mended;¹ whereas, had the blow proceeded from a more dangerous instrument, it would have been murder; for the use of a strong weapon would have imputed a mischievous disposition, and thence implied malice would have been presumed. So, where a man's son came home to his father very bloody, having been beaten by another lad, the father ran immediately three-quarters of a mile, and struck the other boy with a small cudgel and killed him. The judges held this manslaughter, as being done in sudden heat and passion.² So, where the prisoner, being much provoked, struck a woman with a pewter pot twice on the head, and which produced erysipelas and caused her death, Gibbs, C. B., told the jury that the aggravation, though not sufficient to justify a provocation which would excuse the giving a deadly wound would palliate a moderate blow, and it was found manslaughter only.³

Adulterer.] There is one species of wrong which, although not a personal assault, is yet so grievous as in some measure to excuse the injured party in yielding to a sudden transport of passion. It is where a man finds another in the act of adultery with his wife. Here, if death be immediately inflicted, the law will hold him to be guilty of manslaughter only, and that, too, of the lowest degree.⁴ So, if a father see one in the act of committing an unnatural offence with his son, the death inflicted instantly would be manslaughter of the lowest degree. But a delay would be fatal, as if the father should only hear of the act, and then go and strike the offender with a stick, and then stab him with a knife, this would be murder.⁵ And in the case of adultery, mere suspicion, however strong, will not reduce the killing of the woman to manslaughter: such a killing amounts to murder.⁶

Mere words.] Mere words, therefore, (it follows from a review of the authorities,) will not reduce a killing to manslaughter, if a dangerous weapon be used,⁷ nor any insulting gestures under the above circumstances;⁸ and it is a question whether words of menace would in any way alter the case;⁹ although it was cer-

¹ 1 Hale, 456. The converse of *R. v. Sherwood*, ante, where the deceased struck a slight blow, but accompanied it with gross abuse, and was killed with a dangerous weapon.

² *R. v. Royley*, Cro. Jac. 296; Godb. 182; 12 Rep. 87.

³ *R. v. Freeman*, 1 Russ. C. M. 518.

⁴ *R. v. Manning*, Tho. Raym. 212. *R. v. Pearson*, 2 Lew. C. C. 216, ante.

⁵ *R. v. Fisher*, 8 C. & P. 182.

See ante. The jury are to find the time which may have elapsed between the provocation and the stroke, and the court will then judge whether the blood has or not had time to cool. Id.

⁶ *R. v. Kelly*, 2 Car. & K. 814.

⁷ See 1 Hale, 456. *R. v. Sherwood*, ante, p. 763.

⁸ *Watts v. Brains* (on appeal), Cro. El. 778; Noy. Rep. 171; 1 Hale, 455. See Kel. 55.

⁹ East, P. C. 233. *R. v. Woodhead*, 1 Lew. C. C. 163.

tainly said by Lord Hale that it had been so adjudged.¹ Probably, if the words of menace were accompanied by a corresponding action, the matter might be better understood and the opinions reconciled,² although a third person may be regarded with tenderness, under some circumstances, without a personal blow. As, where two were playing at bowls, and a quarrel with blows having ensued, a third person, in revenge of his friend, struck the other mortally: it was held but manslaughter.³

Negligence towards children and others.] The same principle of protecting human life is carried on in cases of gross negligence towards children or others.⁴ This may arise from delay,⁵ inefficiency in medical treatment, or through carelessness, or an accident, which might have been avoided by prudence. These cases would, for the most part, amount to manslaughter.⁶ The prisoner was charged with giving gin immoderately to a child; and it was held, however inconsiderate the act, that an indictment would lie, but as it turned out that the child snatched up the glass and drank off the liquor, an acquittal took place.⁷ So, sending a wrong medicine negligently.⁸ So, giving corrosive sublimate in a case of cancer by a blacksmith;⁹ and administering an improper remedy when medical aid can be procured. There must, however, be more than an ordinary measure of ignorance, or of neglect, or rashness, in order to convict a person of this offence through want of skill;¹⁰ and it is observable, that the cause of death must be the administering of the medicine, so that where a child grew better, and no further notice was taken for three weeks after taking lobelia, (a dangerous medicine,) but then died, the prisoner was acquitted.¹¹ If a man-midwife be so unprepared for his duty as to wound a child mortally before the delivery, in order to save the mother, when, by an ordinary degree of skill he might have saved both, he is guilty of

¹ *R. v. Lord Morley*, 1 Hale, 456. See, however, Kel. 55.

² East, P. C. 233.

³ 12 Rep. 87, said to be *R. v. Rowley*, Fost. 294.

⁴ But trustees of roads must not as trustees be included in this category. *R. v. Pocock*, 5 Cox, 172.

⁵ As where the prisoners neglected for several days to apply to the union for relief for their infant child when starving for want of food. *R. v. Mabbett and another*, 5 Cox, 339.

⁶ See *R. v. Leggett and another*, 8 C. & P. 191. *R. v. Walters*, Car. & M. 164.

⁷ *R. v. Martin*, 3 C. & P. 211. See *R. v. Packard*, ante, p. 751.

⁸ *R. v. Tessymond*, 1 Lew. C. C. 169.

⁹ *R. v. Crook*, 1 Fost. & F. 521; *R. v. Bull*, 2 Fost. & F. 201, was a case of prussic acid, but there was an acquittal upon the merits.

¹⁰ *R. v. Long*, 4 C. & P. 398, 423. *R. v. Simpson*, Wilcock, Med. Law, App. 227; 1 Lew. C. C. 172. S. P. *R. v. Webb*, 1 Moo. & Rob. 405. The case of *Morison's pills*. The principle being, that a person of competent skill may be unfortunate upon some occasions, but that one entirely incompetent must abstain from meddling with medicine or surgery, unless there be no means of gaining better help. See 1 Hale, 429.

¹¹ *R. v. Crick*, 1 Fost. & F. 519.

manslaughter.¹ But if the party exercise his skill *bonâ fide*, and there be an absence of gross negligence, it is no ground for prosecution in case of a fatal result, that he is not a surgeon, and that he has not received a regular medical education.² So, where a man-midwife, not regularly educated, tore away the prolapsed uterus of a patient by mistake for the placenta, Lord Ellenborough said that, in order to convict, there must be the grossest ignorance or most criminal inattention, and the person was acquitted.³ Whilst, on the other hand, a licence will not screen a person from the consequences if he be guilty of misconduct,⁴ and the consent of a patient is no defence to criminal negligence or ignorance.⁵ The negligence of a woman, by not providing clothes and necessities for her baby, is not manslaughter: but concealment of birth may be drawn as an inference.⁶ Again, if it is the duty of a person (for example, a ground bailiff of a mine,) to ventilate the mine by air headways, so that if through his neglect an explosion of fire-damp happens, this is manslaughter, supposing that by any reasonable precautions he might have used these means of protection.⁷ The negligence of others, conjointly with the prisoner, affords no ground of defence upon an indictment of this nature.⁸ So, where the engineer in charge at a coal pit, left it to the management of an ignorant boy, who even told him he could not act right, and a man was killed, the engineer was held guilty of manslaughter.⁹ A servant of a railway was charged with manslaughter. The neglect to give a proper signal was alleged to have been the cause of death. It was held that the rules concerning the signal need not be set forth in the indictment, it being affirmed by the company that there were other duties incompatible with this of signalling; nevertheless it was deemed unnecessary to set forth those duties, and then negative that the prisoner was employed on those other duties; that it was his duty to signal; that there was an obstruction, and that he neglected to signal, were sufficient statements without an averment that he *saw* the obstruction. It was also held unnecessary to describe the signal, proof being given that it was a *proper* signal. The charge of giving a wrong signal, and not the right one, was not deemed bad for duplicity. That he "did neglect and omit to alter the signal" was held sufficient, without stating the specific alteration.¹⁰

But where the valves of an engine were merely out of order, and neither the master nor the engineer knew of it; in fact, the

¹ *R. v. Senior*, 1 Moo. C. C. 346.

² *R. v. Van Butchell*, 3 C. & P. 629. See East, P. C. 264.

³ *R. v. Williamson*, 3 C. & P. 635.

⁴ *R. v. Long*, 4 C. & P. 398, 423. *R. v. Spiller*, 5 C. & P. 333. S. C. nom. *R. v. Spilling*, 2 Moo. & Rob. 107. *R. v. Ferguson*, 1 Lew. C. C. 181. The case of a surgeon.

⁵ *R. v. Ellis*, 2 Car. & K. 470.

⁶ *R. v. Knight*, 2 Fost. & F. 40.

⁷ *R. v. Haines*, 2 Car. & K. 368.

⁸ S. C. See *R. v. Barrett*, Id. 343, and *post*, "Indictment."

⁹ *R. v. Lowe*, 3 Car. & K. 123. Such a neglect of duty might even amount to murder.

¹⁰ *R. v. Pargeter*, 3 Cox, 191.

deceased might himself have caused the accident, it was held not to be manslaughter.¹ Overloading a boat will likewise create the offence.²

Careless accident.] Another case of negligence is, where a party conducts himself with such carelessness towards the public as to cause a fatal accident, as by driving over a person: and it is no excuse to say that the deceased was told to get out of the way, and that if not drunk, he might have escaped.³ Nor is it an excuse that the prisoner is near-sighted.⁴ Nor that the walker is on the carriage-way, being infirm, for he has a right to use the carriage-way, and reasonable care must be used towards him.⁵ Nor that the walker is accustomed to keep the middle of the road, if the driving be of a character to amount to negligence.⁶ And if two persons drive a cart along a road in concert, each is guilty, in case of a death, at least of manslaughter.⁷ And, in that case it was no excuse that the person killed was deaf and dumb.⁸ So, sitting inside a cart instead of being at the horse's head, will warrant a conviction for manslaughter.⁹ So in racing.¹⁰ Still, if the person racing on horseback have a companion, the latter, although riding fast at the time of the accident, will not be guilty of manslaughter.¹¹ So it is in navigating a vessel upon the river Thames.¹² So in the case of fire-arms. The defendant came to town in his chaise, and fired his pistols, thereby killing a woman: he was held by King, C. J., to have committed manslaughter.¹³ So in the case of tampering with a loaded gun.¹⁴ So where a midshipman fired in the usual manner at the hallyards of a boat in order to bring her to, but unhappily killed a man, the same doctrine prevailed.¹⁵ So it was where cannon was sent out on a day of rejoicing in an imperfect state, the defendant having been previously warned, by having the cannon returned.¹⁶ So where per-

¹ *R. v. Gregory and another*, 2 Fost. & F. 153. There was no proof of omission nor of commission.

² *R. v. Williamson*, 1 Cox, 97.

³ *R. v. Walker*, 1 C. & P. 320. See also, to the same effect, 1 Hale, 476; Fost. 263.

⁴ *R. v. Grout*, 6 C. & P. 629.

⁵ *Boss v. Litton*, 5 C. & P. 407.

⁶ *R. v. Longbottom and another*, 3 Cox, 439.

⁷ *R. v. Swindall and another*, 2 Cox, 141. The one is principal in the first, the other in the second degree, and no election was allowed, where both were included in the same indictment.

⁸ *R. v. Swindall*, 2 Car. & K. 230.

⁹ *R. v. Knight*, 1 Lew. C. C.

168. The prisoner was going down hill with the reins on the horse's back. He was not driving hard. Erle, J., left it to the jury to say whether, if the prisoner had used the reins, he could have saved a child who was killed, or whether he could not had he pulled the reins up. *R. v. Dalloway*, 2 Cox, 273. Not guilty.

¹⁰ *R. v. Timmins*, 7 C. & P. 499.

¹¹ *R. v. Mastin*, 6 C. & P. 396.

¹² *R. v. Taylor*, 9 C. & P. 672. See *R. v. Allen* and *R. v. Green*, post.

¹³ *R. v. Burton*, Str. 481.

¹⁴ East, P. C. 267.

¹⁵ *R. v. Phillips*, Cowp. 830.

¹⁶ *R. v. Carr*, 8 C. & P. 163, n.

sons put some hot cinders upon deceased's belly when he was drunk and asleep, having previously covered him with straw, which ignited. Patteson, J., drew the distinction between careless accident, and design, observing, that even if the prisoners meant only to harm the deceased, the act was murder.¹

So, in the ordinary occurrences of life, whether in sport or earnest, a careless disposition will be apt to produce fearful consequences. If a woman runs upon a sword it is an accident, but, if a man has a sword drawn in his hand carelessly, and the woman falls on it, there is negligence, and the man is guilty of the offence.² If a man endeavours to take a gun from another and it goes off, causing death, this is manslaughter.³ As where Sir J. C. played with his servant, the one having a sword in the scabbard, and the other a bed staff, and the chape of the scabbard coming off, the point of the sword killed the servant, it was ruled manslaughter.⁴ So, if in tiling a house, the workman do not give a notice of warning to those passing below, he will be answerable for a fatal accident.⁵ So, again, slinging a cask negligently, and causing death, will be manslaughter.⁶ So, throwing stones down a coal mine, and thereby detaching the scaffolding.⁷ So, where a lad took a trapstick out of a cart for a frolic, but the carman was killed in consequence, it was held to be manslaughter.⁸ So, where the prisoners recklessly threw bags of nails upon the deceased in a cart, it was held unnecessary to allege in the indictment that they knew of the presence of any one in the cart, because manslaughter excludes malice.⁹ And there is a difference in sporting, between cases where the amusement is licensed, and where the party is not acting in conformity with the law. As if one be shooting in his own park, and kill a person by accident, his right to shoot in his own ground will render the misfortune excusable. But if he shoot in the park of another, without licence, the killing will be manslaughter.¹⁰ So, if one throw a stone at a bird in an unfrequented place, an accidental death through a bad aim will be excusable homicide. But if he were to throw at A.'s poultry or cattle, death under such circumstances would amount to manslaughter.¹¹ Still, had he meant to steal the poultry, there would have been a felonious intent, and the death would be murder.¹² So, where a man killed a child whilst cock-throwing at Shrovetide, Judge Foster ruled it manslaughter, because the sport was barbarous and unmanly.¹³ And it may be added, that another

¹ *R. v. Errington*, 2 Lew. C. C. 217.

² *R. v. Noon*, 6 Cox, 137.

³ *R. v. Archer*, 1 Fost. & F. 351.

⁴ *R. v. Sir John Chichester*, Al. 12; and see East, P. C. 269.

⁵ *R. v. Hull*, Kel. 40; 1 Hale, 475.

⁶ *R. v. Rigmaidon*, 1 Lew. C. C. 180.

⁷ *R. v. Fenton and others*, 1 Lew. C. C. 179.

⁸ *R. v. Sullivan*, 7 C. & P. 641.

⁹ *R. v. Lear and another*, 1 Russ. C. M. 638.

¹⁰ 1 Hale, 475.

¹¹ 1 Hale, 475; East, P. C. 255.

¹² East, *ut supra*.

¹³ Fost. 261.

distinction is made between *mala prohibita* and *mala in se*. For if a person were to commit homicide whilst sporting, not being qualified (and at this day without a certificate), yet with the licence of the owner of the land, this act, although he be violating a statute, will not make him a manslayer.¹

Placing poison, through negligence, where a child or other person may improvidently take it by mistake, supposing it to be food, is an act of manslaughter.²

Upon a quarrel, the prisoner struck the deceased with a stick. The deceased spurred his horse, was thrown, and lost his life. This was held manslaughter.³ The act must be that of the prisoner. He carelessly left a steam engine, and an unskilful person in his room set the engine in motion, and killed the deceased. Alderson, B. directed an acquittal.⁴ Mere negligence, without any personal act done, does not come within the limits of this offence, if a part of the duty be performed. As, for instance, an omission in steering a steam boat.⁵ So, where the prisoner went away from a windlass which he was working with two others, in consequence of which the latter were forced to let go their hold, and a person beneath was killed, Garrow, B., held, that the words in the indictment—"compel and force A.B. and C.D. to leave the said windlass," must be intended to mean active force, and the prisoner was acquitted.⁶ So, it was again, where the prisoner accidentally pushed away a boat, and the deceased overbalanced himself.⁷ Yet, the failure of a pilot, through negligence, to make the mariners understand his orders, whereby life was sacrificed, was held to amount to manslaughter.⁸ So, where a banksman on a railway failed to place a stage on the mouth of a shaft to receive a truck, by which omission the truck fell down the shaft and killed a workman, he was held guilty of manslaughter.⁹

Thus, it is evident that a necessity, almost inevitable, will be the only excuse for taking life. There was a scuffle at night between father and son, another son hearing the noise, got up and beat his brother, striking him on the ground, and preventing him from escaping the blows which he was inflicting. As they were striving, however, the prisoner who had been the original aggressor, gave his brother a mortal wound with a penknife, and it was held manslaughter, for there was not such a degree of necessity as might possibly be deemed inevitable.¹⁰ Upon a charge of violating a child, death being the consequence, the jury not being willing to convict of murder, Wightman, J., observed, that they might

¹ East, P. C. 260.

² Id. 266.

³ *R. v. Hickman*, 5 C. & P. 151.

⁴ *R. v. Hilton*, 2 Lew. C. C. 214.

⁵ *R. v. Green*, 7 C. & P. 153.
R. v. Allen and another, Id. 156.

⁶ *R. v. Lloyd*, 1 C. & P. 301.

⁷ *R. v. Waters*, 6 C. & P. 328.

⁸ *R. v. Spence*, 1 Cox, 352, and the cases of *Green* and *Allen* were cited.

⁹ *R. v. Hughes*, 26 L. J. M. C. 202; Dears. & B. 248.

¹⁰ *R. v. Nailor*, East, P. C. 277; Fost. 278.

negative the constructive malice, and find a verdict of manslaughter.¹ It is no defence to a charge of manslaughter, that the deceased might have died in a short time, *ex. gr.*, in a month or six weeks, of natural disease.²

Fireworks.] The prisoner was a maker of fireworks. In his absence, either by negligence or accident, there was an explosion, and a rocket flew across the street, and set fire to a house, by which the deceased was burnt. It was held that there were two causes of death,—the fireworks, (illegally kept indeed,) and likewise the negligent burning of them. And the court held, that the mere keeping was too remote from the death to make the master amenable for the neglect of his servants.³ And a case was cited from the sessions reports at the Old Bailey, where the said law was said to have been laid down by Alderson, B.⁴

Resisting officers and others.] It may be said in few words, that where the proceedings upon which an officer grounds his arrest are defective, or, where he departs from his duty in making the capture, as by undue violence, unnecessary duress, &c., fatal consequences will only draw after them the crime of manslaughter. Thus, where a warrant to arrest the prisoner was delivered in blank to the deceased, who inserted therein the names of A. and B., and afterwards, in endeavouring to assist in the arrest, was shot by the prisoner, it was held no more than manslaughter, although this being the second taking, the prisoner had declared he would shoot the deceased if he attempted to arrest him again.⁵ So, where a bailiff attempted to execute a writ in an exclusive liberty, but there was no *non omittus* clause in the writ, and the prisoner cut him with an axe, Wood, B., held that the bailiff was a trespasser, and he directed an acquittal.⁶ And in the same case, the judge ruled that the writ as well as the warrant should be produced.⁷ So, again, where an officer to whom a press warrant was intrusted, was absent when the vessel was boarded, and one of his party was killed by a mariner, the latter was held guilty of manslaughter only.⁸ But if a warrant be directed to several, any of these may execute it.⁹ So, if a servant of A., who is not lord of the manor, find one poaching at night on B.'s land, and pursue with intent to arrest him, this is so far an attempt at an illegal arrest that it is only manslaughter in the poacher if he shoots the servant,¹⁰ and

¹ Which they did, and the sentence was penal servitude for life. *R. v. Greenwood*, 7 Cox, C. C. 404.

² *R. v. Fletcher*, 1 Russ. C. M., 507. Husband beating his wife.

³ *R. v. Bennett*, 28 L. J. M. C. 27; Bell, 1.

⁴ S. C. And as to the evidence to prove manslaughter in a case of

fire, see *R. v. Gardner*, 1 Fost. & F. 669.

⁵ *R. v. Stockley*, East, P. C. 310.

⁶ *R. v. Meade and another*, 2 Stark. N. P. C. 205; Holt, N. P. C. 593.

⁷ 2 Stark. *ut supra*, 206.

⁸ *R. v. Broadfoot*, Fost. 154.

⁹ East, P. C. 314.

¹⁰ *R. v. Davis*, 7 C. & P. 785.

é converso, if the keeper shoot the poacher, with no other authority as keeper than that of an appointment by a person who has a mere permission to shoot, he is guilty of this charge.¹ So again, in cases where a notification is necessary, and the officer neglect to give the due warning, (and in the case of breaking doors, whether it be upon fresh pursuit or not,) the same mitigation will avail the prisoner.² So again, if the bailiff break an outer door to execute process, his death will be extenuated in like manner;³ and we have seen, that in criminal cases, an *innocent* person is bound to submit to, and respect the laws, so that whatever may be the impropriety of the arrest, he will be guilty of manslaughter if he kill the officer.⁴ On the other hand, should the officer meet with resistance, and use more force than is necessary in making his capture, so as to occasion death, he also becomes guilty of manslaughter.⁵ As, where a collector coming to distrain, met with resistance from a maid-servant who stood at the door to hinder the taking away of the distress, upon which he beat her head and back against the door post, so that she died. He was held guilty of manslaughter, having exceeded the necessity of the case.⁶ So, if a bailiff be locked into a house, he may justify using force to gain his liberty, and if death ensues, the consequences can but amount to manslaughter.⁷ Two constables took opposite sides in an affray, and one of them was killed. Here, the surviving constable was held guilty of manslaughter only, for each constable had as much authority as the other, and each was acting out of the scope of that authority, and, moreover, each had enjoined the other party to desist.⁸

An excise officer meeting with a sudden resistance when off his guard, killed the deceased, who was a smuggler, and Holroyd, J., ruled, that he was not justified in so doing, unless he had reason to apprehend danger to his life, and, even then, a deadly weapon ought not to be used, if any other instrument sufficient for the personal protection of the party attacked were at hand.⁹

But it may be noted, in conclusion, that a blow from an officer will not, in general, reduce the killing of that officer from murder to manslaughter.¹⁰

Judgment.] By 24 & 25 Vict. c. 100, s. 5, Whosoever shall be convicted of manslaughter shall be liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, or to pay such fine as the court shall award, in addition to or without any such other discretionary punishment as aforesaid.

¹ *R. v. Wesley*, 1 Fost. & F. 528.

² East, P. C. 314, 324.

³ *R. v. Cook*, Cro. Car. 537; 1 Hale, 458.

⁴ See East, P. C. 309, observing upon *R. v. Simpson*, 4 Inst. 333. *R. v. Withers*, East, P. C. 233; *The Protector v. Buckner*, Sty. 467.

⁵ East, P. C. 320.

⁶ *R. v. Goffe*, 1 Ventr. 216.

⁷ East, P. C. 324.

⁸ 1 Hale, 460; East, P. C. 304.

⁹ *R. v. Forster*, 1 Lew. C. C.

187.

¹⁰ Anon. Id. 58.

CHAPTER III.

HOMICIDE NOT FELONIOUS.

1. *Excusable.*2. *Justifiable.*

Excusable homicide.] By 24 & 25 Vict. c. 100, s. 7, no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony.

The distinctions between homicide excusable and justifiable are not likely to be very useful at the present day; perhaps the principle deducible is, that the law, as in the case of officers, for the most part, justifies their violence, but, in other cases, makes merely an allowance for the necessity, mistake, or accident, or even the sudden emergency of the transaction, and passes over the homicide, as it were, without exacting the usual retribution where life has been sacrificed. Thus, during innocent recreations, where the weapons used are not deadly nor unlawful, should a casualty occur, the law will not convert a misfortune into an offence, for the possibility of danger cannot be allowed to operate against harmless amusements.¹ So, during the course of rightful employments, an accident will frequently be excusable. A carter ran over a woman with a load upon her head, in an unfrequented place, and killed her. It was held by three judges that this was but misadventure, although, had the spot been much travelled, it would have been manslaughter.² So it was where a workman's axe flew off and killed a bystander.³ So, if one lay poison to kill rats, in a place where no danger need be apprehended, the death will be but misadventure.⁴ So it is in cases of mistakes: a master ordered his servant to fire in case he heard anything rush into the corn, expecting that he might catch some deer, which were in the habit of coming in to spoil it. It was in the night, and as one A. rushed into the corn at another part of the field, the servant fired and killed him; and, although there were some circumstances of difficulty, owing to an idea that the servant had not used proper caution, it was ruled misadventure; but had not the master given the order, it would have been manslaughter; here the servant might have been

¹ East, P. C. 268, 271.

² East, P. C. 263.

³ East, P. C. 264.

⁴ *Id.* 266.

thrown off his guard by the command.¹ So, where a man discharged his gun, and went to church, but whilst he was there, another person went privately to shoot game, and returned the gun to its place loaded. The prisoner took up the gun, and touched the trigger, upon which it went off and killed his wife. Foster, J., directed an acquittal.² So it is if an accident happens with foils, between masters of defence.³ Again, where a thief breaks into a house, the law will consider the natural dread of personal violence which the owner may apprehend, and, therefore, should he kill the intruder, he will be excused.⁴ The same law will protect a lodger, or a sojourner.⁵ So, out of a house, if a person be merely protecting his grounds, his garden, for instance, and he have good reason for suspecting that his life is in immediate danger, he may shoot the thief so menacing him.⁶ So, a man may use reasonable violence to turn a trespasser out of his house, but a kick which causes death is not justifiable under such circumstances.⁷ But there must be good ground for this, or for supposing that some bodily injury is about to be inflicted by the thief.⁸ And it is, moreover, absolutely imperative, in these last cases, that, if it be possible, the party should retreat from the attack.⁹ Upon an alarm of thieves, a man advanced in the dark, thrusting his rapier before him, and killed a woman who had concealed herself; this was ruled misadventure;¹⁰ yet, Mr. Justice Foster inclined to think, that this case of *Levet* should have been manslaughter, for want of circumspection.¹¹ Certain persons drew their swords upon F., and F. killed one of them: he was held excused.¹² Again, where a sudden quarrel arises, and one of the parties assaults the other, upon which, the latter having retreated to the utmost, and, being in danger of his life, kills his assailant, it is but misadventure, or, as it was termed till lately, chance medley.¹³ This was the true meaning of chance medley, which came afterwards to be confounded

¹ 1 Hale, 40, 476; East, P. C. 266.

² Fost. 263, where *Rampton's case* (Kel. 41) is denied to be law. In that case a man found a pistol in the street, and having tried it with the rammer, brought it home. The rammer, however, was too short, and the prisoner having cocked the pistol, in an idle frolic, killed his wife. It was ruled manslaughter.

³ Hob. 134.

⁴ East, P. C. 289; Hob. 96.

⁵ *R. v. Cooper*, Cro. Car. 544.

⁶ *R. v. Scully*, 1 C. & P. 319.

⁷ *R. v. Wild*, 2 Lew. C. C. 214.

⁸ *R. v. Bull*, 9 C. & P. 22.
R. v. Hinchcliffe, 1 Lew. C. C. 161.

⁹ *R. v. Dakin*, 1 Lew. C. C. 166.

¹⁰ *R. v. Levett*, Cro. Car. 538.

¹¹ Fost. 299. *R. v. Morrison*, 8 C. & P. 22, where want of circumspection caused the killing by a watchman to amount to manslaughter. But see *Sir William Hawkesworth's case*, East, P. C. 275, who was killed by his keeper under a command to shoot any one who came near the deer. He, being weary of life, came himself, and was shot. This was misadventure. So, where a commander tried the vigilance of his sentinel, and was shot by the sentinel.

¹² *R. v. Ford*, Kel. 51.

¹³ *Chance meler*, or chaud medley.

with misadventure or accident.¹ Should the first blow be struck by the slayer, or should he not draw back as far as may be practicable, the case will assume the more serious form of manslaughter. The killing above mentioned was denominated, "homicide, *se defendendo*, upon chance medley." There was, indeed, this hardship upon a verdict of chance medley, or of excusable homicide generally,—namely, that as the goods of the party were forfeited, he was compelled, at his own cost, to sue out a pardon. The jury used to find the facts specially, and it then became necessary for the court to bail him, upon which, the record being certified in chancery, a pardon, without application to the king, issued under the Statute of Gloucester, and the goods were restored; but at the present day, a verdict of acquittal is directed.² There is one more, a sort of homicide of dire necessity, which is not induced by the fault of another party, and it is, where one of two innocent men must die for the other's preservation. This has been holden by some to be justifiable, perhaps it may be more properly considered as excusable.³

Justifiable homicide. Secondly, as to justifiable homicide. If a criminal be executed by virtue of a warrant emanating from a proper jurisdiction, and in pursuance of the judgment against him, the homicide will, according to the English law, be justifiable.⁴ But the execution must not vary from the judgment, although the sheriff may behead for felony by a special warrant from the crown. And the officer empowered to execute, or his appointed deputy, is the only person who can lawfully act for that purpose; consequently, it would be murder in any one else to take the life of the culprit.⁵ Again, the officer is excused, although he act under an erroneous judgment, if the court has jurisdiction over the offence.⁶ Should there be no jurisdiction, it seems that, under some circumstances, if the officer act *bonâ fide*, he might still be excused; but the judge would be guilty of murder. Still, with reference to the question of jurisdiction, when there is a colour, and the judge acts *bonâ fide*, the case would probably fall under the head of excusable homicide.⁷ As if justices of the peace were to try a case of treason, upon the ground that their commission embraces all felonies, and so, because treason is felony, their jurisdiction would extend to that crime also. Here, although the judgment would be erroneous, yet, as there might be a colour for the proceeding, Lord Hale is of opinion that the execution of a capital sentence would not be murder in the justices.⁸ Now, however, justices are expressly forbidden to meddle with treason by 5 & 6 Vict. c. 38,⁹ and the case would amount to murder.

Homicide by officers and others in the advancement of justice,

¹ East, P. C. 221.

² East, P. C. 220, 221, 222; and see *Id.* 279, 280.

³ East, P. C. 221.

⁴ East, P. C. 221, 334.

⁵ East, P. C. 335.

⁶ *Id.*

⁷ *Id.* 334.

⁸ 1 Hale, 497.

⁹ Sect. 1.

deserves a particular consideration. It may be justifiable in cases of felony and misdemeanor, and also in civil suits. But this is the plain distinction between felony and other cases, namely, that in felony, it may be lawful for an officer to kill before the arrest, whereas in the latter, he must encounter resistance in order to justify his violence. Thus, in felony, if the officer have a warrant against any one, either he or his assistants, or any private person joining in the pursuit, may kill the accused if he cannot be otherwise secured.¹ And, *à fortiori*, if resistance be made.² So, if a hue and cry be duly raised, *i. e.*, under a magistrate's warrant, or by the aid of the constable without warrant, and with the name of the person sought after, the same doctrine obtains.³ So, if a felony be committed, and the felon be killed while flying from justice, it being impossible to overtake him without doing violence, it is the same.⁴ *A fortiori*, if he resist. So, after arrest, whether by warrant or otherwise, in case of felony, if the party struggle or escape, and there be no other means of retaking him except by violence.⁵ And it seems that neither a constable nor a private person need give back in the event of resistance, but that force may be repelled by force; but where there is no warrant, nor a regular hue and cry, private persons must take the consequences of putting a person to death if he escape, and even a constable must be satisfied of the reasonableness of the charge, before he ventures to kill a fugitive upon fresh pursuit.⁶ So that if the person pursued should turn out to be innocent, the private person killing him would be guilty of manslaughter at the least, though the constable would be justified, inasmuch as no one ought to fly from justice, whatever may be the integrity of his conduct.⁷ And further, if the constable be ignorant of the commission of a felony, and yet fire upon, or assault another, upon fresh pursuit, he will be guilty of manslaughter, or of felonious injury, as the case may be. As, where the party wounded had actually committed felony in a copse, but the constable did not see it, he was held rightly convicted of feloniously wounding.⁸ Then, as to misdemeanors, it may be observed, that a party may not be killed before arrest, under any circumstances, unless, indeed, in the case of a dangerous wound given, which would raise the strongest presumption of felony.⁹ And in cases of misdemeanor, the authority of a warrant makes no difference.¹⁰ But, after arrest, the case is different, and so it is again if resistance be made. Under these latter circumstances, the constable is justified as in felony, and so are all persons upon whom he may call for aid; but a private person cannot act upon his own accord in misdemeanor, whether the party be guilty or innocent.

¹ East, P. C. 298.

² East, P. C. 300.

³ Id.

⁴ 1 Hale, 489.

⁵ East, P. C. 300.

⁶ Id. 301.

⁷ East, P. C. 299.

⁸ *R. v. Dodson*, 3 Car. & K. 148.

⁹ East, P. C. 302.

¹⁰ Id.

Lastly, with regard to civil suits, it may be said that the same rule prevails, so that a bailiff after, but not before arrest, may lawfully kill a person striving to escape.¹ And so it is in cases of resistance, provided, as we have already said, that the capture cannot be made without these violent measures. And the bailiff may repel force by force, and need not retreat, and the case in *Rolle*, which seems to militate against this position, has been denied to be law.²

However, it should be added here, that in all cases, whether of felony, misdemeanor, breach of the peace, or civil process, if it be possible to notify the cause of arrest before the death happens, it must be done in order to warrant a verdict of justifiable homicide. There certainly may be cases where this warning cannot be conveniently given, as upon fresh pursuit, where a felony has been committed, or upon escape from arrest, but here it seems that the party's own act dispenses at once with the necessity of notification. And, once more, gaolers, in case of resistance, or attempts to escape on the part of their prisoners, may repel force by force, and may even take life, rather than that the ends of justice should be defeated. But although they are not compelled to retreat like private persons, as far as may be with safety, they must be prepared to show good grounds for apprehending personal danger, or an escape, before they proceed to extremities. Having used all due forbearance, a killing by them in an endeavour to break prison, or in an affray, will fall under the head of justifiable homicide.³

¹ East, P. C. 307.

² Id. *Calfield v.* — (appeal),
1 Ro. Rep. 189.

³ East, P. C. 330. See generally
upon the subject of homicide, 1
Hale, 411; East, P. C. 198; Haw-

kins *in loco*; 1 Russ. C. M. 482.
And the old law upon the statutes
of stabbing, 1 Jac. 1, c. 8; 3
Car. 1, c. 4. As to the punishment
for rescue in cases of murder, see
1 Vict. c. 91, s. 1.

CHAPTER IV.

OF THE INDICTMENTS AND THE TRIAL IN MURDER AND
MANSLAUGHTER.

Indictments and trial in murder, &c.] Before the statute 14 & 15 Vict. c. 100, the indictment for murder usually stated that A. "not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, feloniously, and of his malice aforethought, did make an assault." It then described the blow, and the time of giving it, the means by which death was produced, and stated that the deceased died in consequence of the violence or injury inflicted upon him, care being taken to insert the time of the death. It then concluded by saying that A. did thus "kill and murder the deceased, against the peace," &c. The indictment for manslaughter was constructed in the same manner, but the expression of the malice aforethought and murder were of course omitted. The word feloniously, however, is retained, and in the conclusion the phrase "kill and slay" is used.¹ The time and place of the wound, as well as of the death, were alleged, in order that the death might appear to have happened within a year and a day after the stroke.² Where it was said that the prisoner wilfully, feloniously, and after malice aforethought, did mix poison, and did then and there deliver the same, &c., it was held sufficient, without repeating "feloniously and after malice aforethought."³ But now, by 24 & 25 Vict. c. 100, s. 6, in any indictment for murder or manslaughter, or for being an accessory thereto, it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased; and it shall be sufficient in any indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased; and it shall be sufficient in any indictment against any accessory to any murder or manslaughter to charge the principal with the murder or manslaughter (as the case may be) in the manner hereinbefore specified, and then to charge the defendant as an accessory in the manner heretofore used and accustomed.

The indictment may run thus in the case of murder:—"That A. on, &c., feloniously, wilfully, and of his malice aforethought,

¹ See Stark. Cr. P. 386, 387, 403.

³ *R. v. Nicholson*, East, P. C.

² East, P. C. 344; 2 Hale, 179; 346.

Stark. Cr. P. 59, 385.

did kill and murder one B." And in manslaughter,—“That one A. on, &c., feloniously did kill and slay one B.”¹

An omission to state that any stroke at all was given, was deemed fatal,² but it is enough now to state the murderous killing; but the word “murder” cannot be dispensed with.³ But “then and there” did kill and murder is no longer necessary, as formerly;⁴ and on account of the deodand, some value was attached to the murderer’s weapon, as a knife of the value of one penny, &c.; but by 9 & 10 Vict. c. 62, which abolished deodands, it was enacted that from and after the 1st of September, 1846, it shall not be necessary in any indictment or inquisition for homicide, to allege the value of the instrument which caused the death of the deceased, or to allege that the same was of no value; and the mode of stating the death is likewise at an end;⁵ but such parts of the old cases as relate to evidence, will be found under that head.

The prisoner was charged with suffocating a child by placing both hands about the neck of the child. It was held that she might be convicted, although the murder was done by some other person in her presence.⁶ And about the neck, means round it, the expression being freer from difficulty than “about the breast.”⁷ So the throat in the indictment was understood in its ordinary sense, and not according to scientific interpretation;⁸ nor was it

¹ No statement should be made in the alternative, as kill or slay. *R. v. Jones*, 1 Car. & K. 243. “Stick or staff.” As to the place, see *R. v. Helsham*, 4 C. & P. 394, no longer material.

² *R. v. Long*, 5 Rep. 120. *R. v. Lorkin*, 1 Bulstr. 124. And see 2 Hawk. c. 25, s. 77.

³ 1 Ro. Rep. 137.

⁴ *R. v. Buckler*, Dy. 69, judgment reversed.

⁵ See some of the old cases, *infra*, for, by possibility, an indictment upon the old system, might be preferred, and might not happen to be quashed. *R. v. Hall*, Cro. Jac. 95; 5 Rep. 122. *R. v. Kelly*, 1 Moo. C. C. 113. *R. v. Thompson*, 1 Moo. C. C. 139. *R. v. Brown*, 1 Lew. C. C. 165. *R. v. Jones*, 1 Car. & K. 243. *R. v. Jones and another*, 1 Cox, 11. Inquisition quashed for uncertainty. *R. v. Martin*, 5 C. & P. 128. Any hard substance would satisfy the word “hammer” in an indictment. And see *R. v. O’Brian and another*, Den. 9; 2 Car. & K. 115. *R. v. Tye*, Russ. & Ry. 345.

Putting moss and dirt into a child’s mouth. It was so stated in the indictment, and although the jury found the cause of death to have been swelling, and not choking, suffocating, or strangling, it was held sufficient. *R. v. Warman*, 2 Car. & K. 195; Den. 183. *R. v. Spiller*, 5 C. & P. 333. *R. v. Stokes*, Den. 307; 2 Car. & K. 536. *R. v. Waters*, Den. 356; 18 L. J. M. C. 53; 7 C. & P. 250; 2 Car. & K. 864. *R. v. Dale and another*, 1 Moo. C. C. 5. *R. v. Edwards*, 8 C. & P. 611. [Starving.] S. P. *R. v. Pinhorn*, 1 Cox, 70. *R. v. Ellis*, 2 Car. & K. 470. *R. v. Sandys and another*, 2 Moo. C. C. 227; Car. & M. 345. *R. v. Haydon*, 1 Cox, 184, Erle, J. *R. v. Whitehouse*, 5 Cox, C. C. 144. Negligence in a mine.

⁶ *R. v. Culkin*, 5 C. & P. 121. As to the names of bastard children, see *ante*.

⁷ S. C. S. P. generally.

⁸ *R. v. Edwards*, 6 C. & P. 401.

in general necessary to mention the length, breadth, or depth of wounds. Lawrence, J., once directed the clerk on the Oxford circuit to omit these particulars, and his instructions were obeyed,¹ although two judges² subsequently endeavoured to restore the old custom of stating these particulars, but the other ten were of a different opinion. The ten held, that as the precedents were both ways, they felt themselves at liberty to follow common sense.³

Downing and Powys were charged with murder in two counts. In the first, Downing was charged as principal, and Powys as aiding and abetting; in the second, the case was reversed, and Powys was charged as principal; but the second count used the word "afterwards," and the prisoner's counsel urged that this involved an absurdity, and that, as the jury had found a general verdict, the judgment was erroneous. The judges heard counsel upon the point at considerable length, and decided (Maule, J., *diss.*) that the two counts substantially related to the same person killed and to one killing; and that they might have been transposed without any alteration of time or meaning; but it was held not essential that the jury should find which of the prisoners fired the shot which destroyed life.⁴

An indictment concluded without "*contra formam statuti*," but it was held that punishment might, nevertheless, be inflicted under 9 Geo. 4, c. 31, s. 9.⁵ There was an indictment against three, against one as principal, and against the others of aiding and abetting. The wound was given on the 27th of May, but the death did not happen till the 29th, and the charge against the two was, that they were aiding and abetting *on the day and year first aforesaid*. All were found guilty of manslaughter, but it was objected, that as the felony was not complete till the 29th of May, the aiders and abettors could not be convicted upon the charge for killing upon the day and year first aforesaid, which was the 27th. The judges, however, held the conviction right.⁶

Evidence.] It may be observed, that the rule which requires the finding of the body before a verdict of guilty can be pronounced, is qualified, if it can be made appear that the deadly fact has been perpetrated. As where the deceased had been beaten and thrown into the sea; here the jury found that he was killed before he was thrown overboard, and the prisoner was executed.⁷ On the contrary, where

¹ 1 Moo. C. C. 104.

² Holroyd and Littledale, JJ.

³ *R. v. Mosley and another*, 1 Lew. C. C. 179. *R. v. Tomlinson*, 6 C. & P. 370; 5 Rep. 122. *R. v. Grounsell*, 7 C. & P. 788, as to the nature of the instrument and the nature of the wound.

⁴ *R. v. Downing and Powys*,

Den. C. C. 52; 2 Car. & K. 382.

⁵ *R. v. Berry*, 1 Moo. & Rob. 463. *R. v. Sawyer*, Russ. & Ry. 294.

⁶ *R. v. O'Brian and others*, Den. 9; 2 Car. & K. 115. See *R. v. Heydon*, 4 Rep. 41; Cro. El. 176; Dy. 50, n.

⁷ *R. v. Hindmarsh*, Leach, 569.

the father and mother of a child were seen to throw it into a dock where the tide of the sea flowed and re-flowed, Gould, J., directed an acquittal, for the tide might have carried the child out, and so it might have been saved.¹ And, in a case of child murder, it was held that the prisoner could not be called upon to account for the child, nor to say where it was, unless evidence had appeared to show the death of the child.²

Every one present at a murder must be called to give an account of the transaction; so that, when a widow had given her testimony for the prosecution, the learned judge directed the daughter, who had been present at the murder, to give evidence likewise for the prosecution, although her name was not on the back of the indictment, and although she had been brought to the assizes by the prisoner.³ In the same case, two surgeons differed in opinion, and the counsel for the prosecution declined to call a third who was in court, but who, nevertheless, had examined the body of the deceased; but the court ordered him to be called, and examined him.⁴ In tendering evidence of murder by poison, it may be shown that children of the prisoner have previously died of arsenic, and that in the case of her husband, for whose murder she was tried, the symptoms were similar to those of the children.⁵ But Martin, B., rejected evidence that three others of the same family had died by a similar poison, that the prisoner was present at all the deaths, and that he administered something to two of the persons;⁶ whilst on the other hand, evidence of the death of others by explosive grenades, admitted to show the nature of those missiles, was admitted against a prisoner for murder.⁷ And in manslaughter against a surgeon, the court will not hear of his former mode of treatment in other cases, although witnesses may be asked their opinion as to his skill.⁸

The evidence of any kind of violence capable of occasioning death will support a charge of murder upon an indictment framed according to the modern Act of parliament. The proof is no longer limited to the old forms of indictments, where the particular mode of death was set forth with unreasonable technicalities; therefore, whether the death has happened by inflicting a wound or a bruise is entirely unimportant.⁹ But although in cases of starving, it is no longer required that the duty of maintenance should be set out in

¹ Leach, 571. See 2 Hale, 290.

² *R. v. Hopkins*, 8 C. & P. 591.

³ *R. v. Holden*, Id. 606.

⁴ Id. As to evidence of malice, see *R. v. Clewes*, 4 C. & P. 221. Evidence of apprenticeship. *R. v. Crumpton*, Car. & M. 597.

⁵ *R. v. Geering*, 18 L. J. M. C. 215, *cor.* Pollock, C. B.; Alderson, B.; and Talfourd, J.

⁶ *R. v. Winslow*, 8 Cox, 397.

⁷ *R. v. Bernard*, 1 Fost. & F. 240. The name of the person who gave the order for the grenades was allowed to be asked as a fact, although not then apparently connected with the prisoner. S. C.

⁸ *R. v. Whitehead*, 3 Car. & K. 202.

⁹ *R. v. Warman*, Den. 183; 2 Car. & K. 195.

the indictment; nor in cases of exposure, that the obligation to take care of the child should appear; the evidence must show these respective responsibilities.¹ But no such duty need be shown where a medical practitioner causes death by incapacity or misconduct, as by applying wet cloths unskilfully, by which a mortal congestion of the lungs took place.² So it was where a working person was charged with negligence, as when foul air exploded in a mine,³ whereby a fatal calamity ensued. An indictment for causing poison to be taken by B. was not sustained by evidence showing that the poison, although taken by B., was intended for another person.⁴ Upon the indictment of an accessory, the court would not admit of the principal's account of the occurrence, but what the principal said with regard to the intent (*i. e.*, to show malice) was deemed proper evidence.⁵

Trial.] The trial for murder should be in the county where the fact has been committed, *i. e.*, where the blow and the death happen. But as the blow which causes death, and the death itself, might be in more than one county, or, indeed, it might be, than two counties, the statute 7 Geo. 4, c. 64, s. 12, provides that when any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within 500 yards of such boundary or boundaries, or shall be begun in one county and completed in another, it may be dealt with and tried in any of the said counties, as if it had been wholly committed therein. A manslaughter, however, committed by one foreigner upon another foreigner upon the high seas, was not cognizable under 9 Geo. 4, c. 31, s. 8, although the death happened in England,⁶ on the high seas or on land, within the king's dominions or without. A prisoner was charged with manslaughter in the county of the city of Worcester; the blow which caused death was alleged to have been given in the county of Worcester: this was held to be within the 12th section of the old Act.⁷

The 26 Hen. 8, c. 6, applies to murders, &c., committed in Wales; these may be tried in the next adjoining county where the king's writ runneth. Herefordshire has been holden to be the next adjoining county to South Wales, and Shropshire to North Wales.⁸ And, now by 1 Will. 4, c. 70, s. 19, assizes may be held

¹ *R. v. Edwards*, 8 C. & P. 611. *R. v. Pinhorn*, 1 Cox, 70.

² *R. v. Ellis*, 2 Car. & K. 470.

³ *R. v. Barrett*, 2 Car. & K. 343.

⁴ *R. v. Ryan*, 2 Moo. & Rob. 213.

⁵ *R. v. Pym*, 1 Cox, C. C. 339.

⁶ *R. v. Lewis*, Dears. & B. 182; 26 L. J. M. C. 104. *R. v. Menham*, 1 Fost. & F. 369. Pollock, C. B., said that the provision in 7

Vict. c. 2, was directory, and that he could not reserve the points. There might be error on the record. *R. v. Lewis* was cited. See 24 & 25 Vict. c. 100, s. 10.

⁷ *R. v. Jones*, 1 Russ. C. M. 550.

⁸ *R. v. Athos, father and son*, 8 Mod. 136. *R. v. Parry*, Leach, 108. See *R. v. Window*, 3 Campb. 78. *Goodright d. Richards v. Williams*, 2 M. & S. 270.

in Chester and Wales, and consequently, since this statute of 1 Will. 4, murders may be tried in a Welsh as well as in an English county; indeed, it is probable that any trial for murder committed in Wales, otherwise than in a Welsh county, would be a mistrial. If the stroke, however, were given in an English county, and the death should happen in Wales, perhaps there might be a difficulty, notwithstanding the 1 Will. 4, c. 70. The point was doubtful before that Act, and probably is so still.¹ By 28 Hen. 8, c. 15, with reference to murders, &c., upon the high seas; felonies, murders, &c., committed upon the sea, or in any haven, &c.,² shall be tried in any county in England under the king's commission, as if they had been committed on land; and where such felonies, murders, &c., are committed at sea, or in any haven, &c., they may be tried in any of His Majesty's islands, plantations, &c., under the king's commission, and according to the common course of the laws.³

By 57 Geo. 3, c. 53, murders and manslaughters committed on land by the king's subjects out of His Majesty's dominions, may be tried in the colonies belonging to His Majesty; and by 59 Geo. 3, c. 44, murders, manslaughters, rapes, robberies, and burglaries committed on land at the settlement in the Bay of Honduras, may be tried there by virtue of a commission under the great seal.

By 24 & 25 Vict. c. 100, s. 9, where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of Her Majesty or not, every offence committed by any subject of Her Majesty, in respect of any such case, whether the same shall amount to the offence of murder or manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that county or place; provided that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or Ireland, in the same manner as such person might have been tried before the passing of this Act.⁴

By 4 & 5 Will. 4, c. 36, s. 22, (the Central Criminal Court Act,) any offence committed within the admiralty jurisdiction may be tried at the Central Criminal Court. By 7 Vict. c. 2, s. 1, after reciting the 28 Hen. 8, c. 15, it is enacted that justices of assize or of oyer and terminer and gaol delivery for trying offences under the jurisdiction of the admiralty, may have all powers for trying offences within that jurisdiction; such justices may inquire of all offences alleged to have been committed on the high seas and other

¹ See East, P. C. 363.

² See *R. v. Bruce*, Leach, 1093.

³ See 46 Geo. 3, c. 54.

⁴ The Act does not extend to Scotland in this respect: 24 & 25 Vict. c. 100, s. 78.

places within such jurisdiction, and may deliver the gaol in every county and franchise within their commission. All indictments found and trials had shall accordingly be valid under such circumstances, and such justices may award costs under 7 Geo. 4, c. 64, s. 22.

By sect. 2, in all such indictments the venue in the margin shall be the same as if the offence had been committed in the county where the trial is had, and all material facts, which in other indictments would be alleged to have taken place in the county where the trial is had, shall, in indictments prepared and tried under the Act, be averred to have taken place "on the high seas." The 3rd section relates to committals by justices in conformity with the statute. The 4th section saves the jurisdiction of the Central Criminal Court, and the right to issue special commissions.

The following decisions have taken place upon the respective Acts of parliament above mentioned. An indictment under 9 Geo. 4, c. 31, s. 7, ought to have averred that the prisoner and the deceased were subjects of the king, and the prisoner's own declaration would then have sufficed as proof to the jury for that purpose.¹ On the other hand, a Spaniard who killed an Englishman on the Canton river, within the tideway, about eighty miles from the sea, was discharged.² A Spaniard entered into articles to serve in an English merchant vessel, and subsequently the captain set up in trade, making the Spaniard, whose services were not required by the new captain, his interpreter, but without the consent of the crew. A quarrel arose abroad upon land between the Spaniard and one of the crew, which ended in the death of the latter, who died on board ship. It was held that the Spaniard was not a subject of His Majesty within the meaning of the 9 Geo. 4, c. 31, and that as the blow took place on shore, and the death at sea, the offence had not been committed on land, out of the United Kingdom, so as to be within 57 Geo. 3, c. 53.³

The Central Criminal Court has jurisdiction to try a British subject for a murder committed out of the Queen's dominions upon a foreigner. The prisoner was a native of Malta, and he murdered a Dutchman. It was objected that the person murdered should have been a British subject, and so described in the indictment. It was admitted that the murderer abroad must be a British sub-

¹ *R. v. Helsham*, 4 C. & P. 394. See 1 Russ. C. M. 554, note (u), where it is said that the court thought, upon a subsequent occasion, that the construction in *R. v. Helsham* was too narrow. Vaughan, J., said that a man might own allegiance for *protection*.

² *R. v. Depardo*, 1 Taunt. 26, 32; Russ. & Ry. 134. In this case

the prisoner, who was a prisoner of war, had volunteered his services to the king, and received his bounty. He gave the stroke on shore, but the death happened on ship-board. He was tried under 33 Hen. 8, c. 23, and 43 Geo. 3, c. 113, s. 6, for manslaughter.

³ *R. v. De Mattos*, 7 C. & P. 458.

ject. The judges were unanimous in favour of the conviction.¹ The prisoner may be tried for murder and manslaughter at the same time, where the grand jury have found a bill for murder, and the verdict upon the coroner's inquisition is manslaughter and *vice versa*.² Again, the grand jury find for manslaughter, and ignore for murder. The better way is to present a new bill for manslaughter, instead of striking out "maliciously," &c., in open court.³ The grand jury may find a true bill for murder against one, and for manslaughter against another, in the same charge, that is, if it be so charged against them, but not for murder against one and manslaughter against the other, if both be charged with murder.⁴

By 24 & 25 Vict. c. 100, s. 10, where any person, being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England or Ireland, shall die of such stroke, poisoning, or hurt in England or Ireland, or, being feloniously stricken, poisoned, or otherwise hurt at any place in England or Ireland, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of England or Ireland, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county or place in England or Ireland in which such death, stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been wholly committed in that county or place.

Verdict.] It is most common for a jury to find their verdict "guilty of manslaughter," when they do not esteem the charge to amount to murder.⁵ But the judges will not receive that verdict where the evidence is such as to preclude the possibility of the case being manslaughter, the jury must then convict of murder or acquit the prisoner. As in the case of the ghost,⁶ where the court refused to receive a verdict of manslaughter, observing, that if the jury believed the evidence, they must find the prisoner guilty of murder.⁷ A man may be found guilty of aiding and abetting, although the principal in the first degree be acquitted, if the indictment conclude that both the prisoners committed the murder.⁸ In one count of an indictment the cause of death was alleged to have been occasioned by a blow from a stick, in another count by the

¹ *R. v. Azzopardi*, 2 Moo. C. C. 288; 1 Car. & K. 203.

² *R. v. Walters*, 1 Russ. C. M. 565.

³ 2 Hale, 162. *R. v. Turner*, 1 Lew. C. C. 176. East, P. C. 347.

⁴ East, P. C. 347.

⁵ See 2 Hawk. c. 47, s. 5, "not guilty of the murder, but guilty of manslaughter."

⁶ *Ante*.

⁷ 1 Russ. C. M. 546. But this exposition of the law is very unsatisfactory, because, upon seeing the ghost, the prisoner might have been seized with an uncontrollable panic, and, therefore, the question was purely one for the jury.

⁸ *R. v. Taylor and another*, Leach, 360.

throwing of a stone. The verdict on both counts was, guilty of manslaughter, and the court held the conviction right, because the means of death as stated in the two counts were not inconsistent; had they been so, the verdict would have been uncertain, and a difficulty would have arisen.¹

Two persons were charged with murder in two counts. The first charged A. as principal, and B. as aiding and abetting. The second count was *vice versa*. The jury found a general verdict, but expressed themselves uncertain as to which prisoner gave the deadly wound, and it was contended that the prisoners should have been found guilty on one or other of the counts only. But it was answered that both were guilty on both counts, and *R. v. Towle*² was relied on by the judge as applicable to the case, and good law, and the conviction was affirmed.³ Upon an indictment for manslaughter, the jury might have convicted of an assault under 1 Vict. c. 85, s. 11, (now repealed,) and the cause of death being a fight, it was held immaterial that the deceased was the challenger, and that it did not appear which struck the first blow.⁴ But upon an indictment for murder, the prisoner could not be convicted of an assault committed in a previous scuffle, which had no connection whatever with the cause of death;⁵ and in a case of manslaughter, where an assault took place some time before death, and the evidence was that death took place from natural causes, the prisoner could not be convicted of an assault under this statute of Victoria.⁶

No one, excepting the woman, can be convicted of concealing the birth upon an indictment for child murder.⁷

Judgment.] The judgments for murder and manslaughter have been already set forth.

An indictment for murder being moved by *certiorari* into the King's Bench, it was held that a judge at *nisi prius* might pass sentence under 25 Geo. 2, c. 37, without remitting the transcript of the record to that court, although the *postea* might certainly be so returned and judgment given there.⁸

By 24 & 25 Vict. c. 115, ss. 38, 45, and 46, courts-martial are empowered to deal with cases of murder and manslaughter, and to pass sentence of death in cases of murder, and for manslaughter to inflict penal servitude for life or not less than three years, "or such other punishment as is thereafter mentioned."⁹

A case happened before benefit of clergy was abolished, the

¹ *R. v. O'Brian and others*, in the case of the coroner's inquisition. Den. C. C. 9; 2 Car. & K. 115.

² *Russ. & Ry.* 314.

³ *R. v. Downing and another*, Den. C. C. 52.

⁴ *R. v. Lewis*, 1 Car. & K. 419. See *R. v. Pool*, 9 C. & P. 728.

⁵ *R. v. Phelps*, 2 Moo. 240. See

⁶ *R. v. Connor*, 2 C. & K. 518.

⁷ *R. v. Wright*, 9 C. & P. 754.

⁸ *R. v. Thomas*, 4 M. & S. 442, 447.

⁹ *Id.* ss. 38, 45, 46. This Act corresponds with 23 & 24 Vict. c. 123, s. 38, &c.

principle of which still applies, although the question mainly turned upon that privilege. A person had caused the death of two children by one and the same act. He was tried for the murder of one of the children, and found guilty of manslaughter, and he received the benefit of clergy. Then the second child died, and the prisoner was again tried and convicted of manslaughter. But it occurred to the judge that he could not award any punishment for the second death, and the judges were of the same opinion, holding, that the prisoner might allege the allowance of clergy, as a bar to any future judgment for the same offence.¹

Costs.] The father of the deceased retained an attorney to prosecute; but the solicitor of the police had orders likewise to prosecute, and the constable had been bound over to prosecute. The father's costs could not be allowed.²

CHAPTER V.

OF ATTEMPTS TO MURDER.³

Attempts to murder, or do other personal injuries, are usually carried on by active violence on the part of the criminal, as stabbing, strangling, shooting, or the like,—or it might be by placing a noxious material in the way, as poison, explosive substances, or other such things as may occasion a bodily injury, dangerous to life or member. And it should be understood that the hurt must proceed either directly or indirectly from the agency of the prisoner. So that where the party assaulted forced part of his body against a weapon with which the prisoner was attacking him, although it was in self-defence, the judges held that a wound had not been inflicted within the meaning of the statute 9 Geo. 4, c. 31, s. 11.⁴

The modern provisions upon this subject are to be found in 1 Vict. c. 85, ss. 2, 3, 4, and 5, and 9 & 10 Vict. c. 25,⁵ and the offences therein described were—administering, or causing to be taken, any

¹ *R. v. Jennings*, Russ. & Ry. 388. As to the admiralty jurisdiction, see 24 & 25 Vict. c. 100, s. 68, where there is a proviso saving the laws relating to the government of His Majesty's land and naval forces.

² *R. v. Yates*, 7 Cox, 361.

³ The statute 43 Geo. 3, c. 113, respecting malicious injuries, was repealed by 24 & 25 Vict. c. 101.

⁴ *R. v. Beckett*, 1 Moo. & Rob. 526.

⁵ Both repealed.

poison, or other destructive thing; attempting to administer the same; stabbing; cutting; wounding; shooting; drawing a trigger, or attempting to discharge any kind of loaded arms; attempting to drown, suffocate, or strangle; causing any bodily injury dangerous to life; using explosive substances; corrosive fluid, or other destructive matter. There were, besides, injuries to railways, using chloroform, and other such crimes. The intent upon all these occasions is manifested by the particular circumstances of each case, and is, for the most part, a question for the jury.¹ The prevalence of an unkindly feeling is enough to bring the offender within the Act, and, consequently, under these provisions, the term "malice" need not mean "malice aforethought."² General malice is sufficiently to be presumed without evidence of ill-will towards the party receiving the hurt.³ And there is another distinction between cases which are founded upon statutes where the word "maliciously" has been made to constitute the very essence of the crime,⁴ and those which proceed upon Acts like that before us. Under the first-mentioned statutes, although no proof of particular malice was required, the offence must yet have been committed under such circumstances as would have amounted to murder.⁵ And as the word "maliciously" was omitted in 1 Vict. c. 85, ss. 2 and 3, (although in all attempts to murder, malice forms an ingredient in the crime,) yet the party would not be entitled to an acquittal if the facts were such as to reduce the offence in case of a fatal result to manslaughter.⁶

The following are the crimes under the Act of 1861 where the intent is to commit murder.

By 24 & 25 Vict. c. 100, s. 11, whosoever shall administer to or cause to be administered to or to be taken by any person any poison or other destructive thing, or shall by any means whatsoever wound or cause any grievous bodily harm to any person, with intent in any of the cases aforesaid to commit murder, shall be guilty of felony, and liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 12, whosoever, by the explosion of gunpowder or other explosive substance, shall destroy or damage any building with intent to commit murder, shall be guilty of felony, and liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 13, whosoever shall set fire to any ship or vessel or any part thereof, or any part of the tackle, apparel, or furniture

¹ Where, through fear of her husband, a woman jumped out of the window, it was deemed necessary to show that the husband had made her take that step. *R. v. Donovan*, 4 Cox, 399.

² *R. v. Griffiths*, 8 C. & P. 248.

³ 1 Moo. C. C. 95. *R. v. Jarvis and others*, 2 Moo. & Rob. 40.

⁴ See 43 Geo. 3, c. 58. *R. v. Gastinaux*, Leach, 417.

⁵ *R. v. Gastinaux*, ut supra.

⁶ *R. v. Griffiths*, 8 C. & P. 248; *R. v. Nicholls*, 9 C. & P. 267.

thereof, or any goods or chattels being therein, or shall cast away or destroy any ship or vessel, with intent in any of such cases to commit murder, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 14, whosoever shall attempt to administer to or shall attempt to cause to be administered to or to be taken by any person any poison or other destructive thing, or shall shoot at any person, or shall, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent, in any of the cases aforesaid, to commit murder, shall, whether any bodily injury be effected or not, be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and solitary confinement.

And by sect. 15, whosoever shall, by any means other than those specified in any of the preceding sections of this Act, attempt to commit murder, shall be guilty of felony, and shall be liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

In considering these clauses, the failure of the design in view has not escaped the attention of the legislature, and thus attempts to commit these serious offences have, in many cases, been distinguished from the acts themselves. And a mistake, as if A. should shoot at B. and wound him, but with an intent to kill C., will not alter the penalty.¹ Nor is it a defence in a case of apprehension, that the prisoner had no reason to believe in the lawfulness of the apprehension.² In the following case the prisoner's crime might have been reached under 1 Vict. c. 85, s. 3, although he escaped under the old law. He gave a woman a cake and some cherries, desiring her to give them to a bastard child belonging to them. But the woman observing something white on the cherries, tasted one of them, and likewise the cake, and finding both to have a nauseous flavour, buried them in the dunghill. Subsequently, the prisoner offered the woman another cake for her own eating, but after seeing him eat, or pretend to eat a piece, she took it, and put into her mouth, but spat it out, and did not swallow any part. The man then left the cake, and it was discovered to have sundry poisonous ingredients within it. The intent, therefore, of the prisoner was not doubtful, but it was objected that as the woman had not swallowed any part of this cake she could not be said to have taken the poison, and thus, that the prisoner could not be convicted of administering. But the judges were of opinion that swallowing

¹ *R. v. Smith*, 25 L. J. M. C. 29. *R. v. Lynch*, 1 Cox, 361. ² *R. v. Bentley*, 4 Cox, 406.

was not essential to the completion of the crime, hesitating, nevertheless, upon the point whether the mere delivery of the cake to the prosecutrix could be called an *administering*. Had the prisoner put the cake into her mouth, the case might have been materially different; but here, he neither administered, nor caused to be administered, according to the strict construction of a highly penal Act, and a pardon was recommended.¹ Park, J., however, is said to have questioned the accuracy of this statement, and to have attributed the decision of the judges to the fact of no poison having been introduced into the stomach.² But under the 3rd section of 1 Vict. c. 85, and sect. 11 of the present Act, such a person would probably be convicted of attempting to administer poison with intent to murder; for the delivery of the cake, and the taking by the woman, would be deemed one entire act of attempting that which, in the result, might very possibly amount to a real administering.

A delivery of poison, however, in a case of homicide, is proved by showing that the poison was placed in such a situation as to be made use of by the party intended to be murdered. As where the prisoner put poison into a pudding meal which was in a bowl, and would be taken by the family in the ordinary way.³ So, again, where a servant put poison into some coffee, and told her mistress that coffee was ready, it was held "a causing to be taken" within the Act.⁴ So, under 9 Geo. 4, c. 31, it was held, that if poison be sent to A., and B. take it by mistake, the case is made out.⁵ So, where a drug was given to a woman to produce miscarriage, Coleridge, J., doubted, as the prisoner was not present when the drug was taken, whether that was an administering or causing to be taken, but the court, after considering it, affirmed the conviction.⁶ So, where the prisoner brought some savin, and called from time to time to know how it acted, and the woman became ill afterwards, this was a "causing to be taken."⁷ A. delivered poison to B., and told B. to put it into some beer for C. to drink, saying he should like to kill C. Instead of doing this, B. gave the poison to C. and related to C. what had passed. Here, had B. carried out A.'s purpose he would have been the principal felon, and thus A. was held not to have attempted to administer poison within the statute 1 Vict. c. 85, s. 6.⁸ It is no objection that the poison is not free to act, as where two kernels of a *cocculus indicus* berry were administered to a child who swallowed them. They would have destroyed life, but they passed through the body without harm,

¹ *R. v. Cadman*, 1 Moo. C. C. 114.

² 5 Law Mag. 473. The case is said to have been rightly reported in Carr. Sup. 237; 6 Cox, 16, n.

³ *R. v. Nicholson*, East, P. C. 346.

⁴ *R. v. Harley*, 4 C. & P. 369. *R. v. Dale*, 6 Cox, 14. It is a question for the jury.

⁵ *R. v. Lewis*, 6 C. & P. 161.

⁶ *R. v. Wilson*, 26 L. J. M. C. 18; Dears. & B. 127.

⁷ *R. v. Farrow*, Dears. & B. 164.

⁸ *R. v. Williams*, 1 Car. & K. 589. *R. v. Williams and another*, Den. 39.

being too strong for the child's stomach. The judges held the prisoner guilty of the crime charged under 1 Vict. c. 85, s. 2.¹ Spanish flies were put into ale and caused mischief. It was a foolish joke, and not within the 1 Vict. c. 85,² but would now be reached by 24 & 25 Vict. c. 100, s. 20.

Wounding.] If the wound be caused by shooting, it must appear that the prisoner shot AT the person he is charged with assaulting;³ for, if that individual could not, by possibility, have been injured by the shooting, the crime has not been completed. Therefore, upon an indictment for firing a gun into the house of A. with intent to murder A., it was necessary to show that some one was within reach of the gun when it was so fired.⁴ It is true that A. himself need not have been the person,⁵ for general malice will be sufficient; nevertheless, however manifest the evil intention may be, there must be proof that an injury might have been committed.⁶

It seems to be admitted, that the continuity of the skin, or, in other words, the external surface of the body, must be divided in order to sustain a charge of wounding, although the present Act will include almost all bodily injuries.⁷ Where, therefore, the prisoners threw the prosecutor (having previously beaten him with an iron bar and hammer) down a staircase, evidently with an intent to do him a serious injury, and probably to murder him, whereby also his collar-bone was broken, the judges, after much discussion, held, that as the continuity of the skin had not been divided, there had been no wound within the Act, and the conviction was held wrong. Lord Tenterden also said, that he thought the word "wound" had not been introduced to cure the difficulty, whether cutting or stabbing instrument was used.⁸ But, where a hammer was thrown at the prosecutor, which inflicted a wound upon his head, and made him "very bloody," upon a question whether that could be considered a stab, cut, or wound within the statute, the judges held the conviction right.⁹ A blow with a bludgeon has been ranged within the same rule, blood being drawn.¹⁰ So,

¹ *R. v. Cluderay*, 19 L. J. M. C. 119; Den. C. C. 514; 2 Car. & K. 907.

² *R. v. Walkden and others*, 1 Cox, 282. It was not a common assault nor an attempt to commit a misdemeanor.

³ *R. v. Empson*, Leach, 224. See Russ. & Ry. 3.

⁴ *R. v. Lovel*, 2 Moo. & Rob. 39.

⁵ *R. v. Holt*, 7 C. & P. 518.

⁶ *R. v. Jarvis*, 2 Moo. & Rob. 40. The intent is a matter for the jury.

⁷ 1 Moo. & Rob. 527.

⁸ *R. v. Wood and another*. Diss: Bayley, B.; Park, J.

Thus it seems to have been the impression upon the mind of Lord Tenterden, that although the word "wound" would in effect cure the difficulty which arose sometimes in indictments, upon the terms cutting and stabbing, yet, that it was not so much introduced for that end, as to bring within the operation of the Act, a wound which, being neither a stab nor a cut, might yet break the skin, or, to use the words mentioned in the text, the "continuity of the skin."

⁹ *R. v. Withers*, 1 Moo. C. C. 294.

¹⁰ *R. v. Payne*, 4 C. & P. 558.

a kicking with a shoe, the skin being divided.¹ So, a wound from the butt end of an air gun was deemed to fall within the 9 Geo. 4, c. 31, although the instrument itself did not come in contact with the head, a thick hat, which the prosecutor had on his head, having intervened.² A stick or club has been held sufficient.³ And, if the skin be separated internally, it is enough, although there be no external division, as where a blow was given with a hammer which broke the lower jaw in two places.⁴ Yet the whole of the skin must be divided; a mere abrasion of the cuticle, although it should cause an issue of blood, will not be sufficient to constitute an offence within this clause.⁵ And there must be some kind of instrument, in order to satisfy the word "wound," so that an injury inflicted with the hands or teeth will not be such a wound.⁶ Nor the biting off of a finger, although it ought to be added, that in this last case, six judges dissented from the majority.⁷ But the bite of a dog set on by the prisoner has been considered to be within the 9 Geo. 4, c. 31.⁸ A kick on the private parts, which ruptured the membrane lining the urethra, was held to be a wounding.⁹ But a kick in a woman's private parts, which caused a flow of blood mingled with urine for some time afterwards, was held not to be within the Act, because the surgeon could not state from what particular vessel the blood originally flowed.¹⁰ The word "wound" is, nevertheless, a most necessary word to be employed, as it reaches several offences which might otherwise pass unpunished; thus, upon a charge for cutting with a hammer, where it turned out that the injury was caused by the claw or sharp part of the instrument, although indeed the indictment was sustained in that case.¹¹ Yet, if the blow be given with the blunt end, and the charge be for cutting only, not mentioning a wound, an acquittal must take place.¹² So, blows, with a square iron bar, or with the metal scabbard of a sword, (the sword being in the scabbard,) or, with the handle of a windlass, have been respectively held not to be cuttings within

¹ *R. v. Shadbolt*, 5 C. & P. 504.
² *R. v. C. and J. Briggs*, 1 Moo. C. C. 318.

³ *R. v. Skeard*, 2 Moo. C. C. 13; 7 C. & P. 846.

⁴ *R. v. Lancaster*, 2 Stark. Ev. 692.

⁵ *R. v. Smith*, 8 C. & P. 173. See *R. v. Warman*, Den. 103.

⁶ *R. v. M' Loughlin*, 8 C. & P. 635.

⁷ *R. v. Harris*, 7 C. & P. 446.
R. v. Jennings, 2 Lew. C. C. 130. A child's prepuce.

⁸ *R. v. Stevens*, 1 Moo. C. C. 409. For the conviction, 6: Park, J.; Vaughan, B.; Alderson, J.; Gaselee, J.; Bosanquet, J.; Gurney, B. Against the conviction,

7: Lord Denman, C. J.; Lord Lyndhurst, C. B.; Tindal, C. J.; Littledale, J.; Taunton, J.; Bolland, B.; Williams, B. Absent: Patteson, J.; Parke, B. See, however, *post*, "Bodily Injuries dangerous to Life," and *R. v. Murrow*.

⁹ By Alderson, J. *R. v. Elm-sly*, 2 Lew. C. C. 126. The point would have been reserved if necessary. See, however, *R. v. Hughes*, 2 C. & P. 420.

¹⁰ *R. v. Waltham*, 3 Cox, C. C. 442.

¹¹ *R. v. Jones*, Id. 441. The distinction was recognized in *R. v. Waltham*.

¹² *R. v. Atkinson*, Russ. & Ry. 104.

¹³ 1 Russ. M. C. 729.

the old Act, 43 Geo. 3, c. 58.¹ So again, when the wound was punctured and triangular, as if it had been inflicted with the point of a bayonet, (which in fact was the case,) and the indictment charged a striking and cutting, the conviction was held wrong, for the injury was done by stabbing, not by cutting.² It is no defence to say that the weapon was one used for a particular purpose, as, for example, an iron used for forcing open drawers, and sharp at one end, so as probably to cut, and yet not used for cutting.³ Yet, although in ordinary use it might not cause death, an instrument, if used with excessive violence, and in an extraordinary manner, might have a fatal effect. It was for the jury to decide upon the point.⁴ And, moreover, it must not be lost sight of, that all these injuries, if wilfully inflicted, are misdemeanors under 24 & 25 Vict. c. 100, s. 20. But the last cases are quite obsolete, because the indictment would, of course, charge a *wounding*, without more.

What kind of wound.] Yet, although blood be drawn, every slight scratch cannot be called a wound within the statute. Formerly, indeed, some judges doubted whether the wound ought not to have been in a vital part, in order to warrant a conviction.⁵ And Bayley, J., directed an acquittal upon one occasion where the wounds were not severe, although it must be admitted that it was a case in which the provisions in Lord Ellenborough's Act, with reference to manslaughter, very strongly applied.⁶ However, Park, J., held the contrary upon a subsequent occasion,⁷ and the point came to be considered some years afterwards, in a case where the prisoner cut a person upon the wrist, inflicting a slight wound, which got well in about a week, and from deference to the opinion of Bayley, J., this point, amongst others, was saved for the judges; but they said, that the question was the intent which governed the blow, and not the harm itself which was done, so that, as in the case before them, if an intent to do grievous bodily harm existed, it was immaterial whether the prisoner had, in reality, effected his purpose,⁸ and this decision governs the clause with intent to murder. So, although the wound be upon a place which rarely produces a fatal issue, the prisoner is equally guilty if the intent be proved.⁹ So if the wound be neither dangerous nor permanently injurious.¹⁰ If the intent be to cut the clothes, and in warding off the blow, the prosecutor's hand be cut, the case is not within the Act, for want of the intention to cut.¹¹ So, where upon receiving a blow, the prosecutor fell upon some iron trams, the case was not considered to be a wounding within the statute.¹²

¹ *R. v. Adams*, 1 Russ. C. M. 728.
R. v. Whitfield, and Anon. Id.

² *R. v. M'Dermott*, Russ. & Ry. 356.

³ *R. v. Hayward*, Russ. & Ry. 78.

⁴ *R. v. Howlett*, 7 C. & P. 274.

⁵ 1 C. & P. 299. By Park, J.

⁶ *R. v. Akenhead*, Holt's N. P. 469.

⁷ *R. v. Griffith*, 1 C. & P. 298.

⁸ *R. v. Hunt*, 1 Moo. C. C. 93.

⁹ *R. v. Carr*, 2 Stark. on Ev. 692.

¹⁰ *R. v. Ashman*, 1 Fost. & F. 88.

¹¹ *R. v. Day*, 1 Cox, C. C. 207.

¹² *R. v. Spooner*, 6 Cox, C. C. 392.

So, where the prisoner struck at A. and hurt B., who had interposed, he could not be convicted for wounding B., because the intent was absent.¹

The 2nd section of the statute 1 Vict. c. 85, contained the words, "or shall by any means whatsoever cause to any person any bodily injury dangerous to life." These expressions supplied the apparent want of consistency in excluding wounds inflicted without an instrument, from the penal consequences of an attack with intent to murder. For, although the offence might come short of the legal definition of wounding, still, if there were an injury dangerous to life, and with a murderous intent, the case was punishable capitally. But now, by 24 & 25 Vict. c. 100, s. 15, whosoever shall, by any means other than those specified in any of the preceding sections of this Act, attempt to commit murder, shall be guilty of felony, and shall be liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement. It appears, however, not to be sufficient to show, under these circumstances, that the death, had it ensued, would have been murder. The judges will not extend the provisions of a severe statute, and they required under the old Act, a finding by a jury of guilty upon the count charging *the intent to murder*, before they would give effect to the words, "bodily injury dangerous to life."² A woman abandoned her infant and put it into a dry ditch amongst nettles; it was not hurt, being soon afterwards found, and the court held that she could not be convicted of an assault with intent to murder.³ A woman exposed her infant on a cold, wet day and congestion of the heart and lungs followed, but the child recovered. There was no lesion of any part of the organs of the child. The conviction was quashed.⁴ So, where a woman left her infant, a month old, in a highway, and the indictment failed to state that any injury had happened, the same impunity occurred.⁵ But the statute 24 & 25 Vict. c. 100, s. 27, has gone a great way towards a remedy for this evil.

It may be remarked, in conclusion, that an attempt to commit murder is, at common law, a high misdemeanor.

Next, with reference to the instrument. The instrument itself with which the offence is said to have been perpetrated, must be one capable of doing harm. So that where the prisoner attacked the prosecutor with a loaded gun, but in the struggle which ensued the powder fell out, it was held, that although the prisoner subsequently drew the trigger, he must be acquitted, because this could not be called an attack with a loaded gun.⁶ So, where the prisoner levelled a blunderbuss, and pulled the trigger, but upon

¹ *R. v. Hewlett*, 1 Fost. & F. 91.

² *R. v. Cruse et ux.*, 8 C. & P. 541, Patteson, J.

³ *R. v. Renshaw*, 11 Jur. 615. Nor of a common assault.

⁴ *R. v. Gray*, Dears. & B. 303; 26 L. J. M. C. 203.

⁵ *R. v. Cooper*, 2 Car. & K. 876; Den. 459. But this was an indictment for exposing the child with intent to burden the parish. See *R. v. Chandler*, Dears. & B. 453.

⁶ Anon. 1 Russ. C. M. 724.

examining the weapon, it was found that there was no priming in it, the judges recommended an application for a pardon, upon the ground that the instrument was not loaded within the meaning of the statute.¹ So, a pistol which was not capable of being fired off, was considered not to be "loaded arms" within 9 Geo. 4, c. 31, s. 11.² So, where there was no bullet in the pistol, the indictment having stated in all the counts that the prisoner had shot at the prosecutor with a pistol charged with a leaden bullet.³ So it was where the flint had dropped out of the gun.⁴ So, although the prisoner admitted having fired the gun, Patteson, J., directed an acquittal for want of evidence of its having been loaded.⁵ So, where there was a loaded rifle, which, for want of proper priming, would not go off, it was held not to be a "loaded arm" within the statute; and although the gun was pointed at the prosecutor, the trigger pulled, and the pan down, it was held to make no difference.⁶ So, where the gamekeeper waited till the prisoner was out of distance, Parke, B., would only allow a conviction for a common assault.⁷ However, if there be a possibility of mischief, it will be no defence to urge that the instrument was not loaded with a destructive material. The prisoner wounded a woman by firing close to her ear, and the jury added an opinion to their verdict of guilty, that the pistol was loaded with something else besides gunpowder and wadding, for the prisoner had alleged, in extenuation of his crime, that nothing else was there. Application was made to the crown for mercy, upon the ground of there being nothing but powder and paper in the pistol, upon which the matter was referred to the judges, who held the conviction right.⁸ Again, the barrel of a gun, detached from the stock and lock, was deemed an instrument within the statute 9 Geo. 4, c. 31, and the prisoner, who had struck a percussion cap on the nipple of the barrel, was convicted.⁹ So, applying a lighted match to a loaded matchlock gun, or striking the percussion cap of a percussion gun.¹⁰ So, although a scythe was, with the exception of two inches at the end, fenced, the prisoner was convicted of "unlawfully wounding." She might not have intended to wound, and yet might have known that the scythe was uncovered.¹¹ The jury, however, are to be the judges in each case concerning this particular. It is not necessary to adduce independent proof of the loading with a slug, or a bullet; for if, from the circumstances, the jury should be of opinion that the gun or other instrument was so loaded, it will be sufficient.¹² All these are intents to murder.

¹ *R. v. Carr*, Russ. & Ry. 377.

² *R. v. Harris*, 5 C. & P. 159.

³ *R. v. Hughes and another*, 95. Id. 126.

⁴ *R. v. Lewis*, 9 C. & P. 523.

⁵ *R. v. Whitley*, 1 Lew. C. C. 483. 123. See *Blake v. Barnard*, 9 C. & P. 626.

⁶ *R. v. James*, 1 Car. & K. 530.

⁷ *R. v. Abraham*, 1 Cox, 208.

⁸ *R. v. Kitchen*, Russ. & Ry.

⁹ *R. v. Coates*, 6 C. & P. 394.

¹⁰ *R. v. St. George*, 9 C. & P.

¹¹ *R. v. Cox*, 1 Fost. & F. 664.

¹² *R. v. Elliott*, 1 Hawk. c. 55, s. 9. *R. v. Weston*, Leach, 247.

But the intent is in all cases a matter for the jury. They may also find more than one intent, and such a verdict will not vitiate the indictment, although a single intent only be there charged. As, where the count stated an act of shooting with intent to do some grievous bodily harm. The jury found that the prisoner's object was to prevent his lawful apprehension, but that in order to effect that purpose, he had the intention of doing grievous bodily harm to the prosecutor. The judges held the conviction proper, for since both intents existed, it was immaterial which was the principal or which the subordinate one.¹ So, upon evidence of shooting with intent to prevent apprehension, the prisoner may be convicted of an intent to murder.² So, it would seem, that a shot fired into a vessel may be considered as directed at every individual on board of that vessel.³ Upon a count charging that the prisoner shot with intent to murder, if it be necessary that the jury should be satisfied of that intent at the moment when the shot was fired, the fact that the offence would have been murder had death ensued, would be a good ground from whence the jury might infer such intent, since any one must be taken to intend the necessary consequence of his own act.⁴

On the other hand, if the jury negative the intent charged in the indictment, the prisoner cannot be duly convicted. As where the intents were laid, 1st, to murder, 2ndly, to disable, 3rdly, to do grievous bodily harm, but the jury found that the act of cutting was done to prevent apprehension, and for no other purpose; the conviction was held wrong.⁵ So, where the charge was for cutting with intent to murder, maim, and disable, and the jury found the intent to have been to disable till the prisoner could effect his escape, the conviction was held wrong, because a temporary, not a permanent disability was contemplated.⁶ And again, the jury may properly deliver their verdict in accordance with the charge mentioned in the indictment, should the circumstances warrant their finding, although the prisoner's main intent was manifestly different from that found against him. As where the prisoner cut a child's private part, his object, probably, was to commit a rape, but the indictment charged him with doing a grievous bodily harm, and the jury having found him guilty, the judges affirmed the conviction.⁷ Where the intent alleged was to drown, and the prisoner's object appeared to be to keep the prosecutor from landing in a boat at a disputed ferry, which he did by punching holes in the prosecutor's boat, Coleman, J., stopped the case.⁸

¹ *R. v. Gillow*, 1 Moo. C. C. 85. the case would in law have been murder, qu.? S. C.

² *R. v. Davis*, 1 C. & P. 306.

³ *R. v. Bailey*, Russ. & Ry. 1.

⁴ *R. v. Jones*, 9 C. & P. 258.

But whether the jury must be satisfied of such intent at the moment of shooting, or, whether it would be sufficient, that, had death ensued,

⁵ *R. v. Duffin and another*, Russ. & Ry. 365.

⁶ *R. v. Boyce*, 1 Moo. C. C. 29.

⁷ *R. v. Cox*, Russ. & Ry. 362. See *R. v. Bowen*, Car. & M. 149.

⁸ *R. v. Sinclair*, 2 Lew. C. C. 49.

Indictments.—Poison.] The charge for administering poison states that A., on, &c., feloniously did administer to one B. a certain poison, to wit, &c., with intent, thereby feloniously, wilfully, and of his malice aforethought, the said B. to kill and murder.

If the indictment be for a felonious attempt, the words “feloniously did attempt to administer” should be inserted.

The indictment for wounding with a murderous intent alleges that A., on, &c., with a certain knife, which he the said A. in his right hand then had and held, feloniously did wound one B. with intent in so doing then and there feloniously, wilfully, and of his malice aforethought, the said B. to kill and murder.

If the indictment be with an intent to do grievous bodily harm, it should be stated accordingly.

Gunpowder.] The indictment for damaging a building by gunpowder states that A., on, &c., feloniously by the explosion of [gunpowder], a certain building of one B., situate, &c., did damage and destroy, with intent in so doing, feloniously, wilfully, &c., the said B. to murder, against the form, &c.

Ships.] This indictment states, that A., &c., upon the high seas, feloniously did set fire to a certain ship called —, the property of B., with intent, then and thereby feloniously, &c., to murder the persons on board of the said ship, or some of them, against the form, &c.

Shooting.] The indictment for shooting is, that A., on, &c., a certain [gun, &c.] then loaded and charged with gunpowder and [shot], which gun the said A. in his right hand then had and held, did then feloniously shoot and discharge at and against one B., with intent, &c., the said B. then and thereby feloniously, wilfully, and of his malice aforethought, to kill and murder. The attempting is in the same form; so the intent to do grievous bodily harm.

Attempts to drown, suffocate, or strangle.] These indictments are thus varied. That A., on, &c., feloniously did take one B. [if an infant state him or her to be of tender years] into both the hands of the said A., and did then feloniously cast, throw, and push the said B. into a certain [river, pond, &c.] of great depth, to wit, of the depth of —, and did then feloniously keep the said B. in the water of the said [river, &c.,] for a certain space of time, to wit, &c., and by so casting, &c., and keeping as aforesaid, the said A. then feloniously did attempt to drown the said B., with intent in so doing then and thereby [state the intent to murder.]

The attempt to suffocate.] That A., &c., a certain — which in both his hands the said A. then had and held in and upon the mouth and nostrils of one B., there feloniously did put and place, and the said — upon the mouth and nostrils of the said B. then feloniously did forcibly keep and continue for a certain space of time, to wit, &c., for the purpose of preventing the said B. from

breathing, and did then by so putting and placing the same in and upon the mouth and nostrils of the said B., and keeping and continuing the same there as aforesaid, feloniously attempt to suffocate the said B., with intent, &c. [State the intent to murder.]

The attempt to strangle.] That A., on, &c., a certain handkerchief about the neck and throat of one B., then feloniously and forcibly did fix, fasten, and tighten, and did then by so fixing, &c., the said handkerchief about the neck and throat of the said B., and by tightening the same as aforesaid, feloniously attempt to strangle the said B. with intent, &c. [State the intent to murder.]

The word "unlawfully" is indispensable where the statute uses it.¹

It is necessary that the injury should be expressly laid with the intent charged, so that an indictment omitting to state that "in so doing," or "by means thereof," &c., the prisoner intended to do some grievous bodily harm, &c., would probably be deemed invalid.

It is held for clear law that in an indictment for wounding, the means by which the wound was inflicted need not be alleged, and that to state them at all is mere surplusage; therefore, should the means be stated, the court is not confined to such statement, and thus, where two modes of wounding were mentioned, and it was uncertain whether of the two had caused the wound, the judges came to the conclusion that it was immaterial if the wound had been given with a stick, or with a shoe,² and hence no instrument need be named in the indictment. So again, upon a charge of doing a bodily injury dangerous to life, by feloniously beating, striking, and kicking and knocking against a ceiling, &c., it was held that the allegation was sufficient, without stating what the particular injury was,³ nor need it be shown in which hand the prisoner held the weapon.⁴ So it is, although the word "wound" should be omitted in an indictment for stabbing or cutting; but the indictment must distinguish between a stab and a cut, should that important word "wound" be left out, although the weapon need not be mentioned.⁵ So, if the statement of intent be neglected, the indictment fails. As if upon an indictment for wounding, the jury find the intent to have been for the purpose of resisting lawful apprehension, and no other, and there be no such intent laid;⁶ but if the two intents are laid, it is clearly sufficient if the jury affirm one without the other.⁷ And again, the intent may be laid to injure more than one person, so that there may be a count for

¹ *R. v. Ryan and another*, 2 Moo. C. C. 15. See *R. v. Davis*, Leach, 493.

² *R. v. C. and F. Briggs*, 1 Moo. C. C. 318. *R. v. Erle*, 2 Lew. C. C. 133, on 1 Vict. c. 85.

³ *R. v. Cruse et ux.*, 2 Moo. C. C. 53; 8 C. & P. 541.

⁴ *R. v. Howes and others*, 3 Ch. Barn, 868.

⁵ *R. v. M'Dermott*, Russ. & Ry. 356.

⁶ *R. v. Gillow*, ante, p. 796. The intent, as laid, must be proved, in order to justify the more serious charge. *R. v. Cox*, 1 Fost. & F. 664.

⁷ 1 Lew. *ut sup.*

shooting with intent to murder A., and another for a like offence with a similar design against B.¹ And, where there were several counts charging the prisoner with having shot twice at the same person, it was the opinion of the judges, that the words, "with intent in so doing, that is to say, in shooting at the said Thomas Pearce as aforesaid," were grammatically and legally referrible to the last antecedent matter, and consequently, that the omission of the word "last," *i. e.*, "*as last aforesaid*" did not raise a valid ground of objection.² An indictment charged the prisoner with drawing the "trigger of a certain pistol loaded with gunpowder and a leaden bullet," and so feloniously and maliciously attempting to "discharge the said pistol at the said A." &c. This was held good without saying, "discharge the said pistol *so loaded as aforesaid*."³ It is sufficient to allege the shooting, without adding with what the gun was loaded.⁴

Trial.] The jurisdiction of justices of the peace and recorders is taken away in respect of the trial of all these offences by the statutes 5 & 6 Vict. c. 38, s. 1, and 9 & 10 Vict. c. 25, s. 15, with respect to the particular offences therein mentioned. The jurisdiction of the admiralty is preserved by 24 & 25 Vict. c. 100, s. 68.⁵

Verdict.] If there be a joint charge for a malicious mischief of the kind now under consideration, one offender may be found guilty and the rest acquitted.⁶ At no time could a prisoner charged with cutting, &c., plead guilty to a common assault; he must plead to the felony. If no evidence were offered of the felony, he might have been acquitted of that, and convicted of the common assault on his own confession.⁷ But this cannot be now done since the 14 & 15 Vict. c. 100, s. 10. But he may be convicted of unlawfully wounding, which is a misdemeanor under 14 & 15 Vict. c. 19, ss. 4, 5. As where three were charged with felony in cutting and wounding, and two were convicted, and the other found guilty of the misdemeanor of unlawfully wounding, the conviction was held right.⁸ Three persons were indicted jointly for cutting and wounding, but the third did not come up till one of the two first had got away, still this third man kicked the prosecutor whilst he was on the ground struggling with the others: here it was held, that although the case might be sustained against the two first, both in respect of the wounding or

¹ *R. v. Holt*, 7 C. & P. 518.

² *R. v. Voke*, Russ. & Ry. 531.

³ *R. v. Baker*, 1 Car. & K. 254.

⁴ *R. v. Cox*, 3 Cox, C. C. 58.

⁵ See *R. v. Amarro*, Russ. & Ry. 286.

⁶ *R. v. Gibson and others*, Leach, 359.

⁷ *R. v. Calvert*, 3 Car. & K. 201.

⁸ *R. v. Cunningham and others*, Bell, 72; 28 L. J. M. C. 66; and *R. v. Fenwick*, Lincoln, Sp. as. 1844, was cited, where two or more prisoners were tried for this felony, and one was convicted of a common assault.

the assault, yet that the third man must be acquitted of both under this indictment.¹ Again, two persons attacked and wounded the prosecutor, with intent to rob him, but it did not appear which had inflicted the wound. Upon an indictment for wounding with intent to do some grievous bodily harm, it was held that the prisoner might be convicted, whether his were the hand or not which inflicted the wound, if the jury believed that he intended bodily harm in order to carry out his purpose of robbery.²

If counts are joined for wounding and for a common assault, the verdict, to prevent error, should be entered separately. As where the trial had advanced considerably, before the mistake was discovered; here the judge summed up to the jury without noticing the count for the common assault, but the jury found the prisoner guilty of stabbing with intent to do grievous bodily harm, the verdict was so entered, and the judges held the conviction right.³

Again, there may be a verdict of guilty under these statutes, although had death ensued, the case might be but manslaughter;⁴ yet where the intent was laid *with intent to murder*, Lord Kenyon directed an acquittal upon that count, being of opinion that if death had ensued, the case would only have amounted to manslaughter.⁵

By 1 Vict. c. 85, s. 11, it was enacted that, on the trial of any person for any of the offences hereinbefore mentioned, or for any *felony whatever*, where the crime charged included an assault against the person, it should be lawful for the jury to acquit of the felony, and find a verdict of guilty of assault against the person indicted, if the court should warrant such finding. But this clause was repealed by 14 & 15 Vict. c. 100, s. 10. The decisions under the repealed statute were these:—If there were one good count in an indictment judgment might be given for the assault, though all the other counts were bad.⁶ The words “or for any felony whatever,” are worthy of attention. It applied retrospectively, *i. e.* to cases which occurred before the statute came into operation,⁷ and was not confined to cases under the Act. It ap-

¹ *R. v. M'Phane*, Car. & M. 212.

² *R. v. Bowen*, Id. 149. If the weapon be an unlawful one, the prisoner may be convicted of unlawfully wounding, although he had no intent to wound. *R. v. Cox*, 1 Fost. & F. 664.

³ *R. v. Jones*, 2 Moo. C. C. 94; 8 C. & P. 776.

⁴ *R. v. Griffiths*, 8 C. & P. 248. Wounding with intent to disable. Anon. 2 Moo. C. C. 40. Wounding with intent to maim. Under the

old Acts it was for the judge to say whether the offence would have amounted to murder. *R. v. Besson*, 7 C. & P. 142. Here the intent was laid to murder, and Little-dale, J., was disposed to leave it so to the jury, but circumstances occurred, which, if a witness, named Stone, were believed, would have reduced the offence to manslaughter. Verdict, Not guilty.

⁵ *R. v. Mitton*, East, P. C. 411.

⁶ *R. v. Nicholls*, 9 C. & P. 269.

⁷ *R. v. Hagan*, 8 C. & P. 167.

plied to manslaughter, for instance,¹ but the assault in a case of manslaughter, must have been, in some measure, the subject of the charge, and indeed, it must have been of itself a felony, but for some cause of mitigation. And moreover, the assault must have tended to cause the death of the deceased.² So again in rape.³ Two men were charged with robbing the prosecutor of his watch. He did not appear, but an assault upon him was proved. The jury convicted one of the prisoners of an assault, but negatived the intent to rob. This conviction was held right, because the assault was identical with that charged in the indictment, although the felonious part of it was neutralized by the finding.⁴ On the other hand, where there had been a scuffle between the prisoner and the deceased, and the prisoner went home, and afterwards the deceased received a blow from others which killed him, it was held, upon an indictment for murder, that the jury could not find the man who had gone home, guilty of an assault under 1 Vict. c. 85, s. 11, because it was not the identical, but a distinct and separate assault.⁵

These also are the cases where, in general, the conviction for an assault has been allowed. A loaded pistol was presented by the prisoner, who was prevented from pulling the trigger.⁶ The prisoner struck the broker's assistant with an axe over the forehead.⁷ Where two men jointly assaulted and wounded the prosecutor, but not a third man who came up afterwards and assaulted the prosecutor, but who was arraigned on the *joint* charge.⁸ So, in abduction, where the jury were satisfied that force was used towards the lady, and yet were not prepared to say that the force arose from motives of lucre.⁹ And, in a case of robbery, the following finding was held not to take the case out of the statute,—“Guilty of an assault, but without intention to commit any felony.”¹⁰

Cases to the contrary were, feloniously administering poison under the statute.¹¹ So where the charge was administering poison with intent to murder, and the verdict was, guilty of administering, but not with intent to murder, the case was considered not to include an assault within the statute.¹² Again, where the instrument in question was not capable of doing harm in the manner with which it was used, the same result happened; as where the prisoner pointed a pistol at another, which turned out not to be

¹ *R. v. Pool*, 9 C. & P. 728. *R. v. Lewis*, 1 Car. & K. 419.

² *R. v. Crumpton*, Car. & M. 597.

³ *Anon.*, 2 Moo. C. C. 40.

⁴ *R. v. Birch*, 2 Car. & K. 193.

⁵ *R. v. Phelps*, 2 Moo. C. C. 240; Car. & M. 180. *R. v. St. George*, 9 C. & P. 483. *R. v. Gutteridge*, Id. 471.

⁶ *R. v. St. George*, 9 C. & P. 483.

⁷ *R. v. Sullivan*, Car. & M. 209.

⁸ *R. v. M'Phane*, ante, p. 800.

⁹ *R. v. Barratt*, 9 C. & P. 387.

¹⁰ *R. v. Ellis*, 8 C. & P. 654.

R. v. Boden, 1 Car. & K. 395.

¹¹ *R. v. Dilworth*, 2 Moo. & Rob. 531.

¹² *R. v. Draper*, 1 Car. & K. 176.

loaded, or which could not be discharged, there could be no conviction for assault within the Act.¹

But the charge of assault at common law remaining, some prisoners might have been convicted of the felony, and others of the assault, as upon an indictment for wounding with intent to do grievous bodily harm.²

Where a husband and wife were charged with inflicting an injury dangerous to life, with intent to murder, the wife could not be acquitted at the close of the case for the prosecution, inasmuch as she might have been convicted of an assault, at all events, under the statute, and she would then have been punishable for an assault as well as her husband.³ But, as we have seen, the statute which empowered the jury to convict for the assault in these cases is repealed, and the cases themselves are scarcely admissible except as matters of history.

CHAPTER VI.

OF LETTERS THREATENING TO MURDER.

Letters threatening to murder.] By 24 & 25 Vict. c. 100, s. 16, Whosoever shall maliciously send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person, shall be guilty of felony, and liable to penal servitude not exceeding ten nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and, if a male under sixteen years, with or without whipping.⁴

Indictment.] The indictment states that A. on, &c., maliciously and feloniously did send to one B., a certain letter, directed to the said B. by the name and description of, &c., threatening then the said B. to kill and murder, and which said letter is as follows, [set out the letter,] against the form, &c.

¹ *R. v. Baker*, 1 Car. & K. 254.
R. v. James, Id. 530.

² *R. v. Archer and others*, Id. 174; 2 Moo. C. C. 283.

³ *R. v. Cruse et ux.*, 8 C. & P. 541. See also as to the judgment in this case, Anon. 2 Moo. C. C. 40, 41. As to the old law under the Coventry Act, Leach, 51, 55, 187; East, P. C. 394, *et seq.* As to the

old law of mayhem, 1 Hawk. c. 55; the Black Act (repealed) 1 Hawk. c. 55. These crimes are high misdemeanors at common law. *R. v. Bacon*, 1 Lev. 146; East, P. C. 411.

⁴ As to threatening letters under the Larceny Act, see 24 & 25 Vict. c. 96, ss. 44, 46; under the Malicious Injuries Act, Id. c. 97, s. 50.

CHAPTER VII.

OF ACTS CAUSING OR TENDING TO CAUSE DANGER TO LIFE
OR BODILY HARM.

Shipwreck.] The first of these Acts is impeding a person endeavouring to save himself from shipwreck.

By 24 & 25 Vict. c. 100, s. 17, whosoever shall unlawfully and maliciously prevent or impede any person, being on board of or having quitted any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, in his endeavour to save his life, or shall unlawfully and maliciously prevent or impede any person in his endeavour to save the life of any such person as in this section first aforesaid, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

Indictment.] The indictment under this clause would be that A. on, &c. feloniously and maliciously did prevent and impede one B. [or a certain person to the jurors unknown], being on board of a certain ship called —, [or having quitted] the said ship being then in distress, [wrecked, &c.] in his endeavour then to save his life [or the life of any other person], against the form, &c.

Shooting, &c.] By 24 & 25 Vict. c. 100, s. 18, whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, or shoot at any person, or, by drawing a trigger, or in any other manner¹ attempt to discharge any kind of loaded arms² at any person, with intent,

¹ “In any other manner.” These words are interpreted as the word “other” often is in civil actions. They mean something analogous to the acts already related, as drawing a trigger, &c. Where the prisoner put his finger upon the trigger of a loaded pistol, but was prevented from pulling it, he was held not to have committed the crime of attempting to discharge loaded arms by drawing a trigger, or in any other manner. *R. v. St. George*, 9 C. & P. 483; 1 Vict. c. 85, s. 4, (*rep.*) So, where the prisoner administered croton oil, so as

to produce very dangerous symptoms, but with intent merely to punish the prosecutor, his conviction for administering with intent to do grievous bodily harm was considered by the judges, but, as the prisoner died, no judgment was given. *R. v. Hanson*, 4 Cox, 138.

² “Loaded arms.” The case of the tin box loaded with gunpowder and peas, was provided against by 9 & 10 Vict. c. 25, ss. 3, 4, and now is by 24 & 25 Vict. c. 100, ss. 28, 29. The case was *R. v. Mountford*, 1 Moo. C. C. 441.

in any of the cases aforesaid, to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person,¹ shall be guilty of felony, and liable to penal servitude for life, or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

With respect to the term “disfigure” which is used in this section, it has been said by a learned judge, that it is a vague charge:—“I cannot form to myself any idea,” said the judge, “of what constitutes such an intent; I therefore recommend you [the jury] to attend to the charge of cutting with intent to do some bodily harm.”²

With reference to “maim and disable,” a distress was levied for rent, but the man was ejected. The owner of the goods distrained did not appear to have been mixed up with the transaction, but when the broker came to re-enter, the prisoner was in the room, and struck one of the assistants on the forehead with an axe. Here it was held, that he could not be convicted of wounding with intent to maim and disable, though he might for wounding with intent to murder, and that, at all events, he was guilty of an assault.³

In all these cases of wounding, &c., a party having a dangerous weapon is bound to retreat as far as possible before he uses it; he, otherwise, is guilty under this statute, if, indeed, any of the intents of the statute are verified in his case, as if he intended grievous bodily harm when he failed to retreat far enough.⁴ And no words nor gestures can warrant the use of a dangerous weapon.⁵

The injuries mentioned with reference to lawful apprehension and detainer, are, of course, intimately connected with the law of arrest, and they have been already discussed in a former part of this work.

The indictment would be the same, varying the mode of stating the intents as to murder, &c. with those which we have already set out.⁶

Wounding, &c., with or without a weapon.] By 24 & 25 Vict. c. 100, s. 20, whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and liable to penal servitude for three years, or to imprisonment not exceeding two years, with or without hard labour.

Indictment.] The indictment states that A. on, &c. unlawfully

¹ *R. v. Duffy*, 1 Lew. C. C. 58, n.

² *R. v. Duffy*, 1 Lew. 60.

³ *R. v. Sullivan*, Car. & M. 209; but not now of the assault.

⁴ *R. v. Odgers*, 2 Moo. & Rob. 479.

⁵ *R. v. Woodhead*, 1 Lew. C. C. 60.

⁶ *Ante*, p. 797, &c.

and maliciously did wound one B. [or inflict grievous bodily harm] against the form, &c. If the charge be for inflicting bodily harm, the means should be stated.

Attempting to strangle, &c. with intent to commit an indictable offence.] By 24 & 25 Vict. c. 100, s. 21, whosoever shall, by any means whatsoever, attempt to choke, suffocate, or strangle any other person, or shall, by any means calculated to choke, suffocate, or strangle, attempt to render any other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing any indictable offence, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour.

Indictment.] The indictment states the attempt to do the particular act, and the intent to commit the indictable offence, which should be particularly described.

Using chloroform to commit an indictable offence.] By 24 & 25 Vict. c. 100, s. 22, whosoever shall unlawfully apply or administer to or cause to be taken by, or attempt to apply or administer to or attempt to cause to be administered to or taken by, any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter or thing, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour.

The indictment should state the drug with which the offence was committed or attempted, and the intent.

Administering poison so as to endanger life or inflict grievous bodily harm.] By 24 & 25 Vict. c. 100, s. 23, whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and liable to penal servitude not exceeding ten years nor less than three years, or to imprisonment not exceeding two years, with or without hard labour.¹

Noxious thing.] There was a count for administering cantharides with intent to do grievous bodily harm. Another count laid the intent to have been murder. Byles, J., thought that a

¹ See *R. v. Walkden*, 1 Cox, 282. *R. v. Hanson*, 4 Cox, 138. *R. v. Heppingstall*, 8 Cox, 111.

voluntary taking was not within the 9 & 10 Vict. c. 25, but after consulting with Willes, J., he said, that the words "to be taken" might be referred to "dangerous or noxious thing." The prisoner gave the cantharides, a deadly poison, in some rum.¹

The indictment states that A. on, &c., unlawfully, feloniously, and maliciously did administer to one B. a certain destructive and noxious thing called — [a poison], whereby the life of the said B. was then and thereby endangered, [or whereby grievous bodily harm was inflicted upon the said B.] against the form, &c.

Administering poison with intent to injure, &c.] By 24 & 25 Vict. c. 100, s. 24, whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanor, and liable to penal servitude for three years, or to imprisonment not exceeding two years, with or without hard labour.

Indictment.] The indictment is similar to the last, but the intent must be stated, which is not necessary when life is wilfully endangered, or grievous bodily harm inflicted.

Then, as to the verdict incident to the two last sections (23 and 24). By 24 & 25 Vict. c. 100, s. 25, if upon the trial of any person for any felony in the 23rd section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any misdemeanor in the 24th section, the jury may acquit the accused of such felony, and find him guilty of such misdemeanor, and thereupon he shall be liable to be punished in the same manner as if convicted upon an indictment for such misdemeanor.

Apprentices and servants.] With regard to apprentices and servants, it is enacted, by 24 & 25 Vict. c. 100, s. 26, whosoever, being legally liable, either as a master or mistress, to provide for any apprentice or servant necessary food, clothing, or lodging, shall wilfully and without lawful excuse refuse or neglect to provide the same, or shall unlawfully and maliciously do or cause to be done any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and liable to penal servitude for three years, or to imprisonment not exceeding two years, with or without hard labour.

Indictment.] The indictment states that A., &c., on, &c., being then legally liable as the master of one B., then being his appren-

¹ *R. v. Vaughan*, 8 Cox, 256. There was no count for a common assault; had there been one there might have been a conviction at common law. By Byles, J., *Id.* 257.

tice, to provide as master for the said B., his apprentice, necessary food, clothing and lodging, did, on, &c., and on several other days, wilfully neglect to provide the same for the said B., so being such apprentice, whereby the life of the said B. was much endangered, against the form, &c.

In the case of an illegitimate child placed under the defendant's care, the indictment failed to show a duty to take care of the child, or that the child was under the control of the defendant, or that any injury was produced for want of care, or even that injury would naturally have resulted.¹ And so it was where the indictment failed to show that the prisoner had the means of supporting her child.²

Exposing children.] By 24 & 25 Vict. c. 100, s. 27, whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and liable to penal servitude for three years, or to imprisonment not exceeding two years, with or without hard labour.

Indictment.] The indictment states that A., on, &c., a certain child being under the age of two years, &c., to wit, &c., and known by the name of [or to the jurors unknown], unlawfully and maliciously did abandon and expose, whereby the life of said child was then and thereby greatly endangered, against the form, &c.

Causing bodily injury by gunpowder.] By 24 & 25 Vict. c. 100, s. 28, whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm to any person, shall be guilty of felony, and liable to penal servitude for life, or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement; and if a male, under the age of sixteen years, with or without whipping.

By sect. 29, whosoever shall unlawfully and maliciously cause any gunpowder or other explosive substance to explode, or send or deliver to or cause to be taken or received by any person any explosive substance or any other dangerous or noxious thing, or put or lay at any place, or cast or throw at or upon, or otherwise apply to any person, any corrosive fluid,³ or any destructive or explosive substance, with intent, in any of the cases aforesaid, to burn, maim, disfigure, or disable any person, or do some grievous bodily harm to any person, shall, whether any bodily injury be effected or not, be guilty of felony, and liable to penal servitude for

¹ *R. v. Pelham*, 15 L. J. M. C. 456. See as to Scotland, 6 Geo. 4, 105; 8 Q. B. 959.

² *R. v. Chandler*, 24 L. J. M. C. 109, Dears. 453.

³ *R. v. Murrow*, 1 Moo. C. C. or hurt.

life, or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement; and if a male under sixteen years, with or without whipping.

And by sect. 30, whosoever shall unlawfully and maliciously place or throw in, into, upon, against or near any building, ship or vessel, any gunpowder or other explosive substance, with intent to do any bodily injury to any person, shall, whether or not any explosion take place, and whether or not any bodily injury be effected, be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement, and if a male under sixteen years, with or without whipping.

Indictments.—For burning by gunpowder.] The indictment for causing bodily injury states that A. on, &c., by the wilful explosion of a large quantity of gunpowder, to wit, &c., by him so caused, did unlawfully, maliciously, and feloniously burn and disable one B., against the form, &c.

For causing gunpowder to explode.] That A. on, &c., unlawfully, maliciously, and feloniously did cause a certain large quantity of gunpowder, to wit, &c., to explode with intent in so doing, then and thereby to burn one B., against the form, &c.

If the explosive substance be sent, the allegation is, that A., on, &c., unlawfully, &c., did send to one B. a certain large quantity of a certain explosive, dangerous, and noxious substance, with intent then and thereby to burn and disable the said B., against the form, &c.¹

If the charge be for throwing corrosive fluid, the indictment will be that A. on, &c., unlawfully, maliciously, and feloniously did cast and throw at and upon one B. a large quantity, that is to say, — of a certain corrosive fluid called —, with intent in so doing then and thereby to burn the said B., against the form, &c.

So that A. on, &c., unlawfully, maliciously, and feloniously did throw into a certain building, situate, &c., a large quantity of gunpowder, to wit, —, with intent then and thereby to do bodily damage to one B., being then in the said building, &c., against the form, &c.

Spring guns, traps, &c.] So many accidents happened, and so many disputes arose, especially under the game laws, with reference to traps and spring guns, as to determine the legislature to interfere. Thus, by 7 & 8 Geo. 4, c. 18, the act of setting such a gun or trap was made a misdemeanor; and now, by 24 & 25 Vict. c. 100, s. 31, whosoever shall set or place, or cause, &c., any spring gun, man trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or

¹ As to placing gunpowder near a vessel with the intent to damage it, see 24 & 25 Vict. c. 97, s. 45.

whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanor, and liable to penal servitude for the term of three years, or to imprisonment not exceeding two years, with or without hard labour; and whosoever shall knowingly and wilfully permit any such spring gun, man trap, or other engine which may have been set or placed in any place then being in or afterwards coming into his possession or occupation by some other person to continue so set or placed, shall be deemed to have set and placed such gun, trap, or engine with such intent as aforesaid: provided that nothing in this section contained shall extend to make it illegal to set or place any gin or trap such as may have been or may be usually set or placed with the intent of destroying vermin: provided also, that nothing in this section shall be deemed to make it unlawful to set or place or cause to be set or placed, or to be continued set or placed, from sunset to sunrise, any spring gun, man trap, or other engine which shall be set or placed, or caused or continued to be set or placed, in a dwelling house, for the protection thereof.

Indictment.] The indictment states that A. on, &c., did unlawfully set and place a certain [spring gun or man trap], with intent that the same should destroy [or inflict grievous bodily harm upon] a trespasser or other person who might come in contact therewith.

Damages, &c. to railways.] The crime of maliciously or wantonly throwing or placing obstructions on railways necessarily aroused the attention of parliament, and, accordingly, several clauses have been introduced to meet these acts of misconduct.

By 24 & 25 Vict. c. 100, s. 32, whosoever shall unlawfully and maliciously put or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or show, hide or remove, any signal or light upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to endanger the safety of any person travelling or being upon such railway, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and if a male under sixteen years, with or without whipping.

By sect. 33, whosoever shall unlawfully and maliciously throw, or cause to fall or strike, at, against, into, or upon any engine, tender, carriage, or truck used upon any railway, any wood, stone, or other matter or thing, with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage, or truck, or in or upon any other engine, tender, carriage, or truck of any train of which such first-mentioned engine, tender,

carriage, or truck shall form part, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour.

And by sect. 34, whosoever, by any unlawful act, or by any wilful omission or neglect, shall endanger or cause to be endangered the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and liable to imprisonment not exceeding two years, with or without hard labour.

It is no defence to say that the intent was not to effect an obstruction if the act done had a tendency to create the mischief charged.¹ Proof that the prisoner placed a stone on the railway is sufficient to enable the jury to decide what his intention was. If the act was done maliciously, the jury might find that the act was malicious.² It need not be stated that the railway was worked under the powers of an Act of parliament. It needs only to be said that the defendant acted unlawfully, and that the act might have endangered the safety of passengers. Throwing a stone is such an act, and the offender may be indicted on the statute, and there may likewise be a count at common law.³ Where the tender upon which a stone was thrown was empty, the prisoner was acquitted, the statute requiring that some person should be within.⁴ Still the missile needs not to have been thrown on a particular truck, if the safety of the passengers were endangered.⁵ And there must be such an intent as that; if the attempt should succeed, the prisoner would have been guilty of wounding or doing grievous bodily harm. An intent to commit an assault was therefore insufficient.⁶

A truck was placed across a line not completed. No obstruction nor collision took place. The railway was, however, used by the workmen in order to finish it for opening. The prisoners were held to have committed an offence within 3 Vict. c. 97.⁷

The neglect of a driver or stoker to look out for signals, according to the rules of the company, whence a collision happened, was held not to be an act of misdemeanor within the 15th section of 3 & 4 Vict. c. 97. And the offences under the 13th and 14th clauses of that Act were deemed to have been triable at the quarter sessions only, and not at the Central Criminal Court.⁸

Indictment.] If the indictment be for placing wood or stone on the rail, it states, that A. on, &c., unlawfully, maliciously, and

¹ *R. v. Holroyd*, 2 Moo. & Rob. 339.

² *R. v. Upton*, 5 Cox, 298. Not malice in the ordinary sense of the term. *Id.* 299, Wightman, J.

³ *R. v. Bowray*, 10 Jur. 211.

⁴ *R. v. Court*, 6 Cox, 202.

⁵ *R. v. Sanderson*, 1 Fost. & F. 87.

⁶ *R. v. Rooke*, 1 Fost. & F. 107.

And, as there was much popular excitement, the counsel declined, with the approbation of the judge, to offer any evidence upon a second indictment for misdemeanor.

⁷ *R. v. Bradford*, 8 Cox, 309.

⁸ *R. v. Pardenton*, 6 Cox, 247.

feloniously did put, cast, and throw a piece of wood upon and across a certain railway called —, in the parish of —, in the county of —, with intent then in so doing thereby to endanger the safety of persons then and there travelling upon the said railway, against the form, &c.

And if for throwing a stone, that A. on, &c., unlawfully, &c., did throw a stone against and upon a certain carriage then being upon a certain railway called —, in the parish, &c., with intent then in so doing to endanger the safety of the persons then being and travelling in the said carriage, against the form, &c.

Furious driving.] By 24 & 25 Vict. c. 100, s. 35, whosoever, having the charge of any carriage or vehicle, shall, by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of a misdemeanor, and liable to imprisonment not exceeding two years, with or without hard labour.

Indictment.] The charge is, that A. on, &c., being then a coachman, having the charge of a certain public carriage called —, did unlawfully, by wanton and furious driving of the horses attached to the carriage aforesaid, thereby then do grievous bodily harm to one B., and him the said B. did then and thereby maim, hurt, and injure, against the form, &c.

CHAPTER VIII.

OF ASSAULTS.

1. *On Clergymen, during Divine Service, &c.*
2. *On Magistrates, &c. when preserving Wrecks.*
3. *With intent to commit Felony, or on Peace Officers.*
4. *With intent to obstruct the Sale of Grain, or its free Passage.*
5. *On Seamen.*
6. *Assaults arising from Combination.*
7. *Common Assaults and Aggravated Assaults.*

1. *Clergymen.*] The first assault to which we have to direct the reader's attention is that upon an officiating clergyman, the grave character of which is in some degree mitigated by its rarity.

By 24 & 25 Vict. c. 100, s. 36, whosoever shall, by threats or

force, obstruct or prevent, or endeavour to obstruct or prevent, any clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting house, or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place, or shall strike or offer any violence to, or shall, upon any civil process, or under the pretence of executing any civil process, arrest any clergyman or other minister who is engaged in, or to the knowledge of the offender is about to engage in, any of the rites or duties in this section aforesaid, or who to the knowledge of the offender shall be going to perform the same or returning from the performance thereof, shall be guilty of a misdemeanor, and liable to imprisonment not exceeding two years, with or without hard labour.¹

Indictment.] That A. on, &c., in and upon one B., the said B. being then a clergyman, and in the act of performing divine service [on or about to perform divine service, &c.], did make an assault, and him, the said B., by virtue of a certain writ of —, did arrest him, the said B., whilst he the said B. was so performing divine service as aforesaid, [or whilst, &c.]

2. *Magistrates.*] The next assault to be noticed is that upon magistrates, officers, and other persons, in their attempts to preserve wrecks. By 24 & 25 Vict. c. 100, s. 37, whosoever shall assault and strike or wound any magistrate, officer, or other person whatsoever lawfully authorized, in or on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, shall be guilty of a misdemeanor, and liable to penal servitude not exceeding seven nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour.²

Indictment.] That A. on, &c., in and upon one B., the said B. then being one of Her Majesty's justices of the peace in and for the county of —, and then being engaged in the exercise of his duty as such justice in and concerning the preservation of a certain vessel then wrecked, &c., did make an assault, and him the said B. did then strike, &c., by reason of the exercise of the said duty of the said B. as such justice as aforesaid, against the form, &c.

3. *Peace officers.*] An assault with intent to commit felony, or

¹ See 23 & 24 Vict. c. 32, s. 2, as to disturbances in churches, &c.

² See *R. v. Cartwright*, 4 T. R. 490; and the statute 14 & 15 Vict. c. 19, s. 10, as to apprehend-

ing offenders; and sect. 11, as to apprehending persons found committing indictable offences in the night.

upon peace officers, is provided for by 24 & 25 Vict. c. 100, s. 38 : —Whosoever shall assault any person with intent to commit felony, or shall assault, resist, or wilfully obstruct any peace officer in the due execution of his duty, or any person acting in aid of such officer, or shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

At common law an attack upon any officer is a very great misdemeanor, and punishable by fine and imprisonment. The assaults above mentioned are withdrawn from the summary jurisdiction clause,¹ so that, if the justices become sensible of the aggravated nature of the assault, they will call upon the defendant to answer the charge at the sessions. So, with force or violence to assault or resist any excise officer, &c. in the execution of his duty in search of, or arresting persons engaged in carrying, removing, or concealing goods, is a misdemeanor under 7 & 8 Geo. 4, c. 53, ss. 40, 43, and punishable by imprisonment, with hard labour, for three years, in addition to, or in lieu of, any other punishment or penalty which may by law be inflicted or imposed upon the offender.² Moreover, by force or violence, to assault, resist, &c. any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his or their office or duty, is made punishable with transportation for seven years, or imprisonment, with hard labour, for any term not exceeding three years, at the discretion of the court.³ This offence was felony under the statute 6 Geo. 4, c. 108, s. 59. It will be noticed, that the imprisonment with hard labour is part of the sentence, and that the discretion of the court applies to the term of imprisonment.

Likewise, by 13 & 14 Vict. c. 101, s. 9, an assault upon any officer of a workhouse or relieving officer, in the execution of his duty (and by 14 & 15 Vict. c. 105, s. 18, officers under the 4 & 5 Will. 4, c. 76, are included,) is punishable as an assault upon a peace officer, &c.;⁴ and the court shall have the same power as in the case of the last-mentioned assault, to order costs. Upon an

¹ By 24 & 25 Vict. c. 100, s. 46.

² A separate penalty may be recovered against each defendant. *R. v. Clark and others*, Cowp. 610. Where the offence is in its nature single, and cannot be severed, there the penalty shall be only single, because though several persons may join in committing it, it still constitutes but one offence. But where the offence is

in its nature several, and where every person concerned may be separately guilty of it, then each offender is separately liable to the penalty. *Id.* 612.

³ 16 & 17 Vict. c. 107, s. 251, now penal servitude not exceeding 3 years, 20 & 21 Vict. c. 3, s. 2. See *R. v. Lilly*, 7 Mod. 63.

⁴ *Supra.*

application for costs, the judge must be satisfied that the defendant was taken before justices, with a view to a summary conviction, and that he was sent by them to the assizes. But the production of a *summons* is sufficient proof.¹

These seem to be the chief statutes upon the subject of assaulting officers and persons in authority. And the same want of legal right which would make an officer guilty of an assault in arresting another, will likewise operate to produce an acquittal in cases where the defendant is charged with this offence. Therefore, where the prosecutor, a constable belonging to the Thames police office, acting under a general warrant, endeavoured to apprehend the defendants, who thereupon drove away the officer, Lord Kenyon directed an acquittal, for there was no competent authority to make the arrest.² In this case, there was a count for a common assault, but it will be observed, nevertheless, that that circumstance will make no difference if there be a general verdict. The defendant was indicted for an assault, false imprisonment, and rescue, but it turned out that the indictment had omitted to allege that the prosecutor was an officer of the court out of which process had issued, and it was in vain suggested that the term "serjeant-at-mace" had supplied the omission. Judgment was arrested;³ and by Lord Ellenborough, "Though the jury, in finding the defendant guilty generally upon the second count, must necessarily have included the assault, yet finding as they do the whole count, we must take it that they found the assault committed under the circumstances charged in that count."⁴ So, under a warrant directed to the constables of W., a constable of W. was held not justified in executing it within the parish of D., and a verdict of not guilty was entered against the defendant.⁵

It is not a defence to the charge of assaulting an officer, that an affray is likely to be the consequence of persisting in a capture. As where bailiffs endeavoured to carry a process into execution, of the regularity of which there was no doubt, and a scuffle ensued, which ended in the infliction of some injury on a woman by the bailiffs. Supposing her to have been killed, the constable took the bailiffs into custody, and did not liberate them until the next morning, when it was ascertained that the woman had recovered. The constable and his assistants being indicted for the assault and rescue, Heath, J., directed the jury, if they believed the evidence, to find the defendants guilty.⁶ "For if one, having a competent authority, issue a lawful command, it is not in the power of any other, having an equal authority in the same respect, to issue a command contrary to the first, for that would be to legalize confusion and disorder."⁷ An officer has a right to enter a public

¹ *R. v. M'Gavaran*, 7 Cox, 64.

² *R. v. Lawson and others*, 3 Esp. 262.

³ *R. v. Osmer*, 5 East, 304.

⁴ *Id.* 308.

⁵ *R. v. Weir and others*, 2 D.

& R. 444. Had the warrant been directed to the constable by name, the case might have been different.

⁶ East, P. C. 305; Anon. Exeter Sum. 1793.

⁷ *Id.* 304; 1 Hale, 460.

house, if he hear a disturbance, especially at night, and an assault committed under such circumstances is an assault upon him in the execution of his duty.¹

Collectors of taxes are within the protection of the law upon this subject, and likewise are within the provisions of 24 & 25 Vict. c. 100. An assault upon such a revenue officer is, therefore, a serious misdemeanor. It has been held, that the arrears of assessed taxes need not be demanded from the debtor by the collector in person, and that there need not be a direct refusal of payment to the collector in person. If the demand be made by any one on behalf of the officer, and payment has been refused, either through inability or any other cause, the stat. 43 Geo. 3, c. 99, s. 33, will have been satisfied. An indictment was drawn against a defendant for assaulting a collector, and it stated that the officer held lawful possession of certain goods under a levy for a specified sum of money for arrears of assessed taxes. The prosecutor was not in a condition to prove the amount of this sum, and Lord Denman, although he thought that no sum need have been mentioned, ruled, nevertheless, that it was imperative upon the prosecutor to show the amount of the allegation which had been introduced, especially if the debtor understood the nature of the arrears at the time of the demand.² But the defendant was convicted on the second count, and upon a motion for a new trial, the court held that no personal demand was necessary under the statute, and that if the debtor understood what the amount of the demand was, it was not necessary to specify it, in order to support that count.³ But a collector has no right to take a constable with him when he goes to collect his rate, unless he has grounds for believing that an assault will be committed upon him, or that payment of the tax will be resisted. A collector went into the house of the defendants in order to demand a land tax, and introduced a constable. No objection was made, but afterwards, having reasonable grounds to apprehend violence, the officer brought in another constable, and upon this last person an assault was made by the defendants. The court held that the collector was justified in asking for the services of the last-mentioned constable, and that the attack made upon the officer was whilst he was in the execution of his duty, and moreover, that the wrongful introduction of the first constable furnished no ground for an answer to the indictment.⁴ If an officer strike first, his situation will not protect him against the return of the blow. It was so held, where the mayor of Yarmouth struck a

¹ *R. v. Smith and others*, 6 C. P. 136. *R. v. Mabel*, 9 C. & P. 474. The officer in this last case laid hold of the defendant without a probability that there would be a breach of the peace, and Parke, B., desired the jury to consider whether the violence used by the defendant in consequence was more than ne-

cessary to repel the policeman's assault, for if so, they should find him guilty of the common assault. The jury acquitted the party.

² *R. v. Ford*, 4 Nev. & M. 451; Ad. & El. 588.

³ 2 Ad. & El. *ut supra*.

⁴ *R. v. Clarke and another*, 3 Ad. & El. 287; 4 Nev. & M. 671.

defendant, and an information was denied to the mayor.¹ Upon the trial of an assault upon a county-court bailiff, it was objected, that proof of the proceedings out of which the warrant issued should be shown, especially as it was a prison judgment, *i. e.* sent from one county to be executed in another. But the court overruled the objection.²

Indictment with intent to commit felony.] That A. on, &c., in and upon one B. did make an assault, and him, the said B., did then beat, wound, and illtreat the said A., then intending feloniously, &c. [describe the felony contemplated], against the form, &c.

Second count—Common assault.

Upon a peace officer.] That A. on, &c., in and upon one B., the said B. then being one of the constables of —, and in the due execution of his office, did make an assault, and him, the said B., so being such constable as aforesaid, did then beat, &c., against the form, &c.

Second count—Common assault.

To prevent apprehension.] That A. on, &c., in and upon one B. did make an assault, and him, the said B., did then beat, &c., with intent thereby then to resist and prevent the lawful apprehension [detainer] of the said A., for and in respect of a certain felony, for the commission of which said felony the said A. was then liable to be apprehended by the said B., against the form, &c.

4. *Assaults with intent to obstruct the sale of grain.*] By 24 & 25 Vict. c. 100, s. 39, whosoever shall beat, or use any violence or threat of violence to any person, with intent to deter or hinder him from buying, selling, or otherwise disposing of, or to compel him to buy, sell, or otherwise dispose of, any wheat or other grain, flour, meal, malt, or potatoes, in any market or other place, or shall beat or use any such violence or threat to any person having the care or charge of any wheat or other grain, flour, meal, malt, or potatoes, whilst on the way to or from any city, market town, or other place, with intent to stop the conveyance of the same, shall, on conviction thereof before two justices, be liable to be imprisoned and kept to hard labour in the common gaol or house of correction not exceeding three months: provided that no person who shall be punished for any such offence by virtue of this section shall be punished for the same offence by virtue of any other law whatsoever.

5. *Assaults on seamen, &c.*] By 24 & 25 Vict. c. 100, s. 40, whosoever shall unlawfully and with force hinder or prevent

¹ *R. v. Symonds*, Cas. Temp. H. 159, Williams, J. *dub.* *Morrell v. Martin*, 4 Sc. N. R. 300. *Carratt* 240.

² *R. v. Davies*, 8 Cox, 486. *v. Morley*, 1 Q. B. 18; and *Fost. Leigh & Cave*, 64; 30 L. J. M. C. Cr. L. 311, were cited.

any seaman, keelman, or caster from working at or exercising his lawful trade, business, or occupation, or shall beat or use any violence to any such person with intent to hinder or prevent him from working at or exercising the same, shall, on conviction thereof before two justices, be liable to be imprisoned and kept to hard labour in the common gaol or house of correction not exceeding three months: provided that no person who shall be punished for any such offence by reason of this section shall be punished for the same offence by virtue of any other law whatsoever.

Assaults arising from combination.] By 24 & 25 Vict. c. 100, s. 41, Whosoever in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or of any unlawful combination or conspiracy respecting any trade, business, or manufacture, or respecting any person concerned or employed therein, shall unlawfully assault any person, shall be guilty of a misdemeanor, and liable to imprisonment not exceeding two years, with or without hard labour.¹

Common assault and battery.] By 24 & 25 Vict. c. 100, s. 42, where any person shall unlawfully assault or beat any other person, two justices, upon complaint by or on behalf of the party aggrieved, may hear and determine such offence, and the offender shall, upon conviction thereof before them, either be committed to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding two months, or else shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs (if ordered), the sum of 5*l.*; and if such fine as shall be so awarded, together with the costs (if ordered), shall not be paid, either immediately after the conviction, or within such period as the said justices shall at the time of the conviction appoint, they may commit the offender to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding two months, unless such fine and costs be sooner paid.

In its common acceptation, the common assault does not mean merely the ordinary attack which so frequently happens when persons are irritated by passion; whatever pain or inconvenience is wilfully or unlawfully inflicted upon the person of an individual by the act or agency of another is an assault. And it is a common assault when no circumstances present themselves in the case which manifest an intent to have committed some other crime, or where the act done constitutes a separate charge under some act of the legislature. Thus if one administer a mischievous drug in coffee to his neighbour, thereby causing him a certain amount of suffering, the act, however hazardous, may not be of

¹ See a form for an assault committed in pursuance of a conspiracy to raise the rate of wages. Wool-

rych, Alphabetical Arrangement of Peel's Acts, p. 27.

a felonious character, and yet, although no blow be struck, it is very clearly an assault at common law.¹

So, if a person of tender years be under the control of a master who withholds proper food from the child, or exposes it to the inclemency of the weather, the party thus misconducting himself is liable to be indicted for an assault.² Yet where a woman abandoned her infant in a dry ditch among nettles, and it was not hurt, it was held, that she could not be convicted of a common assault nor of an intent to murder.³ And it is no defence to allege that a mere non-feazance, as not providing maintenance, is not punishable,⁴ although it might be matter of excuse if the child were able to relieve itself from the treatment complained of, because the presumption of coercion would be lessened.⁵ And, on the other hand, exposure to weather is an assault, whether the servant be of tender years, or of a more advanced age.⁶ These cases, however, proceed upon the supposition of dominion on the part of the master. Where, therefore, an idiot was found in a dark room without sufficient warmth or clothing, it was held, that no obligation attached on his brother, at whose house he was an inmate, to provide proper food or warmth for him, and consequently, the charge for assault and imprisonment was considered invalid.⁷

However, if the charge be for neglecting to provide sustenance or clothing, the indictment must allege that the child was of tender years, and under the control and dominion of the defendant. For want of such allegations a person was held to have been improperly convicted by a majority of the judges.⁸ And in the case of *R. v. Ridley* above mentioned, Lawrence, J., mentioned the case at Exeter, upon finding that these same allegations were omitted in the indictment, and the counsel for the prosecution declining to proceed, the defendant was acquitted.

By 4 & 5 Will. 4, c. 35, s. 8, to require or compel an apprentice or person of any description to ascend a chimney flue for the purpose of extinguishing a fire therein, is declared to be a misdemeanor, and punishable with fine and imprisonment as at common law. Under 24 & 25 Vict. c. 100, s. 27, the offence depends on the permanent injury to health. Evidence that the child had suffered injury, but not to any serious extent, was held insufficient to warrant a conviction under the statute of 14 & 15 Vict. c. 11.⁹

Duress amounts to an assault. Whence it is, that an illegal

¹ *R. v. Button*, 8 C. & P. 660. See *Edsall v. Russell*, 6 Jur. 996, and 24 & 25 Vict. c. 100, s. 20.

² *R. v. Ridley*, 2 Campb. 650.

³ *R. v. Renshaw*, 11 Jur. 615. Had the child been hurt, whether she could have been convicted of a common assault, qu.? S. C.

⁴ *R. v. Ridley*, 2 Campb. 653.

⁵ *Id.*

⁶ By Lawrence, J., *R. v. Ridley*, 2 Campb. 653.

⁷ *R. v. W. J. & S. Smith*, 2 C. & P. 449.

⁸ Anon. 2 Camp. 652, at Exeter, cor. Le Blanc, J., in 1802. See now 24 & 25 Vict. c. 100, ss. 26, 27.

⁹ *R. v. Philpott*, 22 L. J. M. C. 113.

imprisonment is punishable in like manner. And this offence happens where a person is improperly detained in any place, whether it be a private house, or in the street, or in a mad-house,¹ and, of course, if in a gaol. No blow needs be given, for the coercion creates an immediate inconvenience, if not pain to the person of the individual confined, who, if he should attempt to escape, would be met with actual force, and who by remaining passive through fear, is under the influence of an implied restraint. And it probably came to be assumed that every false imprisonment included a battery,² on the ground of the natural anxiety which would prompt every man to release himself from an unjust thralldom, inasmuch as the effort to escape would immediately create a laying on of hands, and so a battery. In a case, however, which came before the Court of Common Pleas, the judges said they had looked into the authorities, and that it was absurd to contend that every imprisonment included a battery. And they cited Co. Litt. 253,³ to show that nothing more was said by Lord Coke in the passage relied on than that the "imprisonment was a corporal damage."⁴

Again, to lift up the hand in a threatening manner so as to exhibit an intention, coupled with an ability, to do harm is an assault, though no blow be struck, for it is an attempt or offer to do violence; and striking at a person, drawing a sword or bayonet, throwing a bottle or glass, or presenting a weapon within reach of him, will come within the same rule.⁵ So, if a pistol, whether loaded or not, be presented so near as that, had it been loaded and gone off, it would have been dangerous to life, the person presenting it is guilty of an assault.⁶ Indeed, if two go out to fight, and a battle takes place, it is immaterial who is the first striker, for both are guilty;⁷ yet in the case of the pistol, clearly denoting that the party did not mean to fire it off, as where the master of a ship said that if the plaintiff was not quiet he would blow his brains out, it seems that this was not an assault.⁸ Several persons surrounded the plaintiff, tucked up their sleeves, and threatened to break his neck if he did not go out of the house. This was an assault.⁹

So, the act of setting a dog on to bite; wilful and furious driving over a person; or riding wantonly and carelessly over him, are respectively assaults.¹⁰ So, where a light squib was tossed by the defendant into the street at Taunton, which, after passing

¹ *R. v. Coate*, Lofft. 73.

² *Oxley v. Flower*, Selw. N. P. 620, *cor.* Lord Kenyon, C. J.

³ Which was the foundation of the proposition in Bull. N. P. 22 (c).

⁴ *Emmet v. Lyne*, 1 New. Rep. 255; Co. Litt. 253 (b). A person falsely imprisoned may likewise demand surety of the peace, 1 Hawk. c. 60, s. 7.

⁵ East, P. C. 406; 1 Hawk. c.

62, s. 1.

⁶ *R. v. St. George*, 9 C. & P. 483.

⁷ *Matthew v. Ollerton*, Comb.

218. *R. v. Lewis*, 1 Car. & K. 419.

⁸ *Blake v. Barnard*, 9 C. & P.

626. See *Osborn v. Veitch*, 1

Fost. & F. 317.

⁹ *Read v. Coker*, 22 L.J.C.P. 201.

¹⁰ 1 Russ. C. M. 751.

through several hands, finally fell on the plaintiff and put out his eyes, it was held by three judges that the action for trespass and assault was well brought.¹

So, if one push a drunken man against another, and especially if he cause an injury by his act, he may be punished by indictment, or be compelled to pay damages.²

So, evidence that the defendant spit in the prosecutor's face was held sufficient to prove a battery.³

So, where the hair of a pauper was forcibly cut off in the poor-house, it was held to be an assault.⁴ If a man place an infant, which cannot help itself, upon a dunghill, or openly in the fields, so that beasts or fowls may destroy it, it is a breach of the peace.⁵ So, where two persons carried an infant in a bag, and hung it on some park palings, it was an assault on the child.⁶ But words alone, although they may serve to explain the defendant's intention at the time of the assault, will never, of themselves, amount to this offence.⁷ From hence it follows as a necessary consequence, that as soon as the hand is unlawfully laid upon the person of an individual, the offence is manifestly an assault. A blow of any kind, a push,⁸ or any similar act of violence must be undoubtedly deemed an assault. Although there must be a hostile intention. Placing the hand on the shoulder in order to show an inspector how he might manage the hose better at a fire, is not an assault.⁹ A master took indecent liberties with his female scholar. They were short of a rape, or of an immediate attempt to commit that offence, and the girl, a girl of thirteen, did not resist to the utmost the lustful conduct of the defendant. But she swore that the acts done were against her will, and the judge observed, that the authority and influence of the master were likely to have put the child off her guard, through her age and inexperience; that a fear and awe of the prisoner might check her resistance and lessen her natural sense of modesty and decency, and that under such circumstances less resistance was to be expected than in ordinary cases. A verdict of guilty then passed against the prisoner upon a count for an

¹ *Scott v. Shepherd*, 3 Wils. 403, Blackstone, J., *diss.*

² *Short v. Lovejoy*, Bull. N. P. 16. *Secus* if the intention were to assist the drunken man, *Id.*

³ *R. v. Cotesworth*, 6 Mod. 172. Every battery includes an assault, but the rule does not hold *è converso*. But personal violence, as a push, or blow, or stroke of any kind, will constitute a battery. But not a gentle laying on of hands, such as would satisfy an allegation of *molliter manus imposuit*, which may, indeed, be an assault, but not a battery.

⁴ *Forde v. Skinner*, 4 C. & P. 239;

and the cutting off of the hair with a view to degrade the plaintiff, and not for the purpose of cleanliness, would be an aggravation, and operate to increase the damages. S. C.

⁵ Poph. 13.

⁶ *R. v. March*, 1 Car. & K. 496.

⁷ 1 Hawk. c. 62, s. 1, although the contrary doctrine was once entertained. *Id.*

⁸ Although stopped by the plaintiff or prosecutor. *Martin v. Shoppee*, 3 C. & P. 373. *Stephens v. Myers*, 4 C. & P. 349.

⁹ *Coward v. Baddeley*, 28 L. J. Ex., 260.

assault with intent to commit a rape, and also upon one for a common assault, but the judgment was respited upon a doubt whether the evidence justified a conviction for the assault with intent, &c. And the judges came to the conclusion that the evidence was fully sufficient to support the count for a common assault, and that judgment should be passed upon the prisoner.¹

A German quack was applied to by a woman for his advice against fits, with which she was troubled. He made her strip naked, himself taking off her clothes, and he then rubbed her for some minutes with some stuff from a bottle. She swore that she did not put off her clothes willingly—he made her. In this case, again, the judges held that the conviction for the common assault was good, thus laying aside the special count for an assault with intent, &c.² So, where a medical man had connection with a girl of fourteen under the plea of curing her of a complaint, there being no proof of her being aware of the act which was done, the court were clear that it was an assault, although she consented under the idea that it was for her benefit.³ And personal chastisement, inflicted on a female pauper in an indecent manner, is an assault, although confined within the limits of moderation.⁴ However, where the defendant put cantharides into rum, and the prosecutor drinking it unwittingly became ill, it was neither an assault nor a misdemeanor at common law.⁵

It may be remarked here, that in misdemeanors all are principals. So that although the defendant strike not any blow, yet if he used words of encouragement, as, "Go it, go it," he is equally guilty with the striker.⁶

Defences to common assaults.] However, the intention of the party upon a charge of assault will be taken into consideration by the jury in common as well as in aggravated cases of that nature. As where a man laid his hand upon his sword, and probably in a menacing manner, but said, "If it were not assize time, I would not take such language from you:" here the observation negatived the intent to assault, and the intention not operating with the act, the deed was not complete.⁷ This intent, again, is negatived in the case of the schoolmaster who properly corrects his pupil, of the parent who chastises his child with moderation, of the gaoler who coerces his prisoner, or even, as some say, the husband his wife, of the officer who compels obedience to the laws,⁸

¹ *R. v. Nichol*, Russ. & Ry. 130.

² *R. v. Rosinski*, 1 Moo. C. C. 19.

³ *R. v. Case*, Den. 580 ; 19 L. J. M. C. 174. "The counsel for the defendant has confounded active consent with passive non-resistance." Den. 583, Patteson, J. Alderson, B., inclined to think it a rape. Id. See *R. v. M'cGavarron*, 6 Cox, 164. The defendant put his hands on a girl of thirteen, who did not object.

⁴ *R. v. Miles*, 6 Jur. 243.

⁵ *R. v. Hanson*, 2 Car. & K. 912.

But see now 24 & 25 Vict. c. 100, s. 20.

⁶ Anon. 1 Lew. C. C. 17.

⁷ *Tuberville v. Savage*, 1 Mod. 3.

⁸ The case of the churchwarden, who after request and refusal, removed the hat of a person from his head in church. *Hawe v. Planner*, 1 Saund, 13.

of the man who binds or restrains an insane person, or lays hands upon one who is about to commit a violent action, or¹ resists in a gentle and reasonable manner an attempt to despoil him of lands or goods.²

The plea to an action of assault and battery was that the plaintiff had some dead rabbits which belonged to his master, and that the servant requested the plaintiff not to carry them away, and, on his refusal, gently took them from him. The defendant had judgment in his favour.³

So, if the striking be in defence of a parent, wife, or child, or master, the assault is justified, for the intention which promoted the blow was lawful.⁴ So again, if the wife should inflict a blow in defence of her husband.⁵ Or if the master should interfere to protect his servant.⁶ The relation between master and servant is involved in the transaction. Again, an intention to commit a *battery* is negatived, notwithstanding the infliction of violence, if the circumstances are attended with much outrage on the part of the original aggressor. As where the defendant, in an action of trespass for an assault, proved that the plaintiff had taken his horse, and that he only advanced with his staff in a threatening manner in order to regain his property. The defendant had a verdict.⁷ Or, if a man should discover another in the act of damaging his property,⁸ breaking down his gates, advancing upon his land with a show of force. Here it is competent to repel aggression with something more than an ordinary degree of resistance, and if a battery happen, the intention to commit that breach of the peace is set aside by the emergency of the occasion. And thus a plea by the defendant that the plaintiff had endeavoured with a strong hand to break his close, whereupon he resisted and opposed him, *and if any damage happened to the plaintiff, it was in defence of the possession of that close*, was held good.⁹ And by Lawrence, J., if any further mischief ensued, it was in consequence of the plaintiff's own act, so that the battery followed from the resistance. And this way of considering the case, said the learned judge, would reconcile all the authorities.¹⁰ Where leave and licence can be pleaded, there may be a defence to an indict-

¹ As where two were fighting, and the plaintiff took the defendant by the collar, who, in his turn assaulted the plaintiff. *Griffin v. Parsons*, Selw. N. P. 27, cor. Legge, B. Plea, *Son ass. demesne*. Replication, *de injuriâ*. It was objected that the matter should have been replied specially, but the judge said that the evidence was not offered by way of justification, but to show the absence of any intention to commit an assault, and that was fit matter to be left to the jury.

² 1 Hawk. c. 60, s. 23.

³ *Blades v. Higgs*, 30 L. J. C. P. 347.

⁴ 1 Hawk. c. 60, s. 23.

⁵ *Leward and ux. v. Basley*, Lord Raym. 62. Plea, *Son ass. demesne*. Replication, defence of the husband. Demurrer, judgment for the plaintiff.

⁶ *Tickell v. Read*, Lofft. 215.

⁷ Keilw. 92.

⁸ *Green v. Goddard*, 2 Salk. 641, 2 Inst. 316. See Cro. Car. 138. There is no time to make a request in such a case.

⁹ *Weaver v. Bush*, 8 T. R. 78.

¹⁰ *Id.* 81. See 4 Taunt. 822.

ment for assault.¹ If the entry into a house be peaceable, there must be a request to leave it in order to justify an assault, but if the entry be forcible, the intruder may be repelled at once.²

So, the intent to commit either an assault or battery is negatived by evidence of accident, provided that the circumstances of the transaction were lawful. As in the case of a soldier who hurts another during the exercise of arms. So, where two were playing at cudgels, it was once said that an unintentional hurt was no battery.³ So, if a horse run away, and knock a man down, it is no battery by the rider, if the casualty were not caused by the default of the latter.⁴ So, where the defendants were throwing down skins into a yard in the proper prosecution of their business, and the wind taking hold of a skin blew it into the plaintiff's eye, thereby depriving him of sight, it was held, that although the yard was a public way, the casualty could not have been avoided, and the parties were acquitted.⁵

But in all these cases the law will watch with jealousy against excess. If the defendants in the last case had been throwing about their skins wantonly, they would have been guilty of an assault. If the rider of the horse had been conducting himself carelessly, he could not have pleaded not guilty with success. The soldier who, in a skirmish, had the misfortune to hurt his comrade, was held answerable in trespass, because he had not set out the circumstances of the case so clearly as to show to the court that the hurt complained of had been the result of inevitable accident.⁶ And the case of the cudgels has been questioned, because the act of fighting is in itself unlawful. As where Hayward, Serjt., proposed to show on the behalf of the defendant that there had been a mutual fight, but by Parker, C. B., the consent of the plaintiff is no bar to the action, and he is entitled to a verdict for the injury done him.⁷

So any excess on the part of the schoolmaster, parent, gaoler, or other person, will immediately hinder the presumption of absence of intention from arising, for if an extreme degree of correction or of violence be employed, it cannot be denied that the defendant wilfully committed the battery complained of. As if A. should lift up his hand or stick to strike B., and B. should give way to his passion, and having struck A. should proceed to acts of violence quite incommensurate with the prior assault.⁸

¹ *R. v. Meredith*, 8 C. & P. 589. Lord Abinger.

² *Tullay v. Reed*, 1 C. & P. 6.

³ 1 Russ. C. M. 755.

⁴ *Gibbons v. Pepper*, 4 Mod. 405. But the plaintiff had judgment, because the defendant, the rider, had neglected to plead the general issue, and had pleaded specially instead.

⁵ *R. v. Gill and others*, 1 Str. 190.

⁶ *Weaver v. Ward*, Hob. 134. He had merely pleaded *casualiter et per infortunium contra volun-*

tatem meam, without setting forth that the accident could not be averted. *A fortiori*, if the person assaulted strike a blow from revenge when the danger is passed. *R. v. Driscoll*, Car. & M. 214. To the same effect, *Underwood v. Hewson*, Str. 596. *Dickenson v. Watson*, Tho. Jones, 205.

⁷ *Boulter v. Clark*, Bull. N. P. 16. If a person license another to beat him, such licence is void, being against the peace. Bull. N. P. 17.

⁸ See East, P. C. 406.

So again, the law will not extend the relations which, we have seen, serve occasionally as justifications for assaults. A tenant cannot justify, therefore, for interfering to protect his landlord, otherwise than one individual can raise his hand in defence of an indifferent person.¹ Nor can a servant, although at the bidding of his master, justify an assault and battery as servant, in defence of his master's son, because he is not a servant to the son.² And if, instead of replying *molliter manus* to a plea of *son assault demesne*, in respect of an attack made upon the plaintiff's possession of lands by the defendant, he plead that he gently assaulted the defendant, he will have judgment against him, because, unless the violence were very great on the other side, an assault, under such circumstances, cannot be warranted.³ It has even been determined, that a servant who saw a person about to beat his master's horse, was not justified in laying his hands gently upon him, because he had not then beaten the horse; and, consequently, that the defendant was entitled to judgment, although he had beaten the plaintiff for touching him.⁴ Again, a medical man is protected against a charge of assault if he exercises a careful discretion in giving his certificate in the case of supposed lunacy. But if he should make a statement without being properly satisfied of any immediate injury likely to be inflicted by such a person either upon himself or others, he may become guilty of an assault by rendering himself accessory to the coercion of that person.⁵ And, lastly, with reference to the point of accident, if the occasion be unlawful, the unlawful intention will not be negatived. As where there was a fight, and one of the combatants, without any design to do so, struck a third person. Here the unpremeditated attack would only operate in mitigation of damages.⁶

We have reserved one class of cases respecting violence used by magistrates or officers in the execution of process or warrants, because, as several decisions have taken place upon the peculiar circumstances which have arisen in the course of such proceedings, a separate mention of the subject seems to be the most convenient in this place. And it is observable, that whilst an assault upon officers is made especially punishable under various statutes, an assault by them is merely regarded in the light of a common assault. If an arrest on the part of an officer be unjustifiable, he is certainly guilty of an assault, as if he should attempt to execute process on a Sunday, or, on any day, upon a privileged person, or exceed his authority, although his warrant be regular. An excise officer was executing a warrant to search the house of the defendant for an illegal still. The defendant contrived to get possession of the warrant, and refused to give it up, upon which a scuffle ensued, the officer having first touched the defendant.

¹ 1 Hawk. c. 60, s. 24.

² Id.

³ *Jones v. Tresilian*, 1 Mod. 36; 1 Sid. 441.

⁴ *Shingleton v. Smith*, 2 Lutw. 1481, and see Id. 1483.

⁵ *Anderdon v. Burrows*, 4 C. & P. 210.

⁶ *James v. Campbell*, 5 C. & P. 372.

There being evidence of much violence on both sides, Lord Tenterden left it to the jury to say whether the officer had used unnecessary violence, and they acquitted the defendant.¹ The defendant was a marshal on duty at Guildhall, and meeting with obstruction, he struck the plaintiff on the face, although the latter was unable to move on, and the jury found a verdict against the marshal for this excess of his authority.² So, in the case of a constable.³ But if the constable witness an assault, and arrest the party soon afterwards, lest he should renew the attack, it is one transaction, and the arrest is right, and the conviction good.⁴ So, if a party be seen speaking to a reputed thief, it is not competent for a constable to push him on. By doing so, the constable becomes guilty of an assault.⁵ A magistrate, likewise, is guilty of this misdemeanor if he detains a known person under the expectation that a charge is likely to be preferred against that individual.⁶ Many other cases of assault will easily be conceived by comparing the law of arrest with the present subject, and adverting to those cases where the constable or other officer is not justified in effecting a capture. And, on the other hand, where the officer is borne out in his acts, both in respect of his authority and the mode of exercising it, the assault is negatived.

So, in a case where the jurisdiction of the Palace Court came in question, there was judgment for the defendant upon a special verdict in an indictment for assault.⁷ Again, trespass was brought for an assault and false imprisonment. The pleas were, not guilty, and that the plaintiff committed the first assault, upon which the defendant gave him in custody to a peace officer who saw the transaction. Replication, that the plaintiff was employed to serve the defendant with process, and, in order to do this, that he necessarily laid his hands upon the defendant. Rejoinder, excessive violence, and issue thereon. And, after a verdict for the plaintiff and motion in arrest of judgment, the court said, that by rejoining excess, the defendant had admitted that if in any case it could be necessary to touch a party in order to serve him with process, it was in that instance, and they could not say but that, under particular circumstances, it might be necessary and lawful to do so, and the rule was refused.⁸

The same rule as to officers extends to those who aid and assist them in the execution of their duties. And it has been said to be no battery to lay the hand gently on a man against whom a warrant of arrest had been issued, and to tell the officer that this is the

¹ *R. v. Milton*, Moo. & M. 107 ; 3 C. & P. 31.

² *Imason v. Cope*, 5 C. & P. 193.

³ *Levy v. Edwards*, 1 C. & P. 40.

⁴ *R. v. Light*, 27 L. J. M. C. 1.

⁵ *Stocken v. Carter*, 4 C. & P. 477.

⁶ *R. v. Birnie*, 1 M. & Rob. 160.

⁷ *R. v. Stobbs*, 3 T. R. 735.

⁸ *Harrison v. Hodgson*, 10 B. & C. 445. Therefore, had the defendant demurred, he would probably have been in no better position. And note, that *son assault demesne*, or an arrest upon process, may re-

man he wants.¹ Then, with reference to magistrates, upon the hearing of a summary case, the matter is judicial, and, as long as a person conducts himself properly, it is an assault to turn him out of the room.² On the other hand, when the investigation is preliminary, the magistrates may order any or all persons out of the room.³ So may the coroner.⁴ So, where the magistrates regulate the practice of their own courts, they may turn out a person who insists upon being heard as an advocate or attorney, for instance, if his presence be contrary to their rule.⁵

Proceedings.] The usual proceeding is by indictment, but the court will sometimes grant an information, as for a malicious impressment;⁶ and it will be granted in very aggravated cases, even on the face of affidavits of denial on the other side.⁷ It was refused in a case of an assault with intent to extort money, the money not being obtained;⁸ and again, for a battery committed in Newfoundland;⁹ and again, for forcibly retaking a wife contrary to articles.¹⁰

Trial.] Upon the trial of an assault, as in other cases, the defendant must perform the terms of his recognizance. So that, where he was to appear, enter, and try his traverse, although he might have withdrawn his plea of not guilty, and have pleaded guilty, or might have given the prosecutor ten days' notice of his intention to try, he could not otherwise claim to try his traverse at the gaol delivery, unless he *entered* his traverse. Where he neglected to take this step, it was held, that he ought not to have been tried.¹¹

It was formerly received for law, that a party might indict for an assault and proceed to judgment, although an action were depending at the same time for the assault.¹² For the fine to the king and the damages to the party are quite distinct in their nature.¹³ And accordingly the Court of Common Pleas refused to make a rule upon the prosecutor under such circumstances to put him to his election, saying, they must then make a general rule, that the parties must always make their election.¹⁴

spectively be given in evidence under the general issue. *Wilson v. Dod*, 1 Ro. Rep. 135. *Lane v. Hegberg*, Bull. N. P. 9.

¹ 1 Hawk. c. 62, s. 2.

² *Daubney v. Cooper*, 10 B. & C. 237.

³ *Cox v. Coleridge*, 1 B. & C. 37.

⁴ *Garnett v. Ferrand*, 6 B. & C. 611.

⁵ *Collier v. Hicks*, 2 B. & Adol. 663.

⁶ *R. v. Webb*, 1 Sir Wm. Bl. 19.

⁷ Anon. 2 Barnard 27. See also Anon. Id. 138. Assault on a farmer

by a magistrate, and information granted. See *R. v. Lynn*, Id. 242.

⁸ Anon. 2 Barnard, 87.

⁹ *R. v. Hooker*, 7 Mod. 193; see also *R. v. Sir C. Holloway*, 8 Mod. 283, a rule to show cause granted against a boy of fifteen, for assaulting his master.

¹⁰ *R. v. Lord Vane*, Sir Wm. Bl. 18.

¹¹ *R. v. Fry*, 1 Leach, 111. See also *R. v. Featherstonhaugh*, 8 C. & P. 109. But traverse is abolished.

¹² 1 Hawk. c. 62, s. 4.

¹³ 1 B. & P. 191.

¹⁴ *Jones v. Clay*, Id.

But the law upon this subject appears to have undergone some revision. For in a far more modern case, although no determination was come to as to the matter of election, the Court of King's Bench refused to pass any judgment upon a defendant who was brought up after a conviction for an assault, because it appeared that an action was still depending in respect of the same matter. And the offer of the prosecutor to discontinue the action did not alter the resolution of the court. The defendant, however, having indulged in violent language towards the prosecutor in addressing the court, was ordered to find security for his good behaviour.¹

So again, where the prosecutor had taken out a warrant against the defendant for an assault, the court would not grant him a criminal information, although he was ready to agree that the abandonment of the proceedings on the warrant should form part of the rule.² But where the defendant admitted the assault in the presence of a policeman, who thereupon took him into custody, the court granted an information, although the prosecutor declined to press the charge before the magistrate.³

A person may be charged in the same indictment with two assaults, although each assault is, in itself, a distinct offence. Such, at least, was the opinion of the court upon an indictment for publishing two distinct libels upon different persons, and the case of *R. v. Clendon*,⁴ where judgment upon a conviction for assaulting *two* persons was arrested, was denied to be law.⁵ And it is no objection to the finding of a grand jury, that they have rejected that portion of a bill which related to a riot, and found the residue which charged an assault.⁶ So, where there are two counts, evidence of two distinct assaults was admitted.⁷

It sometimes happens that there are cross indictments in respect of the same transaction. When they come on to be tried as traverses, the judge will direct the jury to be sworn in both, and the counsel for the prosecution of that which is first entered will open his case, and call his witnesses. The counsel on the other side will then do the same, and there will not be any reply by either counsel.⁸

The words, "against the form of the statute," in an indictment for an assault at common law, have been held to be mere surplusage.⁹

Verdict.] A verdict of guilty comprehends, of course, both assault and battery, if both be laid. But should the assault be ill laid, and the verdict pass against the defendant for battery, he will have been properly convicted of both, because every battery includes an assault.¹⁰

¹ *R. v. O'Gorman Mahon*, 4 Ad. & El. 575.

² *Ex parte* — Gent. one, &c., 4 Ad. & El. 576.

³ *R. v. Gwilt*, 8 D. P. C. 476.

⁴ 2 Str. 870; Ld. Raym. 1572; 1 Barnard. 337.

⁵ 2 Burr. 984; Lofft. 271.

⁶ *R. v. Fieldhouse*, Cowp. 325.

⁷ *R. v. Davies*, 5 Cox, 328.

⁸ *R. v. Wanklyn*, 8 C. & P. 290. *R. v. Vaughan*, Id.

⁹ *R. v. Mathews*, Leach, 585.

¹⁰ See *post*, *R. v. Powell*, 2 B. & Adol. 75; 1 Hawk. c. 62, s. 1.

There were two counts, one for inflicting grievous bodily harm, the other for a common assault. The verdict was, "Guilty of an aggravated assault, but without premeditation." The verdict was entered upon the count for inflicting grievous bodily harm, and the judges held this course to have been right.¹ However, upon an indictment for assaulting and inflicting grievous bodily harm, the verdict "Guilty of a common assault" was sustained.²

Judgment.] The judgment for an assault at common law is fine and imprisonment at the discretion of the court, and surety of the peace may likewise be a part of the sentence,³ although the defendant is occasionally allowed, by a sort of extrajudicial permission, to speak with the prosecutor, and thus obtain a mitigation of the fine.⁴

Aggravated assaults.] By 24 & 25 Vict. c. 100, s. 43, when any person shall be charged before two justices with an assault or battery upon any male child whose age shall not in the opinion of such justices exceed fourteen years, or upon any female, either upon the complaint of the party aggrieved or otherwise, the said justices, if the assault or battery is of such an aggravated nature that it cannot in their opinion be sufficiently punished under the provisions hereinbefore contained as to common assaults and batteries, may proceed to hear and determine the same in a summary way, and, if the same be proved, may convict the person accused; and every such offender shall be liable to be imprisoned in the common gaol or house of correction, with or without hard labour, for any period not exceeding six months, or to pay a fine not exceeding (together with costs) the sum of 20*l.*, and in default of payment to be imprisoned in the common gaol or house of correction for any period not exceeding six months, unless such fine and costs be sooner paid, and, if the justices shall so think fit, in any of the said cases, shall be bound to keep the peace and be of good behaviour for any period not exceeding six months from the expiration of such sentence.

But it is provided by sect. 46, that in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if they had no authority finally to hear and determine the same: provided also, that nothing herein contained shall authorize any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice.

¹ *R. v. Sparrow*, Bell, 398.

² *R. v. Oliver*, Bell, 287.

³ East, P. C. 406.

⁴ See 1 Russ. C. & M. 760.

Assault—Certificate.] By 24 & 25 Vict. c. 100, s. 44, if the justices, upon the hearing of any such case of assault or battery upon the merits, where the complaint was preferred by or on the behalf of the party aggrieved, under either of the last two preceding sections, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred.

And by sect. 45, if any person, against whom any such complaint as in either of the last three preceding sections mentioned shall have been preferred by or on the behalf of the party aggrieved, shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause.

Upon application, the justices are bound to grant the certificate, although neither party be present. The word "forthwith" is satisfied by a day or two afterwards;¹ even some days afterwards will not exclude the certificate, but it must be asked for.² "Forthwith" may mean that the justice cannot grant it when the matter has passed out of his mind, and the case of *R. v. Robinson* can only be supported in that view.³

For there the case was heard on the 29th of November, but the appeal was not granted till the 29th of January: it was held that the word "forthwith" was not satisfied.⁴

Moreover, it was held on special demurrer, that a plea of certificate was bad for want of showing that the dismissal of the complaint accrued under one of the grounds mentioned by 9 Geo. 4, c. 31, s. 27,⁵ and by Lord Denman, "it ought to show the ground upon which it is given."⁶

As to what is a "hearing," upon one occasion the plaintiff retired, but the defendant attended. This was a "hearing."⁷

The words "upon the hearing," are satisfied if the defendant pleads not guilty. Therefore, although the complainant declined to proceed, saying he should bring an action, the certificate of the justices dismissing the case was held to be an absolute bar to such action. The defence in question was pleaded in answer to the count in trespass.⁸

¹ *Hancock v. Sones*, 28 L. J. M. C. 196; 8 Cox, 172.

² *Coster v. Hetherington*, Id. 175.

³ See *Chaplin v. Levy*, 23 L. J. Ex. 200.

⁴ *R. v. Robinson*, 12 Ad. & El. 672.

⁵ 10 Ad. & El. 635. *Skuse v. Davis*.

⁶ 10 Ad. & El. 639

⁷ *Bradshaw v. Vaughton*, 30 L. J. C. P. 93.

⁸ *Tunncliffe v. Tedd*, 5 C. B. 553. See *R. v. Ebrington*, 31 L. J. M. C. 14, and *ante*, plea of "autrefois convict."

Assault occasioning bodily harm and common assault.] Lastly, by 24 & 25 Vict. c. 100, s. 47, whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable to penal servitude for three years, or to imprisonment not exceeding two years, with or without hard labour; and whosoever shall be convicted upon an indictment for a common assault shall be liable to imprisonment, not exceeding one year, with or without hard labour.¹

This is a very sensible provision, calculated to punish many enormities which have hitherto escaped their due punishment, and the sentence for the common assault is where the justices do not think fit to adjudicate, or where an indictment is at once preferred before the grand jury.

And, in conclusion, we may observe, that false imprisonment at sea is an assault. As where a vessel was engaged by the Chilian government to convey certain prisoners, who had been banished, from Chili to England. As long as the vessel was in Chilian waters the detaining was lawful, but when the defendant, who was the master of an English vessel, sailed out of the Chilian territory, an assault and false imprisonment attached.²

CHAPTER IX.

OF RAPE, ABDUCTION, AND DEFILEMENT OF WOMEN.

Rape, &c.] By 24 & 25 Vict. c. 100, s. 48, Whosoever shall be convicted of the crime of rape shall be guilty of felony, and liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour. And by sect. 49, Whosoever shall, by false pretences, false representations, or other fraudulent means, procure any woman or girl under the age of twenty-one years to have illicit carnal connection with any man, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Rape is where one of competent age and mind³ has the carnal knowledge of a woman by force, and against her will. It is said, of competent age, because a boy of fourteen has been held incapable by law of committing this crime.⁴ And the presumption of law to that effect was not altered by the statute 9 Geo. 4, c. 31,

¹ See Sect. 20.

² *R. v. Lesley*, Bell, 220. Conviction affirmed.

³ If the prisoner's counsel or friends mean to rely on weakness of intellect, great caution must be used. Such a defence is most suspicious. Even the clerk to the

magistrates should put down any questions and answers relating to this circumstance at the examination. See *R. v. Painter*, 2 Cox, C. C. 244; 2 Car. & K. 319.

⁴ *R. v. Eldershaw*, 3 C. & P. 396.

which, by the 16th section, declared the offence to be felony.¹ Nor can evidence be adduced to show the capacity of the prisoner in this respect, he being under fourteen years of age.² But the boy might have been convicted of an assault under the repealed section (sect. 11) of 1 Vict. c. 85.³

It may be observed, that an idiot, utterly unconscious at the time of the offence, is not the less the subject of rape, for although there may be no force, it is an act done without consent, and the power of or capacity to give consent should be left to the jury.⁴

The chief subjects for our consideration seem to be,—

1. The carnal knowledge.
2. The resistance of the woman, and under what circumstances.
3. The evidence.

First, as to the nature of the carnal knowledge.⁵ It is enacted, by 24 & 25 Vict. c. 100, s. 63, that whenever, upon the trial for any offence punishable under this Act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only.

Before this enactment, there had been much discussion whether both penetration and emission must have united in order to consummate the crime of rape. At one time the authorities and decisions were strongly against the necessity of their union, and old text-writers were by no means wanting who advocated the same doctrine. Moreover, executions took place in conformity with that principle, till at length it came to be doubted whether there could be a carnal knowledge without emission. And upon a case reserved, a majority of the judges, in 1787, were of opinion that both penetration and emission were necessary. Still it was agreed that the jury should be the sole judges of the transaction, and, accordingly, if they decided that the double act had happened, although, no doubt, evidence of emission was given, the judges considered that the finding of the jury on that point must be deemed conclusive.⁶ And hence, probably, it was, that Taunton,

¹ *R. v. Groombridge*, 7 C. & P. 582. *Duffin*, East, P. C. 437, [sodomy], the judges were divided. *R. v. Cave*, Id. 438, Willes, C. J., directed an acquittal. [Rape.] *R. v. Hill*, Id. 439, seven judges against three. Absent, Perryn, B. Lord Mansfield gave no opinion. *R. v. Parker*, 1 Russ. C. M. 681. *Contra*, and agreeable to the present law, see East, P. C. 438. Case at O. B., Foster, J. *R. v. Blomfield*, Id. 16. Clive, J. *R. v. Sheridan*, Id. Bathurst, J., and Smythe, B., concurred. *R. v. Russen*, Id. [Assault on a child.] Ashhurst, J. There being doubts on this case, it was considered by the judges, and

² *R. v. Philips*, 8 C. & P. 736. See *R. v. Jordan*, 9 C. & P. 118, *post*, p. 832.

³ *R. v. Brimlow*, 2 Moo. C. C. 122; 9 C. & P. 366.

⁴ *R. v. Ryan*, 2 Cox, 115. Verdict "Guilty." *R. v. Fletcher*, Bell, 63; 8 Cox, 131, where the matter was fully argued, and Willes, J., said he had ruled the same at the Old Bailey.

⁵ See *R. v. Nicholls*, 2 Cox, 182.

⁶ For the opinion of the text writers, see East, P. C. 437. In favour of the old opinion, see *R. v.*

J., formed an incorrect opinion when he held, that notwithstanding 9 Geo. 4, c. 31, the jury ought to be satisfied that both the events above alluded to had happened.¹ The learned judge probably thought that to leave the question for the consideration of the jury, in spite of the absence of direct evidence of emission, was a sufficient advance when contrasted with the judicial decisions which required both acts to be sworn to. So Park, J., stated in a case where the prisoner was interrupted, but did not immediately desist, that he could not consider penetration alone to be sufficient under the new statute.² But Alderson, J., held that penetration being proved, the jury might infer emission, and that it lay on the prisoner to negative the latter fact.³ And previously to this Hullock, B., had held penetration sufficient.⁴ This latter holding is now the law of the land, as the statute 9 Geo. 4, c. 31, intended it to be. Indeed, the judges came at length to a resolution that although the jury had negatived emission, the conviction was right, penetration having been proved.⁵ Even when the hymen has not been ruptured by the penetration, the case is complete, although this conclusion was not arrived at at once. For Gurney, B., upon one occasion held, that the offence had not been committed under such circumstances.⁶ Bosanquet, J., subsequently propounded the contrary of this doctrine, adding, however, that where the *accesses* to the hymen had not been broken, there was not sufficient to sustain the more serious charge.⁷ The same law prevailed in a case of abusing a female child.⁸ And it was also held, that the prisoner's being disturbed in the act made no difference, provided there were proof of penetration.⁹ So, again, *Cox's case* was relied on by the judges, in a case where the woman herself negatived emission.¹⁰ In the next case, the prisoner was charged with a rape upon a girl between eleven and twelve years old. The hymen had not been ruptured, but the surgeon expressed his opinion that penetration had taken place, and this fact was found specially, accompanied by a verdict of guilty. But Coleridge, J., who had tried the case, asked whether the matter could be argued, adding, that he

the direction of the judge was held right, namely, that if penetration were proved, the rape was complete. The prisoner was executed. Absent: De Grey, C. J., Eyre, B. That the opinion of the jury should be the governing principle upon these occasions, see *R. v. Sheridan*, East, P. C. 440. *R. v. Fleming and another*, Leach, 854; East, P. C. 440. *R. v. Harwood*, East, P. C. 440. *R. v. Burrows*, Russ. & Ry. 519; 1 Lew. C. C. 288, where the prisoner was interrupted.

¹ *R. v. Russell*, 1 M. & Rob. 122.

² *R. v. Baldwin*, 1 Russ. C. M. 683.

³ *R. v. Coulthart*, 1 Lew. C. C. 94, Carlisle Sp. Assizes, 1832.

⁴ *R. v. Jennings*, 1 Lew. C. C. 93 and 290. The prisoner was executed. *R. v. Cozins*, 6 C. & P. 351. [Bestiality.]

⁵ *R. v. Cox*, 1 Moo. C. C. 337; 5 C. & P. 297. [Abusing a child.]

⁶ *R. v. Gammon*, 5 C. & P. 321.

⁷ *R. v. M'Rue*, 8 C. & P. 641. Verdict, guilty of an assault.

⁸ *R. v. Jordan*, 9 C. & P. 118.

⁹ *R. v. Allen*, Id. 31.

¹⁰ *R. v. Brook*, 2 Lew. C. C. 267, Patteson, J.

had reserved it out of respect to a reported doctrine of Mr. Baron Gurney,¹ which that learned judge had withdrawn. And *Russen's case*² was referred to as having settled the point. The conviction was then affirmed, the prisoner's counsel having withdrawn from the argument, after so strong an expression of opinion.³ However, it must, on the other hand, be observed, that emission was never deemed to be conclusive evidence of penetration, and indeed it may be doubted how far it could have been esteemed even *prima facie* evidence of that act.⁴

Secondly, we have to consider the resistance of the woman. This is so necessary, that eight judges against four resolved, upon one occasion, that, where a man personated a woman's husband, and was not detected till he was in the act of copulation, he was not guilty of rape,⁵ because the beguiling her into consent and co-operation was very different from raising the natural abhorrence consequent upon violence.⁶ This was an indictment for burglary, with intent to commit a rape. But several of the eight judges advised a special verdict should such a case again occur, and it did occur in 1854, and this advice as to the special verdict was insisted on, but the judges of criminal appeal said, that they could not get over the decision in *R. v. Jackson*.⁷ And Gurney, B., expressly held, before this case in 1854, that such a fraud did not amount to rape, and the prisoner was found guilty of an assault under 1 Vict. c. 85, s. 11.⁸ And Alderson, B., held the same upon another trial.⁹ So, where under pretence of performing a medical operation, the prisoner got possession of the person of the woman by surprise, and penetrated her person, but she discovered the fraud, and escaped out of the room, it was held, that, although this would have been rape had violence been committed, yet, that under these circumstances, it was merely an assault, and not even an assault with intent to commit a rape.¹⁰

On the other hand, the law will respect female delicacy, and, although proof of resistance or otherwise is, of course, a strong feature in each case, resistance is not universally necessary in order to constitute the offence. As, where the prisoner stupefied a child of thirteen by liquor, and then violated her. Here, he had by constructive force annihilated the power of resistance, and put the will of the woman out of the question. It was as though

¹ *R. v. Gammon* is alluded to, *ante*.

² *Ante*. p. 831.

³ *R. v. Hughes*, 2 Moo. C. C. 190; 9 C. & P. 752. *R. v. Lines*, 1 Car. & K. 393. [Abuse of a child.]

⁴ See 1 Russ. C. M. 686.

⁵ *R. v. Jackson*, Russ. & R. 487.

⁶ Per Dallas, C. J.

⁷ *R. v. Clarke*, 24 L. J. M. C. 25, Dears. S. P. in Scotland, *R. v. Sweeney*, 8 Cox, 223. The majority of the judges held that either actual or constructive force was ne-

cessary. The Lord President Macneill and Lord Ivory *diss.* They said, that the force essential to the crime should be relative to the resistance offered. Where there is no resistance to be overcome, it is not necessary to prove the use of force.

⁸ Now repealed. *R. v. Saunders*, 8 C. & P. 265.

⁹ *R. v. Williams*, 8 C. & P. 286.

¹⁰ *R. v. Stanton*, 1 Car. & K. 415. See also *R. v. Case*, 19 L. J. M. C. 174; Den. 580. *Semble* to the same effect.

he had knocked her down, and effected his purpose. The conviction was held right by ten judges against three.¹ But it should be remarked, that the jury found the administering of the liquor to have been given for the purpose of exciting the child, and not to make her insensible. So again, where actual resistance would be dangerous and almost impossible, as, where several persons combined together forcibly to violate a female, the question of resistance scarcely occurs. Still, if the jury should be of opinion, that, although in the first instance, the prosecutrix was laid hold of against her will, yet, that she afterwards, in some degree, consented to the act, they ought to acquit of the capital, or more serious charge, and convict of the assault only.² So, where the prisoner took advantage of an idiot, his conviction was affirmed, although she made no resistance, but only complained that he hurt her, and started to try to run away.³ Nor can a prostitute be forced, not even if the prostitute were first taken with her own consent, nor a concubine.⁴ And ultimate consent, extorted by fear of death, or duress, affords no mitigation of the offence.⁵ However, circumstances may be presented to the jury in favour of the woman's consent, as that she concealed the fact for a considerable time from persons who could have protected and avenged her, that she made no cry, nor much personal opposition at the time.⁶

Thirdly, as to the evidence upon indictments for rape, it is of so much importance, that we will mention it under a separate head. First, with reference to the parties who may give testimony, —the common rule of rejecting the wife's evidence against her husband is dispensed with by reason of necessity.⁷ The charge must be substantiated upon the oath of a witness who understands the nature of the obligation, but in the case of an adult, the trial cannot be postponed for the purpose of instructing the witness, as it may in the case of an infant.⁸ And, on the other hand, the judge would not postpone the trial in a case of a child six years old, in order that she might be instructed, although he said he would have done so had she been of more mature intellect, *i. e.*, ten or twelve years of age.⁹ Five persons were charged with this offence. The prosecutrix, when before the grand jury, did not know the names of the different prisoners, but she was able to identify their persons. Here, Tindal, C. J., held, that the grand jury were justified in calling before them a witness who had seen the prisoners when under examination by the magistrate, and who gave their names as the prosecutrix described them; and the learned chief justice added, that if the prisoners could not be thus identified, they might themselves be brought before the grand jury.¹⁰

¹ *R. v. Camplin*, Den. 89; 1 Car. & K. 746.

² *R. v. Hallett*, 9 C. & P. 748.

³ *R. v. Fletcher*, 28 L. J. M. C. 85. [Bell, 63.

⁴ East, P. C. 444; and see *R. v. Hodgson*, Russ. & Ry. 211.

⁵ East, P. C. 444.

⁶ East, P. C. 445.

⁷ *Id.* 444.

⁸ *Ante.*

⁹ *R. v. Nicholas*, 2 Car. & K. 246.

¹⁰ *R. v. Jenkins*, 1 Car. & K. 536.

The prosecutrix stated in her evidence that she had made an immediate complaint to her mistress, but the mistress and a washerwoman were attending as witnesses for the prisoners, the washerwoman being able to testify to a fact connected with the offence. Upon this, the judge ordered that both should be called as witnesses for the prosecution, and that every latitude should be allowed to the counsel for the prosecution in examining them. Neither the names of the mistress nor of the washerwoman were on the back of the indictment.¹

Much care and vigilance are necessary in conducting the cross-examination of the prosecutrix. The following questions have been permitted:—"Were you not, on Friday last, walking with a woman reputed to be a common prostitute?"² "Had you connection on — with T. D. or with any other men."³ However, in another case, the learned judge, although he admitted the question, distinctly told the prosecutrix, that she might or might not answer the question; and this alternative reconciles the following decision, where similar questions were rejected by the judges upon a case reserved, but on the ground that the woman was not compellable to answer. It was there held incompetent to ask, whether the witness had not before had connection with other persons, and, whether she had not before had connection with a particular person,—naming him. In the same case, after Wood, B., had decided that the woman was not under an obligation to answer, the counsel for the prisoner called a witness to show that the girl had been caught in bed about a year before this charge with a young man, and offered the young man to prove the connection, but Wood, B., refused the evidence, as it was a specific act of criminality, and one which the other side could not be prepared to answer, and the judges held this ruling to be correct.⁴ Nevertheless, if the woman denies the fact of connection with other persons, those persons may be called to contradict her.⁵ And she may be asked whether the prisoner had not, previously to the charge, had connection with her, with her consent.⁶ And, upon her denial, the prisoner may show such a connection.⁷ Or, whether she had not allowed another man than the prisoner to take liberties with her between the commission of the alleged offence and her complaint of it.⁸ But where the prosecutrix, upon a trial for rape, accounted upon her cross-

¹ *R. v. Stroner*, 1 Car. & K. 650.

² *R. v. Barker*, 3 C. & P. 589, by Park and Parke, J.

³ *R. v. Goldney*, M. S. Hants Lent assizes, 1830, per Bosanquet, J.

⁴ *R. v. Hodgson*, Russ. & Ry. 211.

⁵ *R. v. Robins*, 2 Moo. & Rob. 512.

⁶ *R. v. Martin*, 6 C. & P. 562. In this case Williams, J., observed

that he could not understand the case of *R. v. Hodgson*. Moreover, something said by a relative of the prosecutrix to a relative of the prisoner, in the presence of the prosecutrix "about making it up," was admitted. *R. v. Arnall*, 8 Cox, 439.

⁷ *R. v. Aspinall*, 3 Stark. on Ev. 952.

⁸ *R. v. Mercer*, 6 Jur. 243.

examination for the money supposed to have been given to her, the prisoner's counsel was allowed to contradict that fact.¹

It appeared upon one occasion, that the prosecutrix had been examined before the mayor of a borough. Her answers were taken down, but the prisoner was discharged, and the answers were neither read over to her, nor signed by her, nor, indeed, by the mayor. The man was, however, taken before the magistrates, who committed him. Upon the trial it was held that the counsel for the prisoner might cross-examine the woman as to what she said before the mayor, without having the examination taken before the mayor produced.²

Evidence of loose character generally may be given to affect the credit of the witness,³ and she, on the other hand, may resort to general evidence in opposition to admissions elicited from her in cross-examination, and, *à fortiori*, to contradict testimony which the judge has admitted against her of a general nature. Thus, where the prosecutrix had allowed herself to have been guilty of crimes committed years since, Holroyd, J., suffered her to show that she had conducted herself with propriety during the interval which had elapsed between that time and the outrage complained of.⁴

The next point of evidence is, the confirmation of the woman's story. This confirmation is much aided by proof of her having called for help, or having related her misfortune as soon as possible to her relations or friends. Still the particulars of her complaint cannot be given in evidence, although they may be so stated if she should be cross-examined as to the fact of her complaint.⁵ The witness cannot be asked more than that the prosecutrix made such a complaint, and that the nature of the complaint related to the violence done her.⁶ The prosecutrix herself may be asked whether she named "a person," but not what person. The name must not be mentioned.⁷ Not even where the woman, who was the object of the violence, was dead at the time of the trial,⁸ could the names be disclosed, which she mentioned at the time of her complaint of the rape. Neither the names nor the particulars of her statement were allowed in evidence.⁹

It appeared upon one occasion that the prosecutrix had been kept out of the way by the prisoners. The judge, upon this, offered to permit her deposition to be read in evidence, but as it was not proved, he would not suffer evidence of her complaint recently

¹ *R. v. Dean*, 6 Cox, C. C. 23. And care must be taken to distinguish these direct issues from collateral issues where witnesses cannot be called on one side or on the other; See *Tilman v. Johnstone*, 2 Fost. & F. 66.

² *R. v. Griffiths*, 9 C. & P. 746.

³ *R. v. Clarke*, 2 Stark. 241. *R. v. Tissington*, 1 Cox, 48.

⁴ S. C.

⁵ *R. v. Walker*, 2 Moo. & Rob. 212.

⁶ *R. v. Mercer*, 6 Jur. 243.

⁷ *R. v. Osborne*, Car. & M. 622.

⁸ If the death occurs through the violence, query? whether it would be murder? See *R. v. Lad*, Leach, 96; East, P. C. 226, 343.

⁹ *R. v. Megson*, 9 C. & P. 420. *R. v. Nicholas*, 2 Car. & K. 246.

after the transaction to be given, because that evidence is only legitimate when the prosecutrix herself has been examined. It is admitted only as confirmatory evidence.¹

Principals and accessories in rape.] Where three were indicted for a rape, and all were charged in the first degree, although each one by himself did not perpetrate the act, the judges thought the conviction right, although they recommended that a similar form should, for the future, be avoided.² Principals, therefore, in the second degree, should be charged as being present, aiding and abetting, and so independently of the principal in the first degree.³ A woman may be charged as a principal in the second degree, and so may a husband, for she is not to be prostituted by him to another.⁴

The relations of principals in the first and second degree were much considered in another case. The first count charged Robert Folkes with an actual rape upon the prosecutrix, and Levy Ludds with having been present, aiding and abetting the same. Other counts charged Ludds with being the actor and Folkes with aiding and abetting; other counts charged a certain evil-disposed person with being the principal, and Folkes and Ludds the aiders and abettors; other counts charged a certain *other* evil-disposed person with being the principal and the others with abetting. Ludds was acquitted upon an *alibi*, and Folkes was found guilty generally. The facts proved were, that the prisoner Folkes, together with three other men, committed successive rapes upon the prosecutrix, and that the others aided and abetted in turn. No specific provision was made by the statute, 9 Geo. 4, c. 31, as to principals in the second degree,—and the question was, whether upon this indictment the verdict could be sustained against Folkes, who was charged in the first count as a principal, and in the second as an aider and abettor. The judges⁵ met, and considered the point, and they held the conviction good on the first count.⁶

Accessories before the fact are punishable under 24 & 25 Vict. c. 100, s. 67.

An indictment charged A. with the principal offence, and B. as principal in the second degree, *i. e.*, aiding and abetting in the commission of the felony. In this case the indictment was held good, and it was also held that B. might be charged either as a principal in the first degree, as he was in law, and a principal in the second degree, as he was in fact.⁷

¹ *R. v. Gutteridge*, 9 C. & P. 471.

² *R. v. Burgess and others*, 1 Russ. C. M., 687; 5 Evans, stat. 399. *Semble*.

³ See *R. v. Vide*, Fitz Corone, pl. 86. *R. v. Lord Baltimore*, 4 Burr. 2179.

⁴ *R. v. Lord Castlehaven*, 1 St. Tr. 387; 1 Russ. C. M. 676.

⁵ Absent; Lord Lyndhurst, C. B.; Bayley, B.; Alderson, J.; and Patteson, J.

⁶ *R. v. Folkes and Ludds*, 1 Moo. C. C. 354. See in general upon the subject of rape, East, 433, 449; 1 Russ. C. M. 675-693; 1 Hawk. c. 41.

⁷ *R. v. Crisham*, Car. & M. 187.

Indictment.] The indictment charges, that A., on, &c., in and upon one B., violently and feloniously did make an assault, and her the said B. violently and against her will feloniously did ravish and carnally know, against the form, &c.

It is prudent to use all these words, although the word "ravish" may possibly include the carnal knowledge.¹ The words "an assault" were, upon one occasion, accidentally omitted, so that the charge stood "feloniously and violently did make;" "and her," &c. It was held, nevertheless, that the conviction was right, an assault being included in rape, and that the judgment should not be arrested.²

Where *carnaliter cognovit* was left out, six judges held that, after verdict, the case was within 9 Geo. 4, c. 31, but that the omission before verdict, if objected to, would be fatal.³

Verdict.] In rape the verdict is guilty or not guilty, for the felony and misdemeanor are not capable of joinder. The prisoner, if acquitted, may be tried for the assault⁴ at common law, and the accessory after the fact may be imprisoned, with or without hard labour, for any term not exceeding two years. Instead of committing the prisoner for trial, the magistrates convicted for an aggravated assault under 16 & 17 Vict. c. 30, the information being for assaulting and abusing, though the evidence disclosed a rape. The Court of Exchequer was equally divided, so that the rule for a *habeas corpus* was discharged, and the conviction stood.⁵

Indictment under sect. 49.] That A., on, &c. [by false pretences, &c., set out the fraud] did procure one B. to have illicit carnal connection with one C., she the said B. at the time of the said procurement being a [woman or child] under the age of twenty-one years. Whereas, [negative the truth of the pretence, &c.]

Against the form of the statute, &c.

Carnal knowledge of a girl under ten years of age.] By 24 & 25 Vict. c. 100, s. 50, whosoever shall unlawfully and carnally know and abuse any girl under the age of ten years shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

In this case consent is immaterial, as far as the more serious charge is concerned, it being a felonious act to violate the child,

¹ See East. P. C. 447.

² *R. v. Allen*, 2 Moo. C. C. 179; 9 C. & P. 521.

³ 3 Burn. on Just., by D'Oyly & W. 725.

⁴ As to the assault under 1 Vict. 585, see *R. v. Holcroft*, 2 Car. & K. 341. *R. v. Brimilow*, ante,

p. 831. *R. v. Finchard*, 1 Russ.

C. M. 692. Anon. 2 Moo. C. C. 40. *R. v. Saunders*, 8 C. & P.

265. *R. v. Williams*, Id. 286.

⁵ *In re Thompson*, 30 L. J. M. C.

19. *Re Thompson*, 6 Jur. (N. S.), 1247.

with or without her concurrence.¹ Penetration is sufficient without emission, in like manner as in rape. If any part of the virile member of the prisoner should be found to have entered the labia of the pudenda, this is a penetration.² And the hymen need not be ruptured.³

Again, in like manner as in rape, a boy under fourteen years of age cannot be convicted of this crime, although it should be proved that he had arrived at the age of puberty.⁴

The child must be examined upon oath, but provided that she be acquainted with the nature of that obligation, her age, with regard to the oath, is immaterial.⁵ Even then the trial may be postponed in order that instruction may be given to her for the next assizes,⁶ unless, indeed, the child should be but six years old, in which case Pollock, C. B., declined to allow it, but said that if the age had been ten or twelve, and the intellect more matured, it might have been otherwise.⁷ Although this seems to have been laid down too broadly. For, although the judges would not formerly receive a witness under nine years of age,⁸ yet the rule is, that if a child appears to understand the nature of an oath, she may be examined, although she be under seven years of age.⁹ And Rooke, J., mentioned a case at the Old Bailey, (upon the trial of a prisoner for violating a child seven years of age,) which he had tried at Gloucester, where he had postponed the trial for the sake of instruction, and the prisoner was subsequently convicted and executed upon the child's testimony.¹⁰ Hence, it seems that an age under ten or twelve, though perhaps not so early as six, might be sufficient to warrant instruction, if the intellect of the infant should prove equal to it, whereas, at the age of six, the court will prefer the evidence of immaturity, rather than risk the loss of memory by postponing the inquiry for education.¹¹ But any account given by the child to others cannot be received.¹² And here the difference truly consists, in like manner, as we have seen, that the particulars of a statement in rape cannot be admitted. The fact of a complaint may be shown as confirmatory evidence, and it is better, if possible, that such a circumstance should appear, or that some concurrent fact in corroboration should be adduced.¹³ Although there may certainly be a conviction upon the child's unsupported statement, if there be no reasonable doubt of the prisoner's guilt.¹⁴

¹ *R. v. Toon*, 1 Lew. C. C. 15.

² *R. v. Lines*, 1 Car. & K. 393.

³ *R. v. Jordan*, 9 C. & P. 118.

⁴ S. C.

⁵ *R. v. Powell*, Leach, 110.
R. v. Flemming and another, Id. 854.

⁶ Anon., Id. 430, n. *R. v. Baylis*, 4 Cox, C. C. 23.

⁷ *R. v. Nicholas*, 2 Car. & K. 246.

⁸ East, P. C. 442, where the several cases are given.

⁹ *R. v. Brazier*, Leach, 199. See also *R. v. Tucker*, Phil. on Ev. 10.

¹⁰ *R. v. Murphy*, Leach, 430, n.

¹¹ *R. v. Nicholas*, 2 Cox, C. C. 136. Otherwise, if eight or nine years old. Verdict, Guilty.

¹² *R. v. Brazier*, Leach, 199.

¹³ East, P. C. 441.

¹⁴ Anon., 1 Russ. C. M. 695.

In the case above mentioned also, where the child of six years old was rejected as incompetent,¹ the chief baron would not allow evidence of what she said to her mother, and he likewise refused to permit the mother to prove that the child had named a particular person.²

The following evidence, as to the age of the child, was held insufficient upon an indictment for carnally abusing an infant on the 5th of February, 1832:—

1st. A declaration of the grandmother to the father, on the 9th of February, 1832, that on the day previous the child had been born. 2nd. An examined copy of the register of baptisms, by which it appeared that the child had been baptized on the same 9th day of February. The mother was dead.³

Indictment.] That A. on, &c. upon B., a girl under the age of ten years, to wit, of the age of — and upwards, feloniously did make an assault, and her the said B. did then unlawfully and feloniously carnally know and abuse, against the form, &c.

Where the prisoner was charged with assaulting a child, with intent carnally to know and abuse her, and the jury negatived the intent carnally to know, but found the intent to abuse, Holroyd, J., held the allegation divisible.⁴

Verdict.] It would seem that there has been some hesitation concerning the verdict of guilty of assault under 1 Vict. c. 85, s. 11.⁵ Consent is immaterial where the child is under ten, as far as the more serious charge is concerned, but if consent were really given, the charge of assault could not be sustained, and unless a charge of assault had been incorporated in the indictment, the judges were not more disposed to affirm a conviction for an assault under the repealed clause.⁶ Upon an indictment for an attempt to commit an offence of this nature, with a count for a common assault, it appeared that there had been an attempt, but it could not be proved that the child was under ten. No violence was used, and the girl made no actual resistance. The court held that consent would put an end to the charge of assault, but left it to the jury to say, whether the child had not yielded through fear, for

¹ *R. v. Nicholas*, supra.

² S. C.

³ *R. v. Wedge*, 5 C. & P. 298. See generally upon this subject, 1 Russ. C. M. 693–698; East, P. C. 441; 1 Hawk. c. 41.

⁴ *R. v. Dawson*, 3 Stark. N. P. C. 62. See *R. v. Martin*, 9 C. & P. 215; 2 Moo. C. C. 123. *R. v. Read and others*, 18 L. J. M. C. 88; Den. 377. Indictment for a common assault. The verdict was “Guilty, the child being a consent-

ing party, but that from her tender years she did not know what she was about.” The court ordered a verdict of Not Guilty to be entered on the record.

⁵ This clause exists no longer: 14 & 15 Vict. c. 100, s. 10.

⁶ *R. v. Holcroft*, 2 Car. & K. 341. That in case of consent, a verdict of guilty of assault could not be received. *R. v. Cockburn*, 3 Cox, C. C. 543.

submission obtained through fear would not amount to consent in a child, although in the case of an adult it would go far to show it.¹ The verdict may be guilty of abusing, but not guilty of carnally knowing, and *vice versa*, for the allegations are divisible.² And, where consent was out of the question, the party might have been convicted of the assault and acquitted of the felony.³ Whilst, on the other hand, where there was no consent, a conviction for the assault could not be had, not even although it were stated in the indictment that the prisoner made an assault on the child.⁴ To prove the age of the child, evidence that the birthday was kept, and that discussions had taken place in favour of the age in the family, was held sufficient.⁵ But where the father was from home at the time of the birth, and the mother was dead, the grandmother, who knew the fact, might have been called.⁶

Carnal knowledge of a girl between ten and twelve years.] By 24 & 25 Vict. c. 100, s. 51, whosoever shall unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.

Consent in this case is therefore immaterial, although, if the girl consent, there is no assault.⁷ The count must expressly allege that the child was between the age of ten and twelve. The first count which did mention the age was held, by Patteson, J., to be incapable of helping the second by means of the word "said."⁸ Where the age turned out to be under ten the prisoner was acquitted, for the offence was felony.⁹ It is, moreover, observable that if the indictment should contain both the charges of knowing and of abusing, an acquittal for the one will not necessarily prevent a conviction for the other.

A summons to the defendant is sufficient so as to ensure costs.

Proof of the case having been heard before the magistrates, must, however, be given, for the hearing must be before justices.¹⁰

¹ *R. v. Day*, 9 C. & P. 722.

² *R. v. Dawson*, ante, p. 840.

³ *R. v. Folkes*, 2 Moo. & Rob. 460. *R. v. Read and others*, 3 Cox, 266.

⁴ *R. v. Banks*, 8 C. & P. 574. *R. v. Meredith*, Id. 589.

⁵ *R. v. Hayes*, 2 Cox, C. C. 226.

⁶ *R. v. Wedge*, 5 C. & P. 298.

⁷ *R. v. Martin*, 9 C. & P. 213.

⁸ *R. v. Martin*, 9 C. & P. 215; 2 Moo. C. C. 123. *R. v. Meredith*, 8 C. & P. 589. See also *R. v. Read and others*, Den. 377; 18 L. J. M. C. 88; 2 Car. &

K. 957. "With respect to indictments under 9 Geo. 4, c. 31, s. 17, it was a very common practice to make an assault form part of the charge, and in cases where the girl was known to have consented. . . . It is a very foolish practice, and I have repeatedly desired it not to be done. . . . The statute makes the offence wholly independent of an assault." By Patteson, J., Den. C. C. 583.

⁹ *R. v. Shott*, 3 Car. & K. 206, under 14 & 15 Vict. c. 100, s. 12.

¹⁰ *R. v. M'Gavaran*, 6 Cox, 64.

Indictment.] That A. on, &c., unlawfully did carnally know and abuse a certain girl named B., she the said B. then being above the age of ten years and under the age of twelve years, to wit, of the age of — years, against the form, &c.

By 24 & 25 Vict. c. 100, s. 52, whosoever shall be convicted of any indecent assault upon any female, or of any attempt to have carnal knowledge of any girl under twelve years of age, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Abduction of a woman against her will from motives of lucre.]

The forcible abduction of women was an offence at common law.¹ But the Act, 9 Geo. 4, c. 31, repealed the statutes of Henry 7, Philip & Mary,² and other Acts upon this subject.

And now by 24 & 25 Vict. c. 100, s. 53, where any woman of any age shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress or coheiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such interest, whosoever shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and liable to penal servitude not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour; and whosoever shall be convicted of any offence against this section shall be incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she shall have any such interest, or which shall come to her as such heiress, coheiress, or next of kin as aforesaid; and if any such marriage as aforesaid shall have taken place, such property shall, upon such conviction, be settled in such manner as the Court of Chancery in England or Ireland shall upon any information at the suit of the attorney-general appoint.

There are three points:—First, the estate required; second, the forcible carrying away from motives of lucre; third, the intent to marry or defile, whether the design be or not executed. First, it is necessary that the woman should have some substance of her own, or be heir presumptive, or next of kin, and, therefore, as far as this clause extends, if a man have ever so considerable a fortune, and his daughter does not come within the qualification above mentioned, she is not within the protection of the statute.³ Secondly, there must be a forcible taking or detainer. And here there is a manifest extension of the old law. For it was holden under the repealed statutes, that if a woman were taken from one county into another, and if she did then con-

¹ *R. v. Moor*, 2 Mod. 128. See 460. *R. v. Wakefield*, 2 Lew. C. C. East, P. C. 458.

² *R. v. Lord Grey*, East, P. C.

³ 12 Rep. 100. *Lady Fullwood's case*, Cro. Car. 485.

sent in the last county, the force ceasing before her consent there, the indictment could not be preferred in either, by reason of her consent.¹ Whereas now, the consent in another place and at another time would be evidence that the original taking had been felonious. But, if the force had not ceased when the woman came into the second county, it would then have been a continuing force, and the offence would have been complete. And, consequently, it was no defence, when the whole transaction took place in one county, for the prisoner to say that the woman consented afterwards, because he would then have been suffered to take advantage of his own wrong by triumphing over the weakness of the woman whom he had got by base means into his power.² Nor does it signify that the woman is so much confused as to be unconscious of what she was doing at the time of her marriage, for although such an union might not be, *de jure*, valid, it is a marriage *de facto*.³ Again, if the woman consent at first, she is at liberty to retract that consent, so that any subsequent force will bring the offender within the statute.⁴

It has also been held, that when a girl was inveigled away by the prisoner's confederates, and the prisoner subsequently joined them, and perpetrated his offence, he was within the statute of 3 Hen. 7.⁵ And now the statute 24 & 25 Vict. c. 100, fully applies. For the intent to marry or defile, from motives of lucre, is the gist of the case according to the statute 9 Geo. 4. It is of no consequence that the marriage has not taken place, as under the old statutes. And if it be alleged that there has been no force, it is a question for the decision of the jury. They may consider whether the subsequent conduct of the prosecutrix could be said to warrant an opinion that she was not originally removed contrary to her inclinations.

Thirdly, the carrying away must be from motives of lucre, but evidence of an indirect character will be fit for the jury to consider whether the prisoner had not that intention. The prisoner said he had seen the will of one of the lady's relations, and that she would have 220*l.* a year. This was thought to be an important fact for the consideration of the jury.⁶

Witness.] After much discussion it seems now to be allowed that a woman or girl may be a witness under the statute, whether she gave her consent ultimately or not, and whether she has cohabited with the ravisher or not. A distinction was once attempted between actual marriage and consent obtained before the marriage, and a case of force before the voluntary union, but this doctrine seems to be exploded, upon the principle that no offender shall advantage himself of his own wrong.⁷ And further, it has

¹ *R. v. Gordons*, 1 Russ. C. M. 707.

² 1 Russ. C. M. 703.

³ *R. v. Fullwood and others*, Cro. Car. 488.

⁴ 1 Russ. C. M. 702.

⁵ *R. v. Brown*, 1 Ventr. 243.

⁶ *R. v. Barratt*, 9 C. & P. 387.

⁷ 4 Com. 209; East, P. C. 454, citing the cases of *R. v. Fullwood*,

been ruled, after debate, that a woman may, under such a charge, be a witness for, as well as against her husband, *ex necessitate rei*, although she has cohabited with him from the day of the marriage.¹

Indictment.] The indictment states, that A. B., on, &c., in and upon one B., the said B. then having a certain interest [describe the interest, as the presumptive heiress of one C., &c.] did make an assault, and her the said B., so having such interest as aforesaid, feloniously and from motives of lucre did take away and detain against the will of the said B., with intent that he, the said A., for lucre as aforesaid, should marry and have the said B. to wife [or carnally know], against the form of the statute, &c.

The second count should omit the particular interest, and merely say "a certain interest," describing it as legal or equitable, as the case may be.

The marriage need not be averred nor proved as formerly, for the offence consists in the intent to marry or defile, combined with the force.

Trial.] The venue may be in any county where the force was used, or where it was continued.² This is one of those offences which, being punishable with transportation for life, cannot be tried by the justices at sessions nor by the recorders of boroughs.³

Verdict.] Before the repeal of the 1 Vict. c. 85, s. 11, the verdict in this case might have been "guilty of an assault." If the jury negatived the charge of taking away for the sake of lucre, and yet were satisfied that force was used towards the person of the lady, they might have convicted of the assault.⁴ But the clause was repealed by 14 & 15 Vict. c. 100, s. 10.

Again, by 24 & 25 Vict. c. 100, s. 53, whosoever shall fraudulently allure, take away, or detain such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and punishable as in the case of lucre.⁵

By sect. 54, whosoever shall, by force, take away or detain against her will any woman, of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and liable to penal

Cro. Car. 488. *R. v. Sweendsen*, 5 St. Tr. 450. *R. v. Swanson and others*, 7 Mod. 100. *R. v. Wakefield and others*, 2 Lew. 1, 279.

¹ *R. v. Perry*, 1 Hawk. c. 41, s. 13, cited by Abbott, C. J., Ry. & Moo. N. P. C. 354. See further

upon this subject, 1 Russ. C. M. 701-712; East, P. C. 452-463; 1 Hawk. c. 41.

² 1 Hawk. c. 41, s. 11.

³ 5 & 6 Vict. c. 38, s. 1.

⁴ *R. v. Barratt*, 9 C. & P. 387.

⁵ *Ante*, p. 842.

servitude not exceeding fourteen nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour.

And by sect. 55, whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and liable to imprisonment not exceeding two years, with or without hard labour.

It has been held that the death of the parent does not invest the step-father or step-mother with authority to consent to the removal of the child. For it is *ex jure naturæ* that these respective parties derive their power over the infant, and that authority cannot be dissolved by the death of one, nor can it be delegated to a stranger.¹ It was also determined that a natural daughter could not be taken from the custody of her putative father, under these circumstances, without a violation of the law. The question was not whether the child were illegitimate or not, but whether she had been taken illegally from the custody and government of those who, by lawful ways and means, had the guardianship of her. The defendants were thereupon convicted, fined and imprisoned.² It has been said, that if the parent once agree to the removal, it becomes impossible for him to dissent afterwards;³ but whether this be a correct principle or not, it cannot be construed to extend to cases where a schoolmistress or other person is intrusted with the care of a child, so as to imply an assent on the part of the parent, from the mere circumstance of committing the girl to such custody. For the governance must still be deemed to reside in the parent.⁴

If a girl be taken away but for a short time, as for two hours, from her father's house, if the husband has induced her to leave her abode to be married, he is rightly convicted. She continued to live, as before, with her father, and the marriage was never consummated.⁵ So it was where the prisoner took away a girl, not with the view of keeping her permanently from home, but in order to gratify his passions. The absence was three days and nights, and the parting was by mutual consent. He was rightly convicted.⁶ But if no improper motive exists, although the actual taking away may be illegal, the prisoner will be acquitted.⁷ So it would be if the departure of the girl were entirely voluntary. But moral force is within the Act. There are,—1st, the unwillingness of the

¹ See 3 Rep. 39.

² *R. v. Cornforth*, 11 East, 451, n.; Str. 1162. *R. v. Sweeting*, East, 457.

³ See 3 Mod. 169.

⁴ See East, P. C. 457, and *R. v. Pierson and others*, Andr. 310.

⁵ *R. v. Baillie*, 8 Cox, 238.

⁶ *R. v. Timmins*, 30 L. J. M. C.

45; Bell, 276. *R. v. Frazer*, 8 Cox, 446.

⁷ *R. v. Tinkler*, 1 Fost. & F. 513. The jury were directed to acquit if they thought that he only wanted the child to live with him, and that he honestly believed, though without right, that he had a right to the custody of the child.

parent; 2nd, the taking; 3rd, the force actual or persuasive.¹ Hence enticement will be sufficient. It is true that where under pretence of getting a place for a girl with 5*l.* a year wages, the prisoner decoyed a girl who was returning from an errand, the case was held not to be abduction under 9 Geo. 4, c. 31, s. 20.² But Parke, B., declared subsequently, that the marginal note of that case was not warranted by the facts as they appeared at the trial.³ And false representations made to the parents will justify a conviction under the statute.⁴ The possession of the father extends beyond his actual control. The daughter, under sixteen, left home, being enticed by the prisoner, and there was no proof that, *but for his arts*, she would not have returned. He was held rightly convicted of taking the girl out of possession. The consent was immaterial.⁵

The prisoner got a ladder and went in the night to a window, from whence the daughter of B., fifteen years of age (who lived with her father), descended, and went away with the prisoner. This was held to be a taking out of the father's possession. The prisoner's defence, that, from her appearance, he thought she was older, was not admitted, nor that the girl herself had proposed to the prisoner to bring the ladder and elope.⁶ On the other hand, if the parents have encouraged the girl in a lax course of life, the case is not within the statute.⁷

Moreover, it being admitted that, in the absence of any disqualifying cause, the father has a right to the custody of his child up to the age of sixteen, persons obstructing the return of a child to her parent are guilty of a misdemeanor.⁸

Indictment.] The indictment states, that A., on, &c., one B. then being an unmarried girl, under the age of sixteen years, out of the possession and against the will of one C., the father of the said B., did then unlawfully take, against the form, &c.

¹ *R. v. Handley*, 1 Fost. & F. 159. According to the ruling of Maule, J., in *R. v. Kipps*, 4 Cox, 648.

² *R. v. Meadows*, 1 Car. & K. 167. So was *R. v. Frazer*, 8 Cox, 399; Dears. 161, Mr. Baron 446.

³ 22 L. J. M. C. 116. ⁶ *R. v. Robins*, 1 Car. & K. 456. *R. v. Biswell*, 2 Cox, 279.

⁴ *R. v. Hopkins*, Car. & M. 254. ⁷ *R. v. Primelt*, 1 Fost. & F. 50. *R. v. Frazer*, 8 Cox, 446.

The child in this case was between ten and eleven. ⁸ *R. v. Greenhill*, 4 Ad. & El. 624; *Ex parte Barford*, 8 Cox, 405.

⁵ *R. v. Manklatow or Manktelow*, 22 L. J. M. C. 115; Dears.

CHAPTER X.

OF CHILD-STEALING.

Child-stealing.] By 24 & 25 Vict. c. 100, s. 56, whosoever shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away or detain, any child under the age of fourteen years, with intent to deprive any parent, guardian, or other person having the lawful care or charge of such child of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong, and whosoever shall, with any such intent, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained as in this section before mentioned, shall be guilty of felony, and liable to penal servitude not exceeding seven nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and, if a male under sixteen, with or without whipping. Provided that no person who shall have claimed any right to the possession of such child, or shall be the mother, or shall have claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof.

Indictment.] That A., on, &c., feloniously and maliciously did [by force or fraud] lead and entice away one B., then under the age of ten years, to wit, of the age of — years, with intent [state the intention under the statute], against the form, &c.

The kidnapping of grown persons is no longer felony. The latter offence amounts, upon most occasions, to little more than an assault, but in less civilised times it was deemed necessary to punish offences of this character committed in the northern counties with death. And child-stealing, which at one time was almost dispunishable, unless, indeed, where the clothes were stolen, is now made the subject of greater severity than at common law.¹

¹ See East, P. C. 429. *R. v. Lord Grey*. Tho. Raym. 473.

CHAPTER XI.

OF BIGAMY.

Bigamy.] By 24 & 25 Vict. c. 100, s. 57, whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and liable to penal servitude not exceeding seven nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour; and any such offence may be dealt with, &c. in any county or place in England or Ireland where the offender shall be apprehended or be in custody, in the same manner in all respects as if the offence had been actually committed in that county or place: Provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

Polygamy is said to consist in having a plurality of wives at the same time. The term “bigamy” is most frequently applied to this offence, although, in reality, it is said to mean marrying two virgins successively, one after the other, or once marrying a widow.

Bigamy, thus defined, was an offence by the ecclesiastical law, and not an uncommon counter plea to the claim of benefit of clergy. And, by misapplication, it has usurped the place of the more proper expression,—polygamy,—which is having more than one wife living at the same time. This latter offence is punishable by statute, and is the subject of the present section.

Three points are presented to the reader concerning this crime:—1st, the operation of the marriage acts, for it is plain that if there be no valid marriage, there can be no charge of polygamy in respect of that supposed marriage:—2ndly, the nature of the offence itself, for there are exceptions in the law, which, although they do not reject the marriage, yet exonerate the accused:—3rdly, the kind of evidence which is necessary in order to prove the case, and more especially with reference to the relation between husband and wife.

Marriage Acts.] Marriages solemnized according to the ritual of the Church of England may take place in churches or in chapels consecrated in conformity with the ceremonies prescribed by that church. They may be performed by virtue of banns published, by licence from a surrogate or other person in authority, or by special licence from the Archbishop of Canterbury.

Marriages under 6 & 7 Will. 4, c. 85, "An Act for Marriages in England," may be solemnized in a place of public worship, other than a church or chapel of the establishment, provided the building be duly registered. They may also be celebrated at the office of the registrar of marriages after due notice and certificate, in the presence of the superintendent registrar and some registrar of the district, and in the presence of two witnesses. The authority for the union, upon these latter occasions, is a notice and certificate (to which we shall presently advert), or a licence from the superintendent registrar, grounded, nevertheless, upon such notice and certificate.

Marriages may also be effected in a church under 6 & 7 Will. 4, c. 85, upon the production of the registrar's certificate, which cannot be had without the notice alluded to.¹

There are, therefore, under 6 & 7 Will. 4, c. 85, the notice and certificate, or the notice and certificate with the licence, when it is intended to use a chapel or the office for the purpose of marriage, and, in a church, there are the notice and certificate. And, further, by 6 & 7 Will. 4, c. 85, s. 1, and 1 Vict. c. 22, s. 36, this facility of contracting marriages in the churches of the establishment by virtue of the registrar's certificate is declared to be in operation in all cases where any marriage may be solemnized after the publication of banns.

The 2nd sect. of 6 & 7 Will. 4, c. 85, following the Marriage Act of 4 Geo. 4, c. 76, s. 31, preserves the marriage rites of Quakers and Jews intermarrying respectively with each other, provided in cases under 6 & 7 Will. 4, c. 85, that the notice and the registrar's certificate be duly obtained. By 4 Geo. 4, c. 76, s. 30, and 6 & 7 Will. 4, c. 85, s. 45, the royal family are excepted.

These ceremonies and documents, therefore, constitute valid marriages, in the absence of impediments, both amongst churchmen and dissenters.

The principal general statute is the 4 Geo. 4, c. 76, which repealed the well known Act 26 Geo. 2, c. 33, and consolidated the law upon this subject. This statute, 4 Geo. 4, c. 76, s. 2, provides for the due publication of banns according to the rubric, and it then contemplates the residence of the parties.² If they dwell in separate parishes, the banns must be published in each, and the

¹ 6 & 7 Will. 4, c. 85, s. 1; 1 Vict. c. 22, s. 36.

² Still if the first marriage be by banns, the objection for the prisoner that the parties did not reside in the

parish where the banns were published, and where the marriage was celebrated, failed. *R. v. Hind*, Russ. & Ry. 253.

marriage must be solemnized in one of the parish churches or chapels where the publication has taken place, and in no other place whatsoever. By sect. 12, parishes where there is neither church nor chapel, and extra-parochial places, are deemed, for the purposes of that Act, only to belong to any adjoining parish, and the publication of the banns is to be certified in like manner as if the parties had actually dwelt in such adjoining parish. By sect. 13, explained and amended subsequently by 5 Geo. 4, c. 32, where a church or chapel is out of repair, or about to be rebuilt, the banns may be published in the adjoining church or chapelry, or in any place licensed for such publication, by the bishop, during such repair. The marriages may also be had, whether by banns or licence, in such licensed places, or, if no place be so licensed, in such adjoining churches or chapels, and marriages theretofore or thereafter solemnized in such churches, chapels, or licensed places, shall not be questioned, nor shall the ministers who have so solemnized the same be liable to any ecclesiastical censure, or other proceeding.¹ And all licences granted by persons having authority to grant such for the solemnization of marriages in any church or chapel wherein marriages have been usually solemnized, shall be available for licensed places, and both banns and marriages published and solemnized in such places shall be considered as proclaimed and solemnized in the church, and shall be registered accordingly. By 4 Geo. 4, c. 76, s. 3, the bishop, with the consent of the patron and incumbent, may authorize the proclamation of banns in any public chapel to which a chapelry is annexed, or in any chapel situated in an extra-parochial place.² By sect. 4, notice must be placed in some conspicuous part of the interior of such chapel. The 5th section extends the provisions relating to marriage registers to chapels so authorized as aforesaid. The 6th section directs that a book shall be substituted for the registration of banns, instead of loose papers as heretofore. The 7th section requires that seven days' notice shall be given to the parson, vicar, &c., dated on the day of its delivery, of the true christian names and surnames, and of the abodes of the parties, together with the time of their residence. But by sect. 26, after the marriage by banns, no proof of the actual dwelling of the parties need be offered, nor shall any evidence be received to prove the contrary.³ The 9th section enacts, that if the marriage be not had within three months after the complete publication of banns, the banns must be republished for three Sundays, according to the Act, unless there be a licence duly obtained, according to the provisions of the Act. By sect. 22, marriages entered into elsewhere than in a church or public chapel, where banns may lawfully be published, or without licence, are declared to be null and void. So it is also if the parties consent to acquiesce in the solemnization of such

¹ See *R. v. Hind*, supra.

² See 6 & 7 Will. 4, c. 85, *post*, chapels.

extending this power to licensed

³ See *R. v. Hind*, supra.

marriage by any person not in holy orders. And in both these cases there must be a guilty knowledge.

Looking for a moment at sect. 7, we may observe, that a partial error in the surnames, or even a mistake in the christian names, without a fraudulent intention, will not vitiate a marriage.¹ But a total mistake in the surname has been held fatal, although the parties were entirely ignorant of any improper conduct at the time of their union.² "Although it is a great hardship," said Lord Tenterden, "upon innocent parties to pronounce such a marriage void, it would be a much greater inconvenience to the public to alter the settled rules upon this subject, for the sake of preventing a particular mischief."³ And the first marriage being thus void, it is presumed that bigamy could not be committed in respect of a second marriage under such circumstances. But where the first marriage is correct, the nullity of the second marriage will not entitle the prisoner to an acquittal. As where W. Allison married a second wife in the name of Wilkinson, his conviction was held right.⁴ So, where the prisoner, upon a second marriage, wrote down the name of Anna Timson for the banns, the judge held that he should not be permitted to defend himself on the ground of his having intermarried with Susannah Timson, the woman's real name.⁵ So, where the prisoner contracted the second marriage in the maiden name of his mother, and the woman he married had also made use of her mother's maiden name, the judges held that the conviction was right.⁶ So, where the deceased wife's sister married the husband of that sister, a widower, contrary to 5 & 6 Will. 4, c. 54, s. 2,⁷ which makes such a marriage void, it was held that bigamy had been committed, notwithstanding such void marriage,⁸ there being no objection to the first marriage.⁹ And it was also held, that if the person marrying the woman knew that she was a married person, he might be convicted of counselling her to commit this offence.¹⁰ However, where the undue publication

¹ See *Tongue v. Tongue*, 1 E. F. Moore, 90.

² *R. v. Tibshelf, Inhabitants*, 1 B. & Adol. 190.

³ 1 B. & Adol. 196.

⁴ *R. v. Allison*, Russ. & Ry. 109.

⁵ *R. v. Edwards*, Id. 283. *R. v. Penson*, 5 C. & P. 412. See also *R. v. Billingshurst*, 3 M. & S. 250. *R. v. Burton-upon-Trent*, Id. 537. See as to names, *post*.

⁶ *R. v. Palmer*, 1 Russ. C. M. 209, citing 1 Deac. Dig. Cr. L. 147.

⁷ A marriage contracted contrary to 5 & 6 Will. 4, c. 54, is void, not merely voidable. *R. v. Chad-*

wick (in error), 17 L. J. M. C. 33; 11 Q. B. 173.

⁸ The prohibited degrees mentioned in this Act are referable to the decision of the Ecclesiastical Court at that time. The degrees prohibited by the law of God in 32 Hen. 8, c. 38, are those enumerated in 25 Hen. 8, c. 22, and 28 Hen. 8, c. 7. *R. v. Chadwick* (in error), 17 L. J. M. C. 33. Where the witness said she had always lived with her sister, and considered the person in question to be her sister, the proof of relationship was deemed sufficient. *R. v. Young and another*, 3 Cox, 296.

⁹ *R. v. Brawn*, 1 Car. & K. 144.

¹⁰ S. C. *R. v. Bawn*, 1 Cox, 33.

of banns is alleged to be wilful, the guilty knowledge must affect both parties in order to annul the marriage.¹

Banns, 6 & 7 Will. 4, c. 85.] By 6 & 7 Will. 4, c. 85, s. 26, bishops, with the consent of patrons and incumbents, under hand and seal, may, without stamp duty,² license public chapels for the solemnization of marriages; or, after two calendar months' notice in writing, given by the registrar of the diocese, they may do so without such consent. The limits within which persons may be deemed resident, for the purpose of marriage at such chapels, are to be specified in the licence, and likewise the amount, appropriation, and apportionment of the dues.

Marriages, until such licence be revoked, are to be deemed as valid as if celebrated in any church or other chapel, and the other documents relating to such licence are to be deposited in the registry. The 28th section gives the patron or incumbent an appeal to the archbishop. The 29th section directs, that a public notice of such licence is to be affixed in the chapel. The 30th section ordains, that marriages performed in such chapel shall be regulated according to the rites of the church. The 31st section saves the rights of parties to be married at the parish church, or elsewhere, according to law, notwithstanding the licence in favour of such public chapel. The 32nd section gives the power and form of making such licences. In this case, the registers are to be sent to the incumbent of the parish church (sect. 33), and by 1 Vict. c. 22, s. 33, banns may be published in such public chapels so licensed by the bishop as aforesaid, notice to such effect being affixed in the chapel. By the 34th section, all such licences shall be construed to extend to, and authorize marriages in such chapels between parties, one or both of whom is or are resident within the said district. Provided that the banns be not only published in the public chapel as aforesaid, in cases where the parties reside in different ecclesiastical districts, but also in the church or chapel where the marriage is to be solemnized; and if there be no such public chapel, then elsewhere, as if the statute 6 & 7 Will. 4, c. 85, had not passed. It is clear that if the marriage be intended to be solemnized in the public chapel, and the parties are resident in different districts, the banns must likewise be published in the place where the party who does not dwell within the district of the public chapel, is resident.

Licence.] The second mode of contracting marriages in the church is by licence.

By 4 Geo. 4, c. 76, s. 10, it is enacted, that after the 1st of November then next following, no licence shall be granted to solemnize marriage elsewhere than in the parish church, or some public chapel belonging to the parish or chapelry within which

¹ *R. v. Wroxton (Inhabitants)*,
4 B. & Adol. 640.

² 1 Vict. c. 22, s. 32.

the usual place of abode of one of the persons to be married shall have been for the space of fifteen days immediately before the granting of such licence. The 11th section relates to caveats. If a caveat be entered and not withdrawn, the licence cannot issue until the judge, out of whose office it is to proceed, has examined into the matter. The 14th section relates to oaths, which are to be taken before the surrogate (who is himself to take an oath of office and give security):¹—1. In order to prevent fraud and collusion, one of the parties must personally swear before the surrogate, or other authority, that to the best of his or her knowledge, there is no lawful impediment to the marriage. 2. That the abode of one of the parties has been for fifteen days last past within the parish or chapelry where the solemnization is to take place. 3. When either of the parties, not being a widower or a widow, is under twenty-one years of age, that consent under the provisions of the Act has been obtained, unless there is no person to give consent, in which latter case the oath must be to that effect, and the licence may then be granted.

The 15th section forbids the giving of any bond or caution by the person applying for the licence; but with respect to the abode, as above mentioned, it is enacted by sect. 26, that after the marriage, no proof need be given of the inhabitancy for the fifteen days required by the oath, nor shall any evidence be received to prove the contrary, in any suit touching the validity of the marriage. By section 19, if the marriage be not had within three months next after the granting of the licence, the minister shall not proceed to solemnize it without a new licence, or the publication of banns. The 33rd section confines the operation of the Act to England.

Under the 6 & 7 Will. 4, c. 85, s. 26, marriages may be had in certain chapels, where there is no chapelry, by licence.²

Special licence.] The third mode of celebrating a Church of England marriage is by special licence from the Archbishop of Canterbury. This privilege is especially saved to the archbishop by 4 Geo. 4, c. 76, s. 20, and 6 & 7 Will. 4, c. 85, s. 1.

Registrar's certificate.] Lastly, a marriage may take place in a church or episcopal chapel by virtue of the registrar's certificate under 6 & 7 Will. 4, c. 85, as we have already shown.³

These are the marriage ceremonies under the respective Acts, according to the ritual of the Established Church.

A chapel was not registered under 15 Vict. c. 31, but proof of the second marriage in it was held sufficient.⁴

¹ Sect. 18.

² As to the confirmation of marriages celebrated in places which were not consecrated at the time of

passing the respective Marriage Acts, see 21 Geo. 3, c. 53.

³ *Ante.*

⁴ *R. v. Tilson*, 1 Fost. & F. 54.

Dissenting chapels.] We come now more particularly to the statute 6 & 7 Will. 4, c. 85,¹ as it respects the relief of dissenters. By sect. 4, in any case where it is intended to solemnize marriage according to the rites of the Church of England, otherwise than by licence, special licence, or publication of banns, or according to the usages of Quakers or Jews, or according to any form authorized by the Act,² notice is to be given by one of the parties to the superintendent registrar of the district where the parties have dwelt for not less than seven days then next preceding,³ or, if they dwell in different districts, then to the registrar of each district, stating the name, surname, profession and condition of each party, their dwelling place, and the time of their abode, not being less than seven days, therein, and the church where it is intended to celebrate the marriage. But if the residence have been for more than one calendar month, the statement may be, for one calendar month and upwards. However, by 3 & 4 Vict. c. 72, s. 2, marriages may not be solemnized out of the district where the parties dwell, unless one of the parties intending marriage shall declare that to the best of his or her knowledge, there is not within the district in which one of the parties dwells, any registered building in which marriage is solemnized according to the ritual which he or she professes, and the district nearest to the residence of that party in which a building is registered wherein marriage is so solemnized, and the registered building within such district in which it is intended to solemnize the marriage.⁴ By 6 & 7 Will. 4, c. 85, s. 6, these notices are to be read for three successive weeks,⁵ at the meetings of guardians, unless a licence shall be sooner granted; provided that if they shall not so meet, it shall be sufficient for the purposes of the Act, that such notices shall be read at any meeting of such guardians which shall be held within twenty-one days from the day of such notice being entered. By sect. 7, after seven days succeeding the entry of such notice, if the marriage is to be by licence, or, after twenty-one days if it is to be solemnized without, the superintendent registrar shall, upon request, issue his certificate,⁶ provided that no lawful impediment should be shown to his satisfaction why such certificate should not issue, and provided the issue shall not have been sooner forbidden,—supposing there shall not be any guardians in the district. By 1 Vict. c. 22, s. 24, the notice of marriage is to be hung up in the office of the superintendent registrar for seven or twenty-one days, according to the circumstances. The particulars of such notice are to be sent to every registrar in the district, and to be open to inspection at all reasonable times. This arrangement, however, is to cease upon the election of a board of guardians, and a clerk to such board.

¹ Refer to 7 Will. 4, c. 1.

² The most material part, as it embraces the dissenters at large.

³ See sect. 25, and 1 Vict. c. 22, s. 1.

⁴ The 3rd section gives the form of notice. The 4th section makes false

declarations punishable as perjuries. The 5th section relieves Quakers and Jews from these provisions, and refers them to 6 & 7 Will. 4, c. 85.

⁵ See sect. 14.

⁶ See 1 Vict. c. 22, s. 1.

Every certificate under 6 & 7 Will. 4, c. 85, s. 7, shall set forth the particulars contained in the notice, the day on which the notice was entered, and the fact that seven or fourteen days had elapsed (as the case may be) since the entry of such notice, and that the issue of such certificate has not been forbidden. By sect. 9 any person authorized in that behalf may forbid the issue of the certificate, upon which the notice, and all subsequent proceedings, shall become void. The 11th section enables the superintendent registrar to grant licences for marriage, but they are not to be used in any church or chapel of the establishment, or in any building out of his district. By sect. 12, the certificate of notice must be given before the granting of this licence, unless notice shall have been received by the registrar who grants the licence. One of the parties must then appear personally before the registrar, and make oath, or a solemn affirmation and declaration in lieu of an oath, that there is no lawful impediment to the marriage, as far as he or she believes, that one of the parties has lived within the district for fifteen days immediately before the granting of the licence; and where either of the parties, not being a widower or a widow, shall be under twenty-one years of age, that due consent to such marriage has been obtained, or that there is not any person having authority to give consent, as the case may be. The 13th section permits the lodging of a caveat against the grant of a certificate or licence. The superintendent registrar shall then examine into the matters contained in the caveat, and he may refer the decision to the registrar-general in cases of doubt; and should the registrar refuse the certificate or licence, the party applying for the same may appeal to the registrar-general, who may confirm the refusal, or direct the required document to issue.

By 6 & 7 Will. 4, c. 85, s. 37, and 1 Vict. c. 22, s. 5, if the registrar-general shall deem the grounds of the caveat frivolous, and that the licence ought not to be refused, the person entering such caveat shall be liable to the costs of the proceeding; and by 6 & 7 Will. 4, c. 85, s. 37, damages may be recovered in a special action on the case by the party against whose marriage the caveat has been vexatiously entered. The certificate of the registrar-general, by 1 Vict. c. 22, s. 5, denoting the frivolousness of the caveat, shall be evidence of the fact in support of such action.

Unless there be a licence, the 6 & 7 Will. 4, c. 85, s. 14, prohibits the celebration of the marriage for twenty-one days next after the entry of the notice; and in the case of licence, for seven days from the entry of the notice. By sect. 15, if the marriage shall not take place within three months after the notice, all proceedings shall be void; and a new notice must be had, whether there be a licence or not. By sect. 16, the certificate of the registrar is to be given upon the marriage to the officiating clergyman, and the certificate or licence to the registering officer of the Quakers, or to the officer of a synagogue; and in all other cases it shall be delivered to the registrar present at the marriage. The 18th section then provides for the registry of places of worship for the solemnization of marriages.

Thus, any proprietor or trustee of a separate building certified according to law as a place of religious worship, may apply to the superintendent registrar of the district for the purpose of registry. He is to deliver a certificate signed in duplicate by at least twenty householders to the registrar to the effect that the building has been used for one year as their place of public worship, and that they are desirous of registry, and such certificate must be countersigned by the proprietor or trustee. The registrar-general will then effect the registry, and give a certificate of registry to the proprietor or trustee by whom the certificates are countersigned, and give public notice in some newspaper circulating within the county, and in the "London Gazette." The 19th section directs how a new place of worship, used instead of the old building, shall be registered; and by 1 Vict. c. 22, s. 35, any building licensed and used as a Roman Catholic chapel for the year before registration, shall be taken to be a separate building for the celebration of marriages, notwithstanding that the same shall be under the same roof with any other building, or shall form a part only of a building.

These arrangements being made, the marriage may take place in the registered building with open doors, between eight and twelve in the forenoon, in the presence of some registrar of the district where the building is situate, and two credible witnesses. A form also is given in the clause, and there is a proviso that no lawful impediment shall exist.¹

The next section, the 21st, respects the opinions of those who prefer to celebrate their marriage in a place not consecrated, nor appropriated to public worship; such persons, after due notice and certificate, may be united at the office of the superintendent registrar (which, for the purposes of the Act, shall be taken to be within the district of which it is the registry office, although not locally situated therein), in his presence, and that of some registrar of the district, with open doors, between the hours aforesaid, and using the same form of words given by sect. 20. The neglect of these hours is, it should seem, a fatal omission. It has, at least, been so held with reference to the canonical hours of the church. Charlotte Reilly was tried at Lancaster for bigamy; her first marriage was solemnized by virtue of a licence from the Archbishop of Dublin, which gave authority to marry at the usual time and place, but the ceremony was performed in a private house, and after the canonical hours; upon which the learned judge was of opinion that the marriage was void, and he directed an acquittal.²

By 6 & 7 Will. 4, c. 85, s. 25, proof of the residence need not be

¹ 6 & 7 Will. 4, c. 85, s. 20. See sect. 36. Provision for marriages in the Welsh tongue is made by 1 Vict. c. 22, s. 23. As to district churches, see *post*.

² *R. v. Reilly*, Ry. & M., N. P. C. 82, (n.). *Smith v. Maxwell*, Id. 80. *Dalrymple v. Dalrymple*, 2 Hag-gard, Consistory Rep. 54.

given after the marriage, in support of its validity, nor can evidence be received to impeach the fact of such residence.

By sect. 35, marriages had under the Act shall be equally good and cognizable with those contracted according to the church ritual before the passing of the Act.

By 1 Vict. c. 22, s. 9, extra-parochial places may be included within the districts of registrars with the consent of the poor law commissioners. The 10th section treats of the union of districts by the registrar-general, and by sect. 11 he may divide them.

Minors—Law of consent.] We come now to speak of the law of consent, with reference to parties under age. By 4 Geo. 4, c. 76, s. 16, certain persons are named, whose consent is respectively necessary for the purpose of giving effect to the marriage of parties under age, not being widowers nor widows. These are in the first place, the father, or if he be dead, then the guardian or guardians lawfully appointed, of the person under age, or if no guardian, then the mother, if unmarried, and if no mother unmarried, then the guardian or guardians appointed by the Court of Chancery; and such consent is thereby required, unless there be no person authorized to give such consent. The age when consent becomes unnecessary is twenty-one.¹

The 17th section provides for cases where the father, or guardian, or mother may happen to be *non compos mentis*, or, where the mother or guardian may be beyond sea, or, where the mother or guardian unreasonably, or from undue motives, refuses or withholds consent to a proper marriage. In such a case application may be made by petition to the lord chancellor, or the master of the rolls, or vice chancellor, who are respectively empowered to proceed in a summary way upon such petition. If the marriage proposed shall then appear to be proper, it shall be judicially declared so by the said lord chancellor or other judges, and such judicial declaration shall stand in the room of consent. And by 6 & 7 Will. 4, c. 85, s. 10, the like consent shall be required to any marriage in England solemnized by licence, as would by law have been required to marriages solemnized by licence immediately before the passing of the Act, and every person whose consent to a marriage by licence is required by law, is thereby authorized to forbid the issue of the superintendent registrar's certificate, whether the marriage is intended to be by licence or without licence. In Ireland, it seems that a marriage without the consent of parents must be vacated within a year if it be intended to make it null.²

Illegitimate children have been held to come within the old Act 26 Geo. 2, c. 33,³ and the consent of reputed parents has been held

¹ See Russ. & Ry. 50.

³ *R. v. Inhabitants of Hodnett*,

² See *R. v. Jacobs*, 1 Moo. C. C. 1 T. R. 96.
140. *R. v. Riordan*, Car. Cr. L.
255.

insufficient to make the marriage of such illegitimate minors valid. The consent, in such cases, can only be had by a guardian appointed by the Court of Chancery.¹

The cases upon the subject of non-consent fall properly under the head in evidence as to bigamy, to which we refer.²

The statute of 4 Geo. 4, c. 76, it will be observed, speaks of the father as *non compos mentis*, and then of the mother and guardians as *non compos*, being beyond sea, or refusing consent unreasonably; consequently, it has been held that this provision does not apply to the case of a father beyond the sea, or who withholds his consent unreasonably, but only in the case of his being *non compos mentis*.³

By 4 Geo. 4, c. 76, s. 8, ministers shall not be punishable for marrying minors without consent, unless they have notice of the disapproval, and the public dissent of parents or guardians shall operate to make the publication of banns void.

Marriages, when invalid.] We will now shortly sum up the occasions upon which a marriage will be declared invalid:—

1. A neglect to publish the banns in a church or chapel, there being at the same time no licence.
2. An omission to procure a licence, there being no banns.
3. An omission to give notice and procure the registrar's certificate under 6 & 7 Will. 4, c. 85.
4. The absence of the registrar when the presence of that officer is required.
5. The absence of consent where it is required.
6. The celebration of marriage in a wrong place in contravention of the Acts. By 4 Geo. 4, c. 76, s. 22, marriages contracted in disobedience to that Act, are declared null and void to all intents and purposes whatsoever.

By 6 & 7 Will. 4, c. 85, s. 42, if any person shall wilfully and knowingly intermarry under the provisions of the Act elsewhere than in the church, chapel, registered building or office, or other place specified in the notice and certificate, or without due notice to the superintendent registrar, or without a certificate of notice duly issued, or without a licence, in case a licence should be necessary under the Act, or in the absence of a registrar or superintendent registrar; where the presence of such a person is necessary, the marriage shall be null and void. A proviso then follows, saving the Act 4 Geo. 4, c. 76.

7. Fraud and collusion of various kinds, especially where both parties are cognizant of the fraud. And by 6 & 7 Will. 4, c. 85, s. 43, in case any valid marriage should be had through any false notice, certificate, or declaration, the attorney-general or the solicitor-general may, notwithstanding,

¹ See *R. v. Edmonton*, Cald. 435. *Priestly v. Hughes*, 11 East, 1. *Horner v. Liddiard*, 1 Russ. C. M. 210.

² *Infra* in this section.

³ *Ex parte an Infant*, 3 Myl. & Cr. 471.

sue for a forfeiture of all estate and interest in any property accruing to the offending party by such marriage.

8. A lawful impediment, as idiotcy,¹ lunacy,² or consanguinity. Three kinds of illegal marriage were for a long time merely voidable, being a marriage *de facto*, but by 5 & 6 Will. 4, c. 54, s. 2, marriages within the prohibited degrees of consanguinity or affinity, are declared absolutely null and void, excepting that marriages of that kind contracted before the passing of the Act are not to be affected by the statute.

District churches.] Some doubts having existed as to the publication of banns in district churches, provision is made for such circumstances by the statute 7 & 8 Vict. c. 56, to which the reader is referred. If there be an alteration in the Acts relating to any subject, it is almost always doubtful whether some circumstance calculated to raise a question of law, may not take place during the interval which elapses between the repeal of the one statute and the full operation of the other. In some cases, the party accused or implicated has the benefit of the change which accrues, in others he becomes himself affected by it. Instances of this appear in considering the law of marriage.³

Defence—Absence.] In order to obtain the benefit of the proviso concerning absence, the defendant must stand in such a position as that his ignorance of the existence of his first wife for seven years preceding the second marriage, must be manifest to the jury. The question is not whether, on the part of the prosecution, he must have known of her being alive, so as to exclude him from the benefit of the proviso, but whether his want of knowledge is so clear to the jury as to bring him within the provision.⁴ The presumption of a death is not to be made. In April, 1831, a person contracted marriage, whose wife was proved at the sessions to have been alive in a colony on the 17th of March, 1831. It was the opinion of the court, that no presumption should be drawn in favour of the ignorance of the husband, notwithstanding the absence, but that the sessions, (or jury, as the case might be,) should draw their conclusion from the evidence.⁵

The prisoner's wife had left him for sixteen years; the second wife proved that she had known the prisoner living for nine years as a single man, and that she had never heard of the first wife,

¹ 3 Inst. 88.

² 1 Com. 438; 15 Geo. 2, c. 30.

³ See *R. v. Waully*, 1 Moo. C. C. 163. *R. v. Birmingham*, 8 B. & C. 29. *R. v. Delpike*, 2 B. & Adol. 226, with reference to marriages in Scotland (the Acts extending only to England). Ireland: *R. v. — O. B.* 1815. 1 Russ. C. M. 214. *R. v. Jacobs*, 1 Moo. C. C. 140. Newfoundland: 5 Geo. 4, c. 68. St.

Domingo: *R. v. Brampton*, 10 East, 282. In the chapel of a British ambassador or minister, or of a British factory abroad, or house of a British subject residing in such factory, or by a chaplain in the British army abroad. See 4 Geo. 4. c. 91.

⁴ *R. v. Cullen*, 9 C. & P. 681.

⁵ *R. v. Inhabitants of Harborne*, 4 Nev. & M. 341.

who, nevertheless, was living seventeen miles from the prisoner's place of abode. It was held by Cresswell, J., that this was sufficient evidence to warrant the acquittal of the prisoner.¹

The finding of the jury in a case where the husband had been absent for more than seven years was, that they had no evidence of knowledge on her part that he was alive, but that she might have acquired that knowledge had she chosen to make use of the means. Pollock, C. B., held, that the effect of this finding was, that she did not know he was alive. But other judges considered the finding merely imperfect, and all agreed that the conviction should be quashed.² Upon another occasion the case was this:—The parties had separated by agreement in 1843; the prisoner went through the marriage ceremony in 1855; in 1857, he produced his wife at a trial, showing that the person whom he had married in 1855 was still, as then, a widow. No communication had passed between the prisoner and his wife. The question was left to the jury, whether he knew in 1855 that his wife was alive, and they acquitted him.³

Divorce.] As to the point of divorce, which forms the third exception in the proviso, it is to be remarked that the words are general,—“Any person who at the time of such second marriage shall be divorced from the bond of the first marriage.”⁴ In the last case, the prisoner relied upon a divorce under the seal of the commissary or consistorial court of Scotland; but he was convicted, and the judges affirmed the conviction; consequently, a sentence of divorce pronounced by a foreign court, of competent jurisdiction, would, under such circumstances, and if that view be correct, be available here.

In the case of Lolley, mentioned above, a point was made for the prisoner, that he had not colluded with his wife for the purpose of divorce, inasmuch as she had been excited by his misconduct to institute the proceedings in Scotland. This suggestion was made on account of an insinuation on the part of the prosecution, that the husband had irritated his wife to sue for a divorce. The point, however, was not taken into consideration, because the jury had not found fraud. This absence of collusion was said to distinguish the case from that of the Duchess of Kingston, who had obtained her divorce by fraud. There, a suit of jactitation of marriage was successful, but it was sought on the part of the prosecution, to impeach the sentence on the ground of its having been gained improperly, and the judges were of opinion that it might be so questioned.⁵ A man married two wives in Scotland, according to the Scotch law, being resident at Carlisle; it was found that he was

¹ *R. v. Jones*, Car. & M. 614.

⁴ See *R. v. Lolley*, Russ. & Ry.

² *R. v. Briggs*, 26 L. J. M. C. 7, 237.
Dears. & B. 98.

⁶ *R. v. Duchess of Kingston*,
Lcach, 146; East, P. C. 468.

³ *R. v. Cross*, 1 Fost. & F. 510.
Cockburn, C. J. *R. v. Briggs* was
cited for the prisoner.

a British subject : he was held to have been properly convicted in England under the statute.¹ It is no defence to say, in answer to a charge of this nature, that although married according to the Catholic ritual, the prisoner was, in reality, a Protestant. He was married in Ireland by a Catholic priest, and declared himself at the time of the marriage to be a Roman Catholic.² If, on the contrary, the prisoner does not hold himself out to be a Catholic, and there is no evidence to that effect, his allegation of Protestantism may be available.³

Evidence.] The evidence in bigamy has occasioned several decisions. A woman was indicted by the name of Hannah Wilkinson, which turned out not to be her own name, and by which she had never been known, and Park, J., in the absence of other evidence, directed an acquittal. There should have been proof that the woman called herself, or went by, that name. If the banns were published in a wrong name, the marriage might be invalid.⁴ But we have seen that the assumption of a fictitious name upon the second marriage, will not prevent the offence from being complete.⁵ The distinction rests between the first and second marriages. If the first wife be married by a name she was never known to bear, as in *Allison's case*,⁶ the contract is probably null and void. But it is no defence to allege this mistake or defect with respect to the second wife.⁷ So it was again where the copy of the marriage certificate did not correspond with the christian name of the first wife, as stated in the indictment. It was held, that the prisoner should be acquitted unless a satisfactory explanation could be offered, or unless it were shown that the party in question had gone by both names.⁸

The next point is, whether the acknowledgment of the defendant, without more, is sufficient. And it seems, that at one time it was considered that such an admission had little, if any weight, especially if made before the second marriage, or upon occasions where it could not be said to have been uttered to the party's own prejudice, nor so conceived by him at the time.⁹ It was even questioned whether such evidence should go to a jury. But some of the judges upon one occasion seemed to think, that an acknowledgment would, *per se*, have been sufficient.¹⁰ And this ruling

¹ *R. v. Topping*, 25 L. J. M. C. 72.

² *R. v. Orgill*, 9 C. & P. 80.

³ *R. v. Sunderland*, 2 Lew. C. C. 109.

⁴ *R. v. Drake*, 1 Lew. C. C. 25.

⁵ *Ante*, p. 851.

⁶ *Ante*, p. 851.

⁷ *R. v. Penson*, 5 C. & P. 412.

⁸ *R. v. Gooding*, Car. & M. 297. Whether the prisoner's first wife can be called on his behalf to prove that she was married to

another husband, prior to her marriage with the prisoner — qu. ? Alderson, B., inclined to think she might; but, after consulting with Williams, J., refused her evidence, saying, that he would reserve the point. The prisoner, however, was acquitted.

⁹ *R. v. Peat*, 2 Lew. C. C. 288 ; East, P. C. 471.

¹⁰ *R. v. Truman*, East, P. C. 470. See *R. v. Upton*, post.

appears now to be the received opinion. The prisoner made an admission of the first marriage, and it was left to the jury to say, whether what he said was an admission that he had been married according to the law of the country where such marriage was solemnized.¹ So, again, such admissions were held sufficient, without proof that the marriage was celebrated according to the law of the particular country where it took place.² But, combined with other proofs, it was always considered proper to admit the prisoner's acknowledgment as evidence of weight. As when the prisoner made an admission to a witness, and backed his assertion by the copy of a proceeding in a Scotch court, against him and his wife, for having contracted the marriage improperly, the marriage, however, being still good according to the Scotch law. There was also evidence of cohabitation. The judges held the conviction right, and some seem to think that the acknowledgment alone would have been sufficient, and that the paper produced in evidence was only a confirmation of such acknowledgment.³ So it was where the prisoner made a statement before a justice, acknowledging his marriage with his first wife. Erskine, J., left the question to the jury, for here the prisoner's admission had been directed to the very point in issue.⁴ Cohabitation for a considerable time will be evidence of the marriage. As in a case of murder, where it was proved that the prisoner and the deceased had lived together for nearly seven years, that they were spoken of as married persons, and that they mutually mentioned each other under the characters of husband and wife. The judges, upon affirming the conviction for murder, observed, that this would be sufficient evidence for a bishop to certify a marriage upon a plea of *neunques accouplez*.⁵ So, in a case of uttering forged notes, it appeared that the man and woman had lived together for several months, and it was put to Gibbs, C. B., that the woman was entitled to an acquittal, and upon his expressing an opinion that she was, the counsel for the prosecution acquiesced.⁶ On the other hand, where the second marriage took place at Gretna Green, and the assent of the second wife was not distinctly proved, although the parties lived together afterwards, yet, as the prisoner always addressed the woman by her maiden name, Alderson, B., directed an acquittal.⁷ And the certificate was refused as evidence of the marriage.⁸

In cases where it is intended to show, that the consent of parties or guardians was obtained, in answer to the defence of the prisoner

¹ *R. v. Simmonsto*, 1 Car. & K. 164. S. C. *R. v. Simmonite*, 1 Cox, 30. The question of knowledge is for the jury. *R. v. Dane*, 1 Fost. & F. 323. See *R. v. Ellis*, Id. 309.

² *R. v. Newton*, 2 Moo. & Rob. 503.

³ *R. v. Truman*, East, P. C. 470.

⁴ *R. v. Upton*, 1 Russ. C. M. 218.

⁵ *R. v. Norwood*, East, P. C. 337.

⁶ *R. v. Atkinson*, 1 Russ. C. M. 24.

⁷ *R. v. Graham*, 2 Lew. C. C. 97.

⁸ S. C.

that he was an infant at the time of the first marriage, the prosecutor must be prepared with evidence to that effect, for the prisoner cannot be called upon to prove a negative. And where the register of the first marriage expressed it to be by licence generally, without mentioning the consent of parents or guardians, and it also appeared that the parents had never been known to have resided in England, the judges considered that a *prima facie* case had been made out for the prisoner, and that the jury might have found him not guilty.¹ Upon a subsequent occasion, however, Lawrence, J., held at the trial, that the prisoner's marriage must be presumed to be valid, although he had shown himself to have been an infant at the time, unless he could prove the negative, that is, the non-consent of parents or guardians. But the judges held the conviction wrong, as there were no circumstances from whence consent could be presumed.² "It seems, that subsequent countenance from parents or guardians, or other circumstances of a similar kind, might afford ground for presuming the necessary consent."³ However, as the Irish Acts do not acknowledge the necessity of this consent,—in a case where the prisoner had proved himself to be an infant,—it was replied, that there was no law in Ireland which required consent, and the judge held, that it lay on the prisoner to produce such an Act, upon which he was found guilty, and the conviction was affirmed.⁴

We have already seen, that a sentence of jactitation is not sustainable, if obtained by fraud. And it may be further said, that even if not so obtained, it is not conclusive so as to stop the counsel for the crown from proving the marriage in an indictment for polygamy.⁵ As to the evidence of the marriage itself, the best is that given by a party who was present at it. Where such testimony was given in bigamy, the judges held that it was not necessary to prove banns, nor licence, nor registration;⁶ therefore, a lawful canonical marriage need not be shown, when it is competent to prove a marriage *de facto*.⁷

To prove a Roman Catholic marriage, it was shown that the Rev. — was a catholic priest, and that the marriage took place, according to the custom, at his house; he asked the parties if they were Roman Catholics, and was answered in the affirmative. Part of the ceremony was in English and part in Latin. Having put the questions reciprocally, and received answers from the husband and wife that each would wed the other, he pronounced the marriage valid. It was held that this evidence was sufficient.⁸

But where a Roman Catholic marriage was made the founda-

¹ *R. v. James*, Russ. & Ry. 17.
R. v. Morton, Id. 19, n.

² *R. v. Butler*, Russ. & Ry. 61.

³ 1 Russ. C. M. 210, n.

⁴ *R. v. Jacobs*, 1 Moo. C. C. 140.

⁵ *R. v. Duchess of Kingston*, Leach, 146; East, P. C. 468.

⁶ *R. v. Allison*, Russ. & Ry. 109. See also Den. C. C. 273, n.

⁷ 10 East, 287, note (b); 1 Sir Wm. Bl. 632.

⁸ *R. v. Orgill*, 9 C. P. 80. See *R. v. Bathwick*, 2 B. & Adol. 639.

tion of an indictment, and it appeared that the ceremony was performed in Latin, which the witnesses did not understand, and, moreover, that the witnesses could not swear to the performance of any ritual, Willes, C. J., directed an acquittal.¹ "After proof of the first marriage, the second wife may be a witness, but it is clear that the true wife cannot be admitted to give evidence against her husband."²

In order to give proof of the law of Scotland respecting marriage, it has been held unnecessary to produce a witness, as of course, who is connected with the profession of the law. A gentleman who stated himself to have been born and educated in Scotland, (where he lived till he was twenty years of age,) and to be acquainted with the law of Scotland, was held to be a sufficient witness.³ But this opinion was overruled in the Sussex peerage case.⁴ However, on a still later occasion, it was left uncertain by Jervis, C. J., whether the presence of a Scotch *lawyer* would be *in all cases* necessary, yet, some one conversant with that law is imperatively required. A woman, therefore, who said nothing on that subject, was held clearly incompetent to procure a conviction, by her evidence of a marriage.⁵

Proof that marriages have been solemnized in a certain chapel, without more, is insufficient. It must be shown (*i. e.* independently of the Registry Act,) that the chapel was one where banns had been usually published before the passing of 26 Geo. 2, c. 33, or, that the chapel was built and consecrated after that Act, and before the statute 6 Geo. 4, c. 92.⁶ Yet a marriage before the registrar is valid, although the chapel may neither have been licensed nor registered.⁷

Under the statutes 6 & 7 Will. 4, cc. 85 and 86, it is sufficient to produce the certificate and show the identity of the parties. The prisoner was indicted for bigamy, and to prove the first marriage the superintendent registrar produced the register returned to him from the registrar. This registrar proved that he was present at the marriage, that it was registered, that the parties signed their names, and that he witnessed it. The superintendent registrar then produced the register of the place where the marriage was solemnized and his certificate. The notice was not produced. It was contended for the prisoner, that evidence should have been given of the first marriage having been celebrated in the registered building specified in the notice and certificate,—that due notice had been given to the superintendent registrar that the certificate of the notice had been duly issued, and that the express

¹ *R. v. Lyon*, East, P. C. 469.

² 1 Russ. C. M. 218.

³ *R. v. Dent*, 1 Car. & K. 97.

⁴ 11 Cl. & Fin. 85.

⁵ *R. v. Povey*, Dears. 32; 22 L. J. M. C. 19. The jury were not justified in presuming a marriage, for they were not told what the

ceremony was, and the fact of the prisoner residing for three days in the house of the sister was not holding himself out to the world in the character of a husband.

⁶ *R. v. Bowen*, 2 Car. & K. 227.

⁷ *R. v. Tilson*, 1 Fost. & F. 54.

exception in 6 & 7 Will. 4, c. 85, s. 25,¹ tended to establish the necessity of proving in "support of the marriage" the other preliminaries required by the Act. The judges held the conviction in this case correct.² However, it is not necessary to produce the original register.³ Some proof beyond the prisoner's statement of the first marriage seems necessary, although he signs his statement when in custody, and mentions when and where the first marriage took place.⁴ It has also been held that the testimony of a witness present at the marriage, who proved that it took place in the presence of the registrar, in a dissenting chapel, was sufficient to establish the fact of the marriage, and that this was considered good evidence of the chapel being duly registered.⁵ A certificate was produced, not a copy or extract from the registrar's book, but one which had been compared with the book at the office by the witness. This was held by two judges to be evidence of the due registration of the chapel.⁶

Lastly, the statutes 3 & 4 Vict. c. 92, and 21 & 22 Vict. c. 25, enable the courts to admit non-parochial registers as evidence of births, baptisms, deaths, burials, and marriages.

Indictment for bigamy.] The indictment usually states that A., on, &c., did marry one B., and had her for his wife, and that being so married he afterwards, and whilst the said wife was living, on, &c.,⁷ he the said A. did feloniously marry one C., against the form, &c.

And it needs not to be alleged that the marriage is still subsisting, if the life of the first wife be averred.⁸ Where E. C. was called a widow in the indictment, but turned out not to be a widow, nor even reputed to be such, the variance was held fatal.⁹

When the trial is had in a county different from that in which the offence was committed, the averment as to custody is indispensable. As where the second marriage took place in Surrey, but the prisoner was apprehended in Middlesex, and there was no averment of that fact, the judge directed that judgment should be arrested.¹⁰ Subsequently, this point came to be much considered. The offence was committed in Cambridgeshire, and the prisoner

¹ *Ante*.

² *R. v. Hawes*, Den. 270.

³ *Sayer v. Glossop*, 2 Car. & K. 694; 12 Jur. 465.

⁴ *R. v. Flaherty*, 2 Car. & K. 782.

⁵ *R. v. Manwaring*, Dears. & B. 132; 26 L. J. M. C. 10.

⁶ *Id.* Pollock, C. B., Willes, J. See *R. v. Millis*, 10 Cl. & Fin. 534. See further upon bigamy, 1 Hawk. c. 42; East, P. C. 463.

⁷ Or, "whilst the prisoner was so married as aforesaid." Whether such an omission can be cured by

any subsequent averment, qu. ? *R. v. Apley*, 1 Cox, 71. Alderson, B., proposed to take the opinion of the judges on the point. The prisoner was convicted and sentenced to a month's imprisonment; there being averments afterwards, that the former husband was "now alive."

⁸ *Murray v. Reg.* (in error), 7 Q. B. Rep. 700.

⁹ *R. v. Deeley*, 1 Moo. C. C. 303, and, probably, not amendable.

¹⁰ *R. v. Fraser*, 1 Moo. C. C. 407.

was taken in the county of Southampton, but there was no averment either as to his apprehension or custody. It was objected, for the prisoner, that the indictment was insufficient, and, upon argument, Parke, B., observed that a similar objection had been taken and overruled in the case of the *Rebels*, in 1745.¹ It was answered, that the decision there applied to the trial, not to the indictment, which might have been good. Alderson, B., observed, that *R. v. Fraser* did not appear to have been much considered, nor to have been argued. After hearing counsel, however, for the prosecution, the judges held the conviction right.² It is said, nevertheless, that the objection could not have been taken in arrest of judgment.

Trial.] We have seen that this offence may be dealt with in the county where the offender shall be apprehended, or be in custody, as if the offence had actually been committed in that county. Where the prisoner was detained for bigamy in Worcestershire, being already in custody upon a charge of larceny, it was said that he could not be taken to have been apprehended in that county for the bigamy, but the judges held his conviction right, for, as being in custody upon a criminal charge, he was liable to be tried where he was imprisoned.³ Elijah Forsyth was charged with bigamy at the Old Bailey. The offence was alleged to have been committed at Manchester; but the warrant for his apprehension in Middlesex was not produced, and no proof of his apprehension in that county was offered, upon which the court decided that they had no jurisdiction to try him, and he was discharged.⁴ The statute 5 & 6 Vict. c. 38, s. 1, forbids the justices at sessions and recorders of boroughs from trying cases of "bigamy, and offences against, and relating to, the laws of marriage."

Judgment.] A judgment proceeded on the Irish statute against bigamy (35 Geo. 3, c. 67). The sentence was, that the prisoner be transported for seven years, "pursuant to the statute in such case made and provided." Upon error brought, it was held, that the judgment rested, not upon the statutes ordaining the transportation of offenders, but upon the 35 Geo. 3, c. 67, and consequently that the conclusion was correct, supposing, indeed, that it was necessary to refer to any statute.⁵

¹ Fost. Cr. Law, 12.

² *R. v. Whiley*, 1 Car. & K. 150. Yet, according to *R. v. Whiley*, 2 Moo. C. C. 186, the conviction was held wrong. Majority, 8: Lord Denman, C. J.; Tindal, C. J.; Littledale, J.; Bosanquet, J.; Patteson, J.; Gurney, B.; Coleridge, J.; Coltman, J. Minority, 3: Parke, B.; Alderson, B.; Maule, J. But Parke, B., has declared that this report is allowed to have been

erroneous, 19 L. J. M. C. 32, and that Lord Denman, C. J., alone held the conviction wrong. Littledale, J. *dub.* 1 Car. & K. *ut supra*; and see, S. P. (Forgery), *R. v. Smythies*, 19 L. J. M. C. 31, where *R. v. Whiley* was recognized as decisive against the prisoner. Den. 498; and see *Id.* 500, *n.*

³ *R. v. Gordon*, Russ. & Ry. 48.

⁴ *R. v. Forsyth*, Leach, 826.

⁵ *Murray v. Reg.* 7 Q. B. 700.

CHAPTER XII.

OF ATTEMPTS TO PROCURE ABORTION.

Attempts to procure abortion.] By 24 & 25 Vict. c. 100, s. 58, Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

By sect. 59, whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and liable to penal servitude for the term of three years, or to imprisonment not exceeding two years, with or without hard labour.

It may be observed that the words “quick with child,” and “not being found to be quick with child,” are no longer used in the statutes;¹ consequently it is not essential under this section that the woman should be with child,² and this point will hold, even should it be found negatively that the woman was not with child, which was an objection under the old law.³ And administering a piece of bread with a felonious intent, so as to be a noxious thing, will come within the statute.⁴ The administering of savin on subsequent days may be admitted as proof of the intent, although not as part of the particular offence charged.⁵ Savin, if administered in small quantities, is not a noxious thing.⁶

In a case of administering drugs, the prisoner was charged with administering savin for the purpose of procuring abortion, and the count set forth the administering of six ounces of the decoction of a certain shrub called savin, whereas it turned out in evidence that the preparation given was an infusion. Lawrence, J., held

¹ See 9 Geo. 4, c. 31, s. 13, repealed.

² *R. v. Goodhall*, Den. 187; 2 Ar. & K. 293; nom. *R. v. Goodchild*.

³ *R. v. Phillips*, 3 Campb. 77. *R. v. Scudder*, 1 Moo. C. C. 216.

⁴ *R. v. Coe*, 6 C. & P. 403.

⁵ *R. v. Calder*, 1 Cox, 348.

⁶ *R. v. Perry*, 2 Cox, 223.

the variance immaterial.¹ In the same case it was objected to the last count, which spoke of "a certain mixture to the jurors unknown, the said mixture being a noxious and destructive thing," that, unless the shrub in question was savin, there was no evidence of the mixture being noxious and destructive. And witnesses had been called for the prisoner to prove that the shrub he had used was not savin; but Lawrence, J., overruled this objection also, observing, that it was immaterial whether the shrub were savin or not;² but the mischievous nature of the thing administered must be alleged. Therefore, where the indictment omitted to state that certain sponge, (the thing administered) was of a deleterious nature, the omission was deemed fatal.³

Indictment.] The indictment states that A., on, &c., unlawfully and feloniously did administer to a certain woman, that is to say, to one B., a large quantity, to wit, — of a certain noxious thing called —, with intent thereby then to cause the miscarriage of the said B., against the form, &c. Second count, a certain noxious thing to the jurors unknown.

CHAPTER XIII.

OF CONCEALMENT OF BIRTH.

By 24 & 25 Vict. c. 100, s. 60, if any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanor, and liable to imprisonment not exceeding two years, with or without hard labour: provided that if any person tried for the murder of any child shall be acquitted thereof, it shall be lawful for the jury by whose verdict such person shall be acquitted to find, in case it shall so appear in evidence, that the child had recently been born, and that such person did, by some secret disposition of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence as if such person had been convicted upon an indictment for the concealment of the birth.

Under the old Acts, the mother must have been arraigned for

¹ 3 Campb. 73.

² Id. 75, 76.

³ *R. v. Powles*, 4 C. & P. 571.

murder, before she could be convicted of concealment, and it became the duty of the grand jury to find the bill for murder, although there might not be any evidence of that crime, if there were some grounds for believing that there had been a concealment. Hence it followed, that an indictment could not be preferred for the concealment as for a substantive offence.¹ But now, the party may be indicted at once for the misdemeanor; or, after a verdict of acquittal for murder, may be charged, under a subsequent inquiry upon the same indictment, with concealment. It makes no difference, however, whether the charge be made upon an indictment or upon the coroner's inquisition, for, as the word "charged" is used generally in the statute 43 Geo. 3, c. 58, and as a coroner's inquisition is certainly a charge, the finding of concealment upon such an arraignment is right, although the bill for murder may have been thrown out by the grand jury. And so it was held by the judges upon a case reserved.² No one except the mother can be convicted of the concealment;³ but a counsellor, aider or abettor, may be convicted.⁴

The evidence necessary to support this charge is, that the child is dead,⁵ whether before or after birth needs not to appear;⁶ that the woman failed to give proper publicity to the fact of her delivery, by illegally concealing her situation,⁷ and if the prosecution depends upon the act of secret burying, the secreting must be made clear.⁸ It is not necessary to prove that the infant was born alive, but if there be no foundation at all for the fact of life in the child, the prisoner must then be acquitted. Supposing that the dead offspring were without hair or nails, or that there were any other circumstances from which high presumption adverse to the circumstance of life might arise, the woman may still be convicted of concealment. This was not the rule under the old statute of 21 Jac. 1, for, in favour of life, every presumption was wont to be made to relieve the prisoner from the capital penalty consequent upon concealment.⁹ But under 43 Geo. 3, c. 58, the matter was viewed in a different light. Eliz. Cornwall was charged, together with D. T., with murder. The child was seven months old, and in a

¹ *R. v. Parkinson*, 1 Russ. C. M. 571.

² *R. v. Maynard*, Russ. & Ry. 240. *R. v. Dobson*, 1 Lew. C. C. 43. *R. v. Cole*, 3 Campb. 371; Leach, 1095.

³ *R. v. Wright*, 9 C. & P. 754.

⁴ *R. v. Shelton*, 3 Car. & K. 119.

⁵ *R. v. Hopkins*, 8 C. & P. 591.

⁶ *R. v. Perkins*, 1 Lew. C. C. 44. *R. v. Davis*, 1 Russ. C. M. 574.

⁷ It seems that some act of disposal of the body should appear.

So that where a woman went to the privy for some other purpose than that of delivery, and was delivered of a child unawares, which was suffocated beneath, it was held that she could not be convicted of concealment, although she denied the birth. *R. v. Turner*, 8 C. & P. 755. *R. v. Wilkinson*, 3 Burn, Just., by D'Oyly & W., 348. *R. v. Nash*, 1 Russ. C. M. 574.

⁸ *R. v. Derham*, 1 Cox, 56.

⁹ See *R. v. Peat*, East, P. C. 229. *R. v. Jefford*, East, P. C. 229.

putrid state, so that a conclusion of its having been still-born might have been fairly drawn. The prisoner admitted throwing it down the privy, and D. T. denied all knowledge of the child's birth, although she must have known of it. The prisoner being convicted, it occurred to the judge, that the presumption of the infant's death was so strong as to warrant him in asking the opinion of the judges whether this could be said to be a concealment, and as D. T. evidently knew of the birth, whether her being privy, although an accomplice,¹ would take the case out of the statute. And the judges were unanimous, that the act of throwing the child into the privy was evidence of an endeavour to conceal the birth, and that the conviction was therefore right.² So, where the paramour deposited the body of a child in a field, with the connivance of the woman, she was rightly convicted of concealment, and he of counselling.³ It is a question for the jury. The judge will not stop the case, although the evidence should show that the child might have been smothered in the privy without any apparent intent on the part of the mother.⁴ Then, with reference to the question of publicity, it appears that a disclosure to an accomplice is no defence according to the present law.⁵ But it was once held, that notwithstanding the throwing the child away as above mentioned, if the woman had disclosed her pregnancy to other persons, or had made preparations for her confinement, the offence would not have been committed.⁶ This case, however, which was decided at Stafford, in 1809, must be considered as of doubtful authority, when contrasted with a recent case. The prisoner was charged with murder, together with Robert Hall, the father of the bastard, and it appeared, that with her full knowledge, he had thrown the child into the privy, under very suspicious and discreditable circumstances. But the pregnancy of the woman was known by her mother, and was apparent to other women, and it was proved that a female had been sent for at the commencement of her labour, but that she was too ill to attend. No provision had been made for the birth. The prisoner was convicted, and an argument was permitted before the judges. It was endeavoured on the prisoner's behalf to urge, that here was only an endeavour to conceal the death, the pregnancy having been sufficiently public, and a neighbour sent for in the time of parturition. But the judges affirmed the conviction, being of opinion that the communication thus made to other persons was not a bar, but only evidence for the jury, and however slight the evidence on the other side against the woman might be considered, the verdict of the jury

¹ As in *R. v. Peat*, under 21 Jac. 1, where Peat, who was heard to call to her mother, indicted as an accomplice, was acquitted of concealment upon this ground. East, P. C. 229.

² *R. v. Cornwall*, Russ. & Ry. 336.

³ *R. v. Bird*, 2 Car. & K. 817, and *R. v. Wilkinson*, ante, p. 869.

⁴ *R. v. Coxhead*, 1 Car. & K. 623.

⁵ 1 Moo. C. C. 482.

⁶ *R. v. Southern*, cor. Bayley, J., 1 Russ. C. M. 572.

could not be set aside. But they recommended a pardon.¹ Where the woman admitted having had a child, and had stated she had sent for a surgeon to attend her in her confinement, and it appeared also that the mother of the prisoner had shown the witness, a surgeon, some clothes intended for the child, Park, J., held, that these facts went to negative concealment, and he directed the jury to acquit.² So, where the woman, through fear of her father, threw the child into a bag, which she would otherwise have buried in the churchyard, she was acquitted, the case not being within the Act.³ If the charge be for disposing of the body, it must be a complete act of disposing. Formerly the possession of the body cleared the woman from this particular charge.⁴ But these cases are overruled. A woman hid the body between the bed and the mattress. Several judges held this a disposing within the Act, and that, in order to convict, the body need not be in its ultimate place of deposit.⁵ So, under the bolster.⁶ Nevertheless, Pollock, C. B., dissented in *Perry's case*, and Martin, B., who tried it subsequently, directed an acquittal where the body of a child was found behind the door of a privy covered with a small cloth, and he said he concurred with the opinion of the chief baron.⁷

Indictment.] The indictment is that A., on, &c., being then big with a [male or female] child, was then delivered of the said child alive, and which said child then instantly died, and that after the child had so died as aforesaid, to wit, on the day and year aforesaid, the said A. did endeavour to conceal the birth thereof by [secretly burying, &c.] the dead body of the said child, against the form, &c. Another count may state that the child was *dead* at the time of the delivery. If the charge be for disposing, the mode of disposing must be shown.⁸ An indictment stated the means of death, and continued, "did thereby then and there unlawfully dispose of, &c., and endeavour to conceal the birth thereof," without saying, "did *thereby* endeavour," &c. It was held that "thereby" in the first instance applied to the endeavour as well as the concealment.⁹

Costs.] No costs were allowable upon prosecutions for this offence as a misdemeanor, until 1 Vict. c. 44. But by that statute, the court is empowered to order payment of the costs and expenses, whether any bill of indictment shall or shall not be preferred, together with a compensation to the prosecutor and witnesses for

¹ *R. v. Douglas*, 1 Moo. C. C. 480; 7 C. & P. 644.

² *R. v. Higley*, 4 C. & P. 366.

³ *R. v. Morris*, 2 Cox, 489.

⁴ *R. v. Snell*, 2 Moo. & Rob. 44. *R. v. Ash*, Id. 294. *R. v. Bell*, 294, n. *R. v. Jones*, 295, n. *R. v. Waterage*, 1 Cox, 338. *R. v. Watkins*, 1 Russ. C. M. 574.

⁵ *R. v. Goldthorpe*, 2 Moo. C. C. 244; Car. & M. 335. *R. v. Farnham*, 1 Cox, 349.

⁶ *R. v. Hughes*, 24 L. J. M. C. 137; 4 Cox, 447.

⁷ *R. v. Opie*, 8 Cox, 312.

⁸ *R. v. Hounsell*, 2 Moo. & Rob. 292.

⁹ *R. v. Coxhead*, 1 Car. & K. 623.

their loss of time and trouble, as in cases of felony.¹ By sect. 2, orders for the payment of the money in such cases shall be the same as in cases of felony.²

Trial.] The trial in this case cannot be at the quarter sessions, nor by recorders.³

CHAPTER XIV.

OF UNNATURAL CRIMES.

Unnatural crimes.] By 24 & 25 Vict. c. 100, s. 61, whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than ten years.

By sect. 62, whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor, and liable to penal servitude not exceeding ten nor less than three years, or to imprisonment not exceeding two years, with or without hard labour.⁴

And by sect. 63, whenever, upon the trial for any offence punishable under this Act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only.

Unnatural crimes are sodomy and bestiality. Sodomy is an unnatural connection between the male sex, or between males and females, and bestiality is an unnatural communication between

¹ Sect. 1.

² See further upon this subject, East, P. C. 228; 2 Hale, P. C. 289. Whether it be an indictable offence for a man to secrete a woman big with child by him, in order to prevent her from giving evidence to charge him, *quære?* See *R. v. Chandler*, 1 Str. 612; 2 Ld. Raym. 1368; 8 Mod. 336. But the indict-

ment was held bad on demurrer, because the words, "*gravidam cum illegitimo*," were used, and that cannot be affirmed until the woman be delivered, for *non constat* but that the parties might be united in lawful wedlock.

³ 5 & 6 Vict. c. 38, s. 1.

⁴ See sect. 63,—that penetration is sufficient.

males, females, and beasts.¹ On the one hand, it may be observed, that the act must be in that part where sodomy is usually committed;² and, on the other, it seems that bestiality must be confined to the term "beast." Therefore, emission in a child's mouth was held not to be sodomy.³ Before the 9 Geo. 4, c. 31, s. 15, an offence with a fowl was not bestiality, at least where the fowl was so small that its private parts would not admit those of a man;⁴ but a fowl is an animal, although not a beast, and therefore the objection would not now avail.

The same law regarding penetration prevails here as in rape, and the penetration, without emission *in corpore*, has been deemed sufficient to support a charge of felony.⁵ So in bestiality.⁶ And if the crime be committed on a child under fourteen, it is felony in the agent only,⁷ whereas if the agent be under fourteen, and the pathic be of years of discretion, it is felony only in the pathic.⁸

Indictment.] The indictment charges, that A., feloniously, and against the order of nature, had a venereal affair with B., and him, the said B., did carnally know, &c.;⁹ and then did with the said B., feloniously, and against the order of nature, commit the abominable crime of buggery. An indictment charged, that the two defendants, in a certain open and public place called, &c., frequented by divers of the liege subjects, &c., unlawfully met together for the purpose and with the intent of committing with each other, openly, lewdly, and indecently, in the said public place, divers nasty, wicked, filthy, lewd, beastly, unnatural, and sodomitical practices, and then and there unlawfully, &c., did commit with each other, in sight of divers of the liege subjects, &c., in the said public place then passing, divers such practices as aforesaid. This was held bad for want of specifying any offence with legal certainty.¹⁰

An indictment for bestiality follows the precedent of sodomy, only mentioning the particular animal instead of B. But it seems that it should go further, and aver that the said A. then and there committed the abominable crime of buggery, &c.¹¹

An indictment charged the offence to have been committed with a certain animal called a "bitch," and it was held sufficiently cer-

¹ East, P. C. 480. *R. v. Jellyman*, 8 C. & P. 604. Where a man assaulted his own wife in this manner. No complaint having been made for two years in a case of bestiality, Alderson, B., would not permit the case to go on. *R. v. Robins*, 1 Cox, 114.

² 1 Russ. C. M. 698.

³ *R. v. Jacobs*, Russ. & Ry. 331.

⁴ *R. v. Mulreaty*, 1 Russ. C. M. 699.

⁵ *R. v. Reeksphear*, 1 Moo. C. C. 342; although it was not so for-

merly. *R. v. Parker*, 1 Russ. C. M. 681. See further, 1 Hawk. c. 4; East, P. C. 480.

⁶ *R. v. Cozins*, 6 C. & P. 351, Park, J., where the prisoner being with a ewe, was disturbed before emission.

⁷ East, P. C. 480.

⁸ *R. v. Allen*, Den. 364; 18 L. J. M. C. 72; 2 Car. & K. 869.

⁹ East, P. C. 480.

¹⁰ *R. v. Rowed*, 3 Q. B. 180;

2 Gale & D. 518; 6 Jur. 396.

¹¹ See Archbold's Cr. Pl. 568.

874 *Making Gunpowder with intent to commit Felony, &c.*

tain, although the females of foxes and of some other animals are called bitches as well as the female of the dog.¹

It is not competent to give evidence of unnatural propensities on the part of the prisoner, not even if he have admitted having committed such offence upon a former occasion.²

Verdict.] The verdict in this case might have been, in sodomy, guilty of an assault, under 1 Vict. c. 85, s. 11, but it is so no longer.

But upon a charge of bestiality this verdict could not be given. The prisoner might have been detained, and indicted for a misdemeanor in attempting to commit a felony.³

Mariners guilty of these crimes are punishable with penal servitude, &c., by the judgment of a court-martial.⁴

CHAPTER XV.

OF "MAKING GUNPOWDER WITH INTENT TO COMMIT FELONY, AND OF SEARCHING FOR THE SAME."

By 24 & 25 Vict. c. 100, s. 64, whosoever shall knowingly have in his possession, or make or manufacture, any gunpowder, explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument, or thing, with intent by means thereof to commit, or for the purpose of enabling any other person to commit, any of the felonies in this Act mentioned, shall be guilty of a misdemeanor, and liable to imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping.

By sect. 65, any justice of the peace of any county⁵ or place in which any such gunpowder, or other explosive, dangerous, or noxious substance or thing, or any such machine, engine, instrument, or thing, is suspected to be made, kept, or carried for the purpose of being used in committing any of the felonies in this Act mentioned, upon reasonable cause assigned upon oath by any person, may issue a warrant under his hand and seal for

¹ *R. v. Allen*, 1 Car. & K. 495.

² *R. v. Cole*, 1 Russ. C. M. 700.

³ *R. v. Eaton*, 8 C. & P. 417.

⁴ 24 & 25 Vict. c. 115, ss. 38, 46, nos. 4-7.

⁵ Liberty is omitted ; whether place will supply the want is very doubtful.

searching, in the daytime, any house, mill, magazine, storehouse, warehouse, shop, cellar, yard, wharf, or other place, or any carriage, waggon, cart, ship, boat, or vessel, in which the same is suspected to be made, kept, or carried for such purpose as herein-before mentioned; and every person acting in the execution of any such warrant shall have, for seizing, removing to proper places, and detaining all such gunpowder, explosive, dangerous, or noxious substances, machines, engines, instruments, or things, found upon such search, which he shall have good cause to suspect to be intended to be used in committing any such offence, and the barrels, packages, cases, and other receptacles in which the same shall be, the same powers and protections which are given to persons searching for unlawful quantities of gunpowder under the warrant of a justice by the Act passed in the session holden in the twenty-third and twenty-fourth years of the reign of her present Majesty, cap. 139,¹ intituled an Act to amend the law concerning the making, keeping, and carriage of gunpowder and compositions of an explosive nature, and concerning the manufacture, sale, and use of fireworks.²

CHAPTER XVI.

OF THE PROCEDURE UNDER THE ACT RELATING TO OFFENCES AGAINST THE PERSON.

By 24 & 25 Vict. c. 100, s. 66, any constable or peace officer may take into custody, without a warrant, any person whom he shall find lying or loitering in any highway, yard, or other place during the night, and whom he shall have good cause to suspect of having committed or being about to commit any felony in this Act mentioned, and shall take such person as soon as reasonably may be before a justice of the peace.

By sect. 67, in the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except murder) shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour; and every accessory after the fact to murder shall be liable to penal servitude for life

¹ Sect. 25.

² As to malicious injury by gun-

powder, see 24 & 25 Vict. c. 97, ss. 9, 10.

or not less than three years, or to imprisonment not exceeding two years, with or without hard labour; and whosoever shall counsel, aid, or abet the commission of any indictable misdemeanor punishable under this Act shall be liable to be proceeded against, indicted, and punished as a principal offender.

The 68th section provides for the admiralty jurisdiction.

By sect. 69, whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this Act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.

By sect. 70, whenever solitary confinement may be awarded for any offence under this Act, the court may direct the offender to be kept in solitary confinement for any portion or portions of any imprisonment, or of any imprisonment with hard labour, which the court may award, not exceeding one month at any one time, and not exceeding three months in any one year; and whenever whipping may be awarded for any offence under this Act, the court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence.

By sect. 71, whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the court may, if it shall think fit, in addition to or in lieu of any punishment by this Act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act otherwise than with death the court may, if it shall think fit, require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized: provided that no person shall be imprisoned for not finding sureties under this clause for any period exceeding one year.

By sect. 72, the writ of *certiorari* is taken away, and the warrant of commitment is not to be void by reason of any defect, provided there be an allegation of a valid conviction.

By sect. 73, where any complaint shall be made of any offence against sect. 26 of this Act,¹ or of any bodily injury inflicted upon any person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount, in point of law, to a felony, or an attempt to commit a felony, or an assault with intent to commit a felony, and two justices before whom such complaint is heard shall certify that it is necessary that the prosecution should be conducted by the guardians of the union or place, or, where there are no guardians, by the overseers, such guardians or overseers, as the case may be, upon personal service of such certificate, or a dupli-

¹ Not providing apprentices or servants with food.

cate thereof, upon the clerk of such guardians or upon any one of such overseers, shall conduct the prosecution, and shall pay the costs reasonably and properly incurred by them therein (so far as the same shall not be allowed to them under any order of any court) out of the common fund of the union, or out of the funds in the hands of the guardians or overseers, as the case may be; and, where there is a board of guardians, the clerk or some other officer of the union or place, and, where there is no board of guardians, one of the overseers of the poor, may, if such justices think it necessary for the purposes of public justice, be bound over to prosecute.

Costs.] By sect. 74, where any person shall be convicted on any indictment of any assault, whether with or without battery and wounding, or either of them, such person may, in addition to any sentence, be adjudged to pay to the prosecutor his actual costs of the prosecution, and such moderate allowance for the loss of time as the court shall by affidavit or other inquiry and examination ascertain to be reasonable; and unless such sum shall be sooner paid, the offender shall be imprisoned for any term not exceeding three months, in addition to the term of imprisonment (if any) to which the offender may be sentenced.

By sect. 75, the court may, by warrant under hand and seal, order such sum as shall be so awarded to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and that the surplus, if any, arising from such sale, shall be paid to the owner; and in case such sum shall be so levied the imprisonment awarded until payment of such sum shall thereupon cease.

By sect. 76, the summary proceedings in England are directed to be under 11 & 12 Vict. c. 43, and in Ireland under 14 & 15 Vict. c. 93. London and the Metropolitan Police District are saved.

By sect. 77, the costs of any prosecution for misdemeanor under the Act are to be allowed as in cases of felony.

CHAPTER XVII.

OF THE CORONER'S INQUISITION.

We purpose to treat in this place more particularly of the proceedings of the coroner when he takes an inquisition of death;¹ and with

¹ To which his jurisdiction is terferre in cases of fire. He can limited. Therefore he cannot in- only proceed in homicide and *super*

reference to this point, it is of necessity that the inquest should be taken *super visum corporis*;¹ and formerly, it was a matter of some consideration to settle correctly, before what coroner an inquest should be holden; but as we shall see presently, the coroner of the jurisdiction where the body lies dead is the proper person to take the office. Therefore, if the body cannot be found, or if it be impracticable to disinter it, the coroner must abandon his proceeding, and leave the matter to be investigated in a more solemn manner; *i. e.*, first, before justices of the peace,² and, secondly, before a higher criminal tribunal. Or, it might be, in the first instance, before the Court of King's Bench, if the felony were committed in the county where the court sits,³ that court having supreme control throughout England,⁴ and the Court of King's Bench may make commissions to inquire in other counties.⁵ Or, again, the inquiry may take place before commissioners of oyer and terminer,⁶ but not before a grand jury at the assizes;⁷ and if the coroner should omit or refuse to hold his court the same appeal was resorted to.⁸ But now by 23 & 24 Vict. c. 116, s. 5, upon any refusal of a coroner to hold an inquest, the attorney-general may apply to the Court of Queen's Bench, or to a judge in vacation, for a rule calling on the coroner to shew cause why he should not hold the inquest, and if the rule be absolute, it may be with or without costs, and in case of refusal or neglect, the coroner becomes liable to an attachment. Further, it seems that the inquisition should be held upon the whole body; so that where a skull only was dug up and identified, the court stayed the filing of the verdict, there being an affidavit that the person had been dead for five years.⁹ However, if the coroner should not act in strict accordance with his office, but, on the contrary, should persist in taking the inquisition, notwithstanding the defect above mentioned, circumstances may be disclosed which will warrant the court in recording his proceedings. As if it should turn out, upon satisfactory affidavits, that a dishumation of the body could not have been productive of any benefit, nor information to the jury.¹⁰ Here, the court exercised a discretion upon facts arising out of the particular case before them, and so it would be if the body had lain so long in the ground as to make it doubtful whether a view could serve in any way the purposes of justice.¹¹

Jurisdiction.] The question concerning the inquest upon the

visum. *R. v. Herford*, 29 L. J. Q. B. 249. In this case the court also had no doubt that a prohibition would lie to a court of criminal as well as civil jurisdiction.

¹ *R. v. Ferrand*, 3 B. & Ald. 260; 1 Hawk. c. 27, ss. 11, 12.

² East, P. C. 379.

³ 1 Hawk. c. 27, s. 12.

⁴ 1 Ventr. 182.

⁵ Id.

⁶ Id.

⁷ *R. v. Killinghall*, 1 Burr. 17.

⁸ See 1 Burr. 18, 19.

⁹ *R. v. Bond*, Str. 22.

¹⁰ *R. v. Causey*, 2 Hawk. c. 9, s. 24.

¹¹ East, P. C. 379.

body itself, having been mentioned, the consideration arises as to the jurisdiction,—before what coroner the inquiry should proceed, whether before him whose office is where the death has happened, or again, where the body is found, or, whether it should be where the mortal hurt has occurred. There were distinctions and difficulties upon this point. By the statute 2 & 3 Edw. 6, c. 24, it was settled that the inquisition should be taken in the county where the death should happen. But this Act was held not to apply where the death arose from accidental injury, and it was doubted whether it would extend to a felonious injury committed out of the borough, although the death took place within the borough. And, at all events, the coroner of the borough had no jurisdiction, neither at common law, nor by statute, in cases of misadventure.¹ So, where a body, found in the Medway, within the limits of the coroner for the city of Rochester, was removed into the county of Kent, and there viewed by a jury of the city of Rochester, it was held that an inquisition held by the coroner of the city of Rochester within that city could not be supported.²

With reference to these cases, it is to be noted, that the statute 6 & 7 Vict. c. 12, has settled the difficulties concerning the injury and death, but it would not cure the defect of the coroner of the city of Rochester viewing the body *dehors* his jurisdiction. By that Act, sect. 1, the coroner only within whose jurisdiction the body of any person upon whose death an inquest ought to be holden, shall be lying dead, shall hold the inquest, notwithstanding that the cause of death did not arise within the jurisdiction of such coroner, and in the case of any body found dead in the sea, or in any creek, river, or navigable canal, within the flowing of the sea, where there shall be no deputy coroner for the admiralty, the inquest shall be holden only by the coroner having jurisdiction in the place where the body shall be first brought to land.

The death occurred in the county of S.; after death the body was removed to L. The inquest was held by the coroner of L., and a trial for manslaughter took place upon the inquisition. It was held that the inquisition was right, although some observations were made upon the obscurity of the statute.³

By 6 & 7 Vict. c. 12, s. 2, it is enacted, that for the purpose of holding coroner's inquests, every detached part of a county, riding, or division,⁴ shall be deemed to be within that county, &c., by which it is wholly surrounded, or where it is surrounded by two or more counties, &c., or within that one with which it has the longest common boundary.

By sect. 3, if a verdict of murder or manslaughter, or accessory

¹ *R. v. Great Western Railway Company*, 3 Q. B. 333 ; 2 Gale & D. 773. See also *R. v. Grand Junction Railway Company*, 11 Ad. & El. 128, n.

² *R. v. Hinde*, 5 Q. B. 944.

³ *R. v. Ellis*, 2 Car. & K. 470.

⁴ There being some doubt whether coroners appointed expressly for some such detached parts of counties were not superseded by this Act of 6 & 7 Vict., the jurisdiction of such coroners was reserved to them by 7 & 8 Vict. c. 92, s. 23.

before the fact to any murder, shall be found at any such inquest, the coroner, and the justices of oyer and terminer, and gaol delivery for the county, city, district or place where the inquest shall be holden, and all other persons, shall have the same powers respectively for the commitment, trial, and execution of the sentence, as they now possess for such commitment, &c. within the jurisdiction where the death happened.

However, the inquiry need not take place at the same spot, nor, as it seems, in the same township where the body has been viewed,¹ but it is usual to summon the jury from the immediate neighbourhood; and the coroner may adjourn from place to place, as well as from time to time,² but the real place should be stated in the inquisition.³

The coroner is not compelled to hold two inquisitions, where there are more deaths than one, if the persons deceased were killed by the same cause, and died at the same time.⁴

By 6 & 7 Vict. c. 83, coroners may appoint a deputy, subject to the approval of the lord chancellor. Nevertheless, such deputy may not act except during the illness of the coroner, or during his absence for some lawful and reasonable cause. And the appointment may be cancelled and revoked by the coroner making it. The fact of the coroner being engaged upon another inquisition, is a sufficient cause of absence, although he may, in fact, be present at a portion of the inquiry which his deputy has conducted.⁵ But after the jury are sworn and the inquiry has commenced, the deputy should go on with the case, notwithstanding the appearance of the coroner.⁶

A coroner was removed by an order under the writs *de coronatore amovendo* and *de coronatore eligendo* at the same time for being in confinement out of the county.⁷ Again, the lord chancellor removed a coroner under 23 & 24 Vict. c. 116, s. 6, for being intoxicated in the performance of his duty.⁸

Duties in cases of violent or doubtful death.] In cases of violent or doubtful death, it becomes the duty of all persons cognizant of the fact, and likewise that of the officers of the district, to take care that the coroner be speedily informed of the casualty,⁹ and in cases of violence, that the offender be forthwith apprehended, either upon

¹ 2 Hawk. c. 9, s. 25.

² 3 Bulstr. 173.

³ East, P. C. 383.

⁴ *R. v. West*, 1 Gale & D. 481.

⁵ *R. v. Perkin*, 14 L. J. M. C. 87; 7 Q. B. 165.

⁶ 7 Q. B. *ut supra*. The inquisition taken before him is not invalid if stated to have been taken before the coroner. It ought to be so described. *Id.* Thus, by A. B., deputy, &c. *Id.* Whether the coroner for a borough is a corporate

officer within 6 & 7 Vict. c. 83, s. 1, is made a question. *R. v. Grimshaw*, 16 L. J. Q. B. 385; see also 10 Q. B. 747. S. C.

⁷ *Ex parte Parnell*, 1 Jac. & W. 451.

⁸ *In re Ward*, 30 L. J. Ch. 775, by petition. See 7 & 8 Vict. c. 92, s. 29. And as to the election of coroners, see 7 & 8 Vict. c. 92, and 23 & 24 Vict. c. 116.

⁹ East, P. C. 378; 1 Salk. 377.

hue and cry or otherwise.¹ And if such active search be not carried into effect, the person guilty of neglect is punishable by fine and imprisonment.² And, formerly, it was the custom to amerce the vill where such an event took place attended by bloodshed, unless the offender were rendered to justice, and in case of insufficiency on the part of the vill, the hundred was fined, and, in default of the hundred, the county.³ So it would be, if the body were allowed to remain unburied for an unreasonable time before summoning the coroner, even without any ground for suspecting that the deceased had been murdered, or slain by another.⁴ As, for instance, if a prisoner should happen to die, and putrefaction should take place in his body before the inquest is applied for, the gaoler or the township shall be amerced.⁵ And, if the coroner do not appear in a convenient time, he also is liable to fine and imprisonment.⁶ By 1 Hen. 8, c. 7, the forfeiture for each default by such coroner was 40s., concerning which, by sect. 2, justices of the peace and of assize had power to inquire.

By 4 Edw. 1, st. 2, (*de officio coronatoris*):—

1. When any person is reported to be slain, or suddenly dead, or wounded, the coroner is to assemble a jury from the neighbouring places for the purpose of inquiry,⁷ and in the case of a prisoner dead in gaol, six prisoners should form half the number of jurors, if there should be so many prisoners.⁸

This jury should be at least twelve in number, although they frequently amount to twenty or upwards, although twelve must agree to the verdict,⁹ and the main object of their inquiry must be the violent death, for they cannot rightly take into their consideration any other. And Sir Edward East cites instances where coroners have been punished for deviating from this rule, especially where their own private advantage has been the motive. As in the case of the coroners of Norfolk,¹⁰ and Anglesea,¹¹ who persisted in holding inquests upon persons who had unquestionably perished by shipwreck. So, in Cumberland, the coroner was proved to have been guilty of extortion, in taking a sum of money as a bribe for forbearing to hold an inquest, and the offence was aggravated, because, as the deceased had died in consequence of a fever, the coroner had no authority for his proceeding. He was sentenced to pay a fine of 100*l.*, to be imprisoned for six months, and to be removed from his office.¹²

2. The second branch of inquiry under the statute 4 Edw. 1, has reference to the place where the death happened, as whether it

¹ East, P. C. 377.

² 2 Hawk. c. 12, s. 4.

³ East, P. C. 378.

⁴ Id.

⁵ 2 Hawk. c. 9, s. 23.

⁶ 2 Hale, P. C. 58.

⁷ *R. v. Crosse*, 1 Sid. 204.

⁸ East, P. C. 383.

⁹ East, P. C. 383, In a civil

action it will be presumed after verdict that twelve such jurors had agreed upon an inquisition. 4 B. & C. 151; 6 Dowl. & Ry. 188.

¹⁰ East, P. C. 382.

¹¹ *R. v. The Coroner of Anglesea*, Id.

¹² *R. v. Harrison*, Id.

took place in any "house, field, bed, town, or tavern, or company, and who were there;" and then the guilty parties are, if possible, to be discovered, together with those who were present at the death, either men or women, and "of what age, if they can speak or have any discretion."

3. The persons then found guilty by the inquisition are to be forthwith committed to gaol; and,

4. Those who are found to have been there, but who are not guilty, are to be attached till the gaol delivery, and their names written on the rolls of the coroners.

5. Again, if the body be found in fields or woods, "it is to be inquired whether he was slain in the same place or not; and,

6. "If brought and laid there, endeavour shall be made to follow their steps which brought the body thither, whether he was brought upon a horse, or in a cart."

7. "It shall be inquired also whether the dead person were known, or else a stranger, and where he lay the night before." And here we may remark, that although the statute 4 Edw. 1, speaks only of persons slain, drowned, or suddenly dead or wounded, the common law jurisdiction of the coroner as to other matters survives, and, therefore, it is that he is warranted in taking inquests upon such as die in prison, from whatever cause their deaths may have arisen.¹ Because, amongst other possible circumstances, the death might be attributed to unreasonable hardships in gaol.² But neither at common law nor by statute is the coroner justified in interfering with any persons except those who are connected with or present at the death, whence it follows, that he cannot deal with accessories after the fact.³ Nor can he interfere, with propriety, to take cognizance of deaths in private families, in cases of apoplexy, unless he is sent for by the peace officers.⁴

8. Further directions are given to the coroner respecting such as have been found guilty of the murder. He is immediately to go to the house of the culprit, and inquire what goods he has, and what corn is in his grange, and, if he be a freeman, how much land he hath, and the annual value thereof, and what corn he hath upon the ground, which land, corn, and goods are to be valued and delivered to the township, which shall be answerable before the justices for all, and the land shall remain in the king's hands, until the lord of the fee have made fine for it. "The relation of the forfeiture is to the stroke so as to forfeit all mesne conveyances."⁵ But in cases of *felo de se*, goods and chattels only are forfeited. And it is not entirely agreed whether the reference ought to be made to the stroke, or to the inquisition, but it is said that the current of authorities is in favour of the stroke,—whilst Lord Hale would refer it to the death.⁶ "For," says Lord Hale, "suppose a man should give himself a mortal

¹ 2 Hawk. c. 9, s. 21.

² Id.

³ Id. s. 26.

⁴ *R. v. Kent, Justices*, 11 East, 229.

⁵ East, P. C. 388.

⁶ Id. 1 Hawk. c. 27, s. 10;
1 Hale, 414.

stroke, and live eleven months after, how shall he support himself and his family?

The statute then goes on to say, that, at the termination of the inquiry, the bodies of persons dead or slain shall be buried.

The second branch of the Act speaks of such as may be drowned, or who die suddenly, and it is to be inquired whether such were so drowned or slain, or strangled by the sign of a cord tied straight about their necks, or any of their members, or "upon any other hurt found upon their bodies." And if they were not slain, then ought the coroners to attach the finders, and all others in company.² The coroner ought not to exclude testimony offered at his inquest, on the ground that it may tend to criminate the witness.³

Deodands.] As long as deodands were allowed to continue, they were the subject of much difficulty and litigation. The object which seems to have attracted attention in former times to this point, was the purchase of masses for the souls of those who were suddenly snatched away; but, subsequently, the deodand came to be looked upon as the perquisite of the lord of the manor, as well as a medium to avoid purgatory. However, from and after the 1st day of September, 1846, deodands were abolished. Thus, by 9 & 10 Vict. c. 62, there shall (after that day) be no forfeiture of any chattel for or in respect of the same having moved to or caused the death of man; and no coroner's jury sworn to inquire, upon the sight of any dead body, how the deceased came by his death, shall find any forfeiture of any chattel which may have moved to or caused the death of the deceased, or any deodand whatsoever; and it shall not be necessary in any indictment or inquisition for homicide to allege the value of the instrument which caused the death of the decease, or to allege that the same was of no value.⁴

By 9 & 10 Vict. c. 93, an action is given to the relations of a deceased party, notwithstanding the death of the person injured through a wrongful act, neglect, or default, and although the

¹ 1 Hale, 414.

² See East, P. C. 381; 2 Hawk. c. 9, ss. 19, 20.

³ *Wahley v. Cooke*, 4 Exch. 511; 19 L. J. Ex. 91.

⁴ As to the old law, see 1 Hawk. c. 26; East, P. C. 386, &c.; Cro. Jac. 483; Poph. 136; 2 Keb. 719, 806. *R. v. Rolfe*, Fost. 266. *R. v. Grew*, Id. 267. S. C. *R. v. Grew*, Say. Rep. 249. *R. v. Stockton and Darlington Railway Company*, 8 Dowl. P. C. 516. *R. v. Grand Junction Railway Company*, 11 Ad. & El. 128; 3 Per. & D. 57.

R. v. Brownlow, 8 D. P. C. 157. *R. v. Polwart or Polworth*, 1 Q. B. Rep. 818; 1 Gale & D. 211; 9 Dowl. P. C. 1048. *R. v. West*, 1 Q. B. 826; 1 Gale & D. 481. *R. v. Eastern Counties Railway Company*, 10 Mees. & W. 58; 2 Dowl. (N. S.), 293. *R. v. London and Birmingham Railway Company*, 1 Dowl. (N. S.), 15. *Att. Gen. v. Eastern Counties Railway Company*, 3 Rail. Ca. 145; and see 6 & 7 Vict. c. 12, s. 4. which section was repealed by 24 & 25 Vict. c. 101.

death shall have been caused under such circumstances as amount in law to felony.

Of the finding.] Verdicts of coroner's juries are, for the most part, of murder,¹ manslaughter, justifiable homicide, accidental death, died by the visitation of God, insanity, *felo de se*,—in other words, the death is attributed to violent means, used by the deceased, or by some other person, or to the agency of some inanimate thing, or to the immediate interference of the Deity. Where the cause of death proceeds from the inanimate object, circumstances demanding inquiry might arise, independently of the old question of deodand; as, if a party should be killed in consequence of the bad state of some public work, as a bridge, in which case it shall be ascertained whether the inhabitants were in default, for if so, the township must be amerced.² Where the verdict is *felo de se*, the forfeiture is confined to goods and chattels, which belong either to the king, or to the lord of the franchise, &c. But a pardon before the finding of the offence in question will save the penalty.³ *Felo de se* may be, although the party did not intend to kill himself. For if A. endeavour to murder B., and give himself a mortal wound in the attempt, A. becomes a felon of this order, and his goods are forfeited.⁴ But if B. do any act in his own defence, whereby A., the assassin, is killed, A. is not *felo de se*, although the homicide on B.'s part is justifiable.⁵ Again, it is said, that if A. kill B. at B.'s command or persuasion, B. is not *felo de se*, because the assent of B. was against the laws both of God and man, although A. would be clearly guilty of murder.⁶ But it is added, that if A. were to be persuaded by B. to buy a deadly poison in order that they might both take it together, for the purpose of mutual self-destruction, and both were then to partake of it, B. would be *felo de se*, because of his original promotion of the wicked design.⁷

The inquisition.] We come now to the practical details of the inquisition. It has been said that the inquiry must proceed *super visum corporis*, and that a jury of twelve at the least must be empanelled. It is the coroner's next business to see that all the witnesses who can speak to facts are fully heard, and that the evidence is properly taken. By 7 Geo. 4, c. 64, s. 4, every coroner upon any inquisition before him taken, whereby any person shall be indicted for manslaughter, or murder, or as an accessory to murder before the fact, shall put in writing the evidence given to the jury before him, or as much thereof as shall be material, and shall have authority to bind over by recognizance, all persons who know or declare anything material touching the said manslaughter

¹ See as to the verdict where an inquest was held upon dead bastard children. *R. v. Bayley*, Car. Cr. L. 243.

² 2 Hawk. c. 9, s. 28. *R. v. Hall*, Al. 51.

³ 1 Hawk. c. 27, s. 9. See also sects. 7 & 8; 3 Mod. 101.

⁴ 1 Hawk. c. 27, s. 4.

⁵ Id. sect. 5.

⁶ Id. sect. 6.

⁷ Id.

or murder, or offence of being accessory, to appear at the next court of oyer and terminer, or gaol delivery, or superior court of a county palatine, or great sessions, where the trial is to be for the purpose of giving evidence. And the coroner is to subscribe the evidence, recognizances, and inquisition, and deliver the same to the officer of the court where the trial is to be, before or at the opening of the court. By sect. 5, the court may, upon examination and proof, in a summary manner, fine the coroner for neglect. And the 6th section extends the provisions of the Act to coroners, not only of counties at large, but also of all their jurisdictions. Moreover, the coroner must entirely confine himself to the examination of witnesses for the prosecution. Scorey, being in search of poachers with his master, an under keeper, was so unfortunate as to strike a man upon the head, upon his refusing to surrender, and to kill him. The coroner would not receive the testimony of the master, but admitted the companion of the slain person to give evidence, and then told the jury to find a verdict of murder, but the jury persisted in their opinion that this was "accidental death," upon which the coroner recorded their verdict, but sent Scorey to gaol, by his warrant on the charge of murder. But the Court of King's Bench, however, admitted the prisoner to bail upon affidavit of the above facts, and granted a rule against the coroner to show cause why an information should not be filed against him.¹ So, the inquisition was quashed, where the coroner refused to hear witnesses on behalf of the administrator to prove the insanity of the deceased, and *felo de se* was found.² And it is likewise the coroner's strict duty to examine the surgeon, in order that the cause of death may be explained in as satisfactory a manner as possible to the inquest.³ Still, the coroner is not under an obligation to bind over the witnesses for the defence. He ought not to do so, but to confine himself to bind over those for the prosecution; yet, if he should, the clerk of indictments, who has all the names put on the back of the indictment, is not to be blamed, and although all the witnesses on both sides go before the grand jury.⁴ The duty of coroners is to read over to every witness his evidence, and to desire him to sign it.⁵

Medical witnesses.] For some time there was much difficulty and considerable hardship in the case of medical witnesses.⁶ But late Acts of parliament have provided for these inconveniences. By 6 & 7 Will. 4, c. 89, s. 1,⁷ if it shall appear at any inquest that the deceased was attended at his death or during his last illness by any legally qualified medical practitioner, the coroner may command the attendance of such practitioner, or, if the de-

¹ *R. v. Scorey*, Leach, 43.

² *R. v. Barclee*, 2 Sid. 101.

³ *R. v. Quinch*, 4 C. & P. 571.

⁴ *R. v. Taylor*, 9 C. & P. 672.

⁵ *R. v. Plummer*, 1 Car. & K. 600.

⁶ See *R. v. Taylor*, 5 C. & P. 301.

where the costs of opening a body by the direction of the coroner were refused.

⁷ Not to extend to Scotland: sect. 7.

ceased was not so attended, any such legally qualified person, being at the time in actual practice in or near the place where the death has happened, may be summoned; and the coroner, either in his order for the attendance of the medical witness, or at any time between the issuing of such order and the termination of the inquest, may direct a *post-mortem* examination, with or without an analysis of the contents of the stomach or intestines, by the medical witness or witnesses summoned, provided, that if it shall be stated upon oath before the coroner, that the death was caused by the improper or negligent treatment of any particular medical practitioner, that person shall not be allowed to perform or assist at the *post-mortem* examination. By sect. 6, a penalty of 5*l.* is awarded against any such practitioner should he disobey the coroner's order, either upon proof of personal service of the order, or of the receipt of such order in time for attendance, or of service at the residence of such person. Complaint is to be made by the coroner or any two of the jury before any two justices having jurisdiction where the inquest is held, and in default of payment, the penalty may be enforced by distress and sale of the offender's goods, as in other cases of forfeiture.

The 2nd section provides for a case in which the majority of the jury may not be satisfied with the evidence of the medical practitioner or other witnesses. In such a case the said majority may name to the coroner any other practitioner, in writing, duly qualified, and require the coroner to issue his order for the attendance of that person, and for the performance of a *post-mortem* examination, with or without an analysis, although such an examination might have been previously performed. The coroner who refuses to obey such a request by the jury, and to issue his order, shall be guilty of a misdemeanor. The 3rd section regulates the payment of fees to the medical witnesses,¹ and directs that they shall be paid out of the poor's rate. Nevertheless, as to the last provision, it is repealed by 1 Vict. c. 68, s. 2, and such fees are to be paid by the coroner to the medical witness summoned immediately after the termination of the proceedings, and repaid to him out of the county rate or borough fund,² and these payments are compulsory upon justices in quarter sessions. With reference to orders for payment under 25 Geo. 2, c. 29, the Act for remunerating the services of coroners, the justices were the judges of his conduct, and the Court of King's Bench would not interfere with the discretion of the sessions; but there was no such latitude under 6 & 7 Will. 4, c. 89, and 7 Will. 4 & 1 Vict. c. 68.³ And now by 23 & 24 Vict. c. 116, s. 4, the coroner is to be paid by salary instead of fees; and by sect. 3, all provisions of acts as to coroners' fees are repealed.

But, to go on with the statute 6 & 7 Will. 4, c. 89. By sect. 4, no fee can be earned for any *post-mortem* examination which may

¹ For a *post-mortem* examination 2*l.* 2*s.*; for attendance otherwise, 1*l.* 1*s.*

² Sects. 2, 3.

³ *R. v. Justices of Carmarthenshire*, 16 L. J. M. C. 167; 10 Q. B. 796.

be instituted without the previous direction of the coroner. And by sect. 5, if any such inquest shall be holden in a public institution, whether supported by endowments or by voluntary subscriptions, the medical officer whose duty it may have been to attend the deceased person, as a medical officer of such institution, shall not be entitled to those fees. The inquisition should be drawn up for the signature of the jurors immediately after the verdict, and it should not be adjourned to a future day.¹ Where he did so adjourn, and then the jury refused to sign, upon which he threatened to commit them, the inquisition was set aside.²

Form of inquisition.] Notwithstanding the high opinion which was formerly entertained of the coroner's inquisition, it is not now regarded, at least, in cases of murder and manslaughter, in a much higher light than that of a preliminary inquiry, although it was at one time considered that a finding could scarcely be traversed.³ At the present day, however, although convictions have certainly been obtained upon such an inquisition without an indictment, it is very usual to take exceptions to the record itself, and these objections have usually been made with greater success to inquisitions than to indictments.

However, the statute 6 & 7 Vict. c. 83, has stepped in to arrest in a great measure the technical objections which at one time so often prevailed. By sect. 2, no inquisition found upon an inquest, nor judgment recorded thereupon, shall be quashed, stayed, or reversed for want of the averment therein of any matter unnecessary to be proved, nor for the omission of the words, "with force and arms," or, "against the peace," or, "against the form of the statute," nor for the omission or insertion of any other words or expressions of mere form or surplusage, nor for the insertion of the words "upon their oath," instead of the words "upon their oaths," nor for omitting to state the time at which the offence was committed, where time is not the essence of the offence, nor for stating the time imperfectly,⁴ nor because any person or persons mentioned in any such inquisition is or are designated by a name of office or other description or appellation instead of his, her, or their proper name or names, nor by reason of the non-insertion of the names of the jurors in the body of any such inquisition, or of any difference in the spelling of the names of any of the jurors in the body of any such inquisition, and the names subscribed thereto, nor because any juror or jurors shall have set his or their mark or marks to any such inquisition instead of subscribing his or their name or names thereto, nor because any such mark or marks is or are unattested,⁵ provided the name or names of such juror or

¹ *R. v. Mallet and another*, 1 Cox, 336.

² S. C.

³ 2 Hawk, c. 9, ss. 54, 55.

⁴ See the cases before the statute. *R. v. Philips*, 1 Str. 261. *R. v. Hethersal*, 3 Mod. 80. *R. v. Huggins*, 3 C. & P. 414. *R. v. Brown-*

low, 8 D. P. C. 157; 11 Ad. & El. 119; 3 Per. & D. 52. *R. v. Mitchell*, 7 C. & P. 800. *R. v. Devett and another*, 8 C. & P. 639.

⁵ *R. v. Bowen*, 3 C. & P. 602; *R. v. Stockton and Darlington Railway Company*, 8 D. P. C. 516.

jurors is or are set forth, nor because any juror or jurors has or have signed his or their christian name or names by means of an initial, or partial signature only, and not at full length,¹ nor because of any erasure or interlineations appearing in any such inquisition, unless the same shall have been proved to have been made therein after the same was signed, nor for want of a proper venue, where the inquest shall appear or purport to have been taken by a coroner of or for a county, riding, city, borough, liberty, division, or place in which it shall appear or purport to have been taken, nor (except only in cases of murder or manslaughter) for or by reason of any such inquisition not being duly sealed,² or written upon parchment,³ nor by reason of any such inquisition having been taken before any deputy, instead of the coroner himself, nor because the coroner and jury did not all view the body at one and the same instant, provided they all viewed the body at the first sitting of the inquest, and in all or any such cases of technical defect, any judge of the courts at Westminster, or judge of assize or gaol delivery, may order an amendment to be made if he shall so think fit.

These technical defects are, therefore,—

1. With reference to certain averments, omissions, and insertions of a technical nature, and to unnecessary proofs.
2. Defects as to time.
3. As to names.
4. Erasures.
5. Venue.
6. Paper or parchment.
7. As to deputy.
8. As to simultaneous view.⁴

Still, matters of form not mentioned in the statute, and not capable of amendment by the court, and matters of substance, remain as before.

Then as to the jurors, if by reason of the religious or other opinions of a juror, the oath should be dispensed with, as where the witness is a Quaker or Moravian, the coroner in setting forth the affirmation, should mention the persuasion of the person making such affirmation.⁵ The signatures of the coroner and jurors are also essential;⁶ and the coroner's clerk ought not to sign in

¹ *R. v. Evett*, 6 B. & C. 247; *R. v. Bennett*, 6 C. & P. 179. *R. v. Brownlow*, ut supra; 2 Hawk. c. 9, s. 22.

² See East, P. C. 383.

³ *R. v. Beavers and others*. See East P. C. 383. "The inquisitions there were only signed by the coroner and foreman of the jury." *Id. n. R. v. Gregory*, 15 L. J. M. C. 38. where an inquisition taken on pa-

per, but not quashed, was held admissible in evidence, not as an inquisition, but as proof that an inquiry into the subject matter of it had taken place.

⁴ Sect. 3 restricts this Act to England and Wales.

⁵ *R. v. Polfield*, 2 D. P. C. 469.

⁶ *R. v. Norfolk Justices*, East, P. C. 383.

the name of the coroner.¹ Though by "E. M., his deputy," is good.² So that it would be a good objection that no jurors' names were appended to the inquisition, should the fact turn out so; although the signatures of twelve out of twenty-three were deemed sufficient.³ And the names ought to correspond with those mentioned in the caption of the inquisition.⁴ Although if several persons have the same christian and surname, it is not necessary to distinguish them in the caption either by abode or addition.⁵ In cases of murder and manslaughter the inquisition should be sealed as well as signed, and written on parchment,⁶ for the excepted cases show a clear conclusion that as to them parchment is still necessary.⁷

The inquisition must be absolute in its finding. *Nos certe credimus* has been held insufficient.⁸ And in other respects, there should be the same particularity as in an indictment. Thus, the particular circumstances of the case ought fully to appear, such as the nature and manner of a mortal wound.⁹ And it is a principle that the conclusion should be warranted by the premises, so that, in a case of self-drowning, the mode by which the death was accomplished should be explained, "for it is not sufficient to find that a man murdered himself, without showing how."¹⁰ So, where several persons were killed by the fall of a public building, the inquisition was held faulty for want of stating distinctly what part of the materials caused the death, or the precise value of them.¹¹ But the latter objection is now done away with by the statute 9 & 10 Vict. c. 62. *A fortiori*, if it be not stated that the party died of the fall, wounds, or other injury, the verdict cannot stand.¹² And it has been held that the absence of *murdravit* vitiated a verdict of wilful murder.¹³ A coroner's jury found, that the death was occasioned by means of a locomotive engine belonging to B., being driven against A., and that the same "did feloniously cast to the ground" the deceased. This was held not to be a sufficient description of the cause of death.¹⁴ Facts, therefore, which the verdict does not warrant, should not be stated, and thus it was that upon one occasion the court quashed a verdict of justifiable homicide.¹⁵ Again, the place where the death happened, or where the

¹ *In the matter of Daws*, 8 Ad. & El. 936; 1 Per. & D. 146.

² *R. v. Perkin*, 14 L. J. M. C. 87.

³ See Poph. 202; 1 Lew. C. C. 55.

⁴ *R. v. Huggins*, 3 C. & P. 414.

⁵ *R. v. Nicholas*, 7 C. & P. 538.

⁶ East, P. C. 383; 6 & 7 Vict. c. 83, s. 2, *ut supra*.

⁷ *R. v. Whalley*, 19 L. J. Q. B. 14; 7 Dowl. & L. 317.

⁸ *Anon.* 12 Mod. 112.

⁹ *R. v. Clerk*, 1 Salk. 377; 7 Mod. 16.

¹⁰ *R. v. Parker*, 2 Lev. 140; 3 Salk. 101.

¹¹ *R. v. Deputy Steward and Coroner of London*, cited, 10 Law Mag. 92, Jerv. Archb. 408.

¹² *R. v. Clerk*, *ut supra*.

¹³ *R. v. Aldenham*, 2 Lev. 152. See 1 Salk. 377.

¹⁴ *R. v. Stockton and Darlington Railway Company*, 8 D. P. C. 516.

¹⁵ *In re Culley*, 5 B. & Adol. 230; 2 Nev. & M. 61.

body was found, must be inserted.¹ This means the place where the offence was committed, not the venue, which has been already provided for by the statute 6 & 7 Vict. c. 83.² If the place, however, under any circumstances, appears not to be within the jurisdiction of the coroner, the inquisition will not hold.³ He must also be coroner for the district.⁴ Although coroner *in* the county is sufficient, without saying coroner *for* the county.⁵ Therefore, an inquest taken for the liberty of an honour must, on the face of it, appear to have been taken within such honour.⁶

An inquisition charging principals in the second degree with being "feloniously present, then and there abetting," &c., could not be supported, since "feloniously" could not be construed to extend beyond the word "present."⁷ And "so the jurors say," &c. (the concluding averment), requires neither time nor place to be stated.⁸

Amendments.] Besides the amendments now permitted by the statute 6 & 7 Vict. c. 83, there were some faults which might have been amended before. But these were chiefly defects of form when the substance had been duly found by the inquest.⁹ Upon some occasions the judges have sent for the coroner into court, for the purpose of amending the inquisition.¹⁰ It is agreed, however, that an amendment as to matters of substance cannot be permitted.¹¹ And the question, therefore, is, what shall be said to be matters of substance. The inquisition stated that A. feloniously drowned himself, without adding, that he thereupon died, but the court held, that his death was a necessary inference from a felonious submersion, and suffered an amendment to that effect.¹² In the same case, it was said by Twisden, J., that *murdravit* might be introduced as an amendment, but Kelyng was of a different opinion.¹³ So, where the jury had found a cart, as a deodand, to be the property of "Messrs. Williams & Co., in the county of Essex, calico printers," Yates, J., allowed an alteration to "Stephen Williams and Clement Bellamy, of the Poultry, London, linendrapers."¹⁴ But this last case cannot be relied upon as an authority, unless it can be ascertained upon what affidavit the alteration was made, for, upon a more recent occasion, where it was found that the death had been occasioned by a coach and horses, the property of A. & B. & Co., it was held that the verdict

¹ *R. v. Evett*, 6 B. & C. 247. *R. v. Buckler*, Dy. 69.

² Sect. 2.

³ *R. v. Thorny*, Cro. Jac. 276.

⁴ *R. v. Dearing*, Cro. El. 193.

⁵ *R. v. Heydon*, 4 Rep. 41.

⁶ *R. v. The Coroner for the Liberty of Pomfret Honour*, 8 Jur. 910.

⁷ *R. v. Nicholas*, 7 C. & P. 538.

⁸ S. C.

⁹ 1 Hawk. c. 27, s. 15.

¹⁰ 3 Mod. 101.

¹¹ *R. v. Shepherd*, 1 Sid. 259; 11 Mod. 271. *R. v. Burdy* cited.

¹² *R. v. Glover*, 1 Sid. 259.

¹³ Id.

¹⁴ *R. v. Williams and Bellamy*, 6 B. & C. 250, n.

could not be altered, upon affidavits that the property was in A. & B. alone.¹

Quashing the inquisition.] The next point is as to the application to quash the inquisition. It will not be quashed for a misdirection to the jury.² It needs not to be made by any one in particular. Where the finding as to one prisoner only is objected to, the rule *nisi* need not be served upon the others.³ Sometimes the finding is removed by *certiorari*, and the application also occasionally proceeds from the crown.⁴ Where the verdict was suicide, "whilst suffering under the cruel conduct of A. B.," and the coroner took down this as the finding of the jury, the court would not grant a *certiorari* in order to quash so much of the finding as was irrelevant.⁵ For an inquisition may be bad as to part, and yet good as to the residue.⁶ But too much time must not be allowed to elapse before the writ is moved for. Eight months were deemed too long a delay, although there were several irregularities, which, however, did not appear on the face of the inquisition, and although it was suggested, that the cause of death had not been duly inquired into.⁷ Sometimes, likewise, the court will put the party objecting to demur, which they consider in general to be the most convenient course.⁸ There are still other causes than those above mentioned, with regard to form and substance on the record, which will operate to vitiate an inquisition. As where the coroner took some of the jury off the inquisition, fearing that they would return a verdict unfavourable to his views.⁹ And sometimes the court will stay the filing until further motion. As where the coroner had dug up a skull five years after the death, and insisted that the skull sufficiently identified the deceased.¹⁰

As soon as the inquisition has been quashed, it is as if there had not been an inquisition, and either a new inquest must be holden, or a writ of *melius inquirendum* must issue.¹¹ In the first case, the inquiry proceeds *super visum corporis*; in the other it is

¹ *R. v. Evett*, 6 B. & C. 247. A venire had been awarded against Evett, and he appeared and demurred to the inquisition.

² *R. v. M'Intosh*, 7 W. R. 52; 32 L. T. 146.

³ *R. v. Mallet and another*, 1 Cox, C. C. 336, where the inquisition was quashed as to one only.

⁴ *In re Culley*, 5 B. & Adol. 230; 2 Nev. & M. 61.

⁵ *Ex parte Scratchley*, 2 Dowl. & L. 29.

⁶ *Ex parte Carruthers*, 1 Man. & Ry. M. C. 435.

⁷ *In the matter of Daws*, 8 Ad. & El. 436; 1 Per. & D. 196.

⁸ *R. v. Brownlow*, 11 Ad. & El. 119, 128. Lord Denman. 8 D. P. C. 157, 163; 3 Per. & D. 52.

⁹ *R. v. Stukely*, 12 Mod. 493; Holt's Ca. 167. See also *Anon.* 1 Ventr. 352.

¹⁰ *R. v. Bond*, 1 Str. 22.

¹¹ 2 Hawk. c. 9, s. 56. Hawkins says here, that a new inquest is to be taken if the inquisition be quashed for a defect in point of form only. But he must be understood to mean *where there is no blame attributable to the coroner*, because a defect in form is not in general a cause for quashing the verdict.

taken upon affidavit, for the coroner can only take a verdict *super-visum*, and he is not again to be trusted.¹ And, where the body has been dug up for the second time, it is usual to apply to the court for leave to exhume it for the purpose of a fresh inquest.² And, if possible, those who saw the corpse in the first instance, should be summoned as jurors upon the second occasion.³

The writ of *melius inquirendum*, a clause for which needs not to be inserted in a rule *nisi*,⁴ was at first opposed,⁵ but it has long been acquiesced in. It is generally upon an office *post mortem*, and is directed to the sheriff.⁶ But the court will not grant it without proof of malpractices on the part of the coroner.⁷ Where the jury had found a person *non compos mentis*, whereas, in truth, he was *felo de se*, the court appears not to have allowed the writ.⁸ But, on the other hand, there is an instance where the party was found *felo de se*, whereas he was but *non compos*, and the court granted a rule *nisi* for the writ, although the executor might have traversed the inquest.⁹ Yet, again, some few years afterwards, such a writ was, under similar circumstances, denied, and the court advised the administrator to remove the inquisition, and then suggest himself to have been grieved, whereby the matter and truth of the finding might come in question.¹⁰

But no sooner does the coroner's misbehaviour appear, than the writ immediately comes into operation. As where the coroner told the jury that they might find *felo de se* as a matter of course, although the jury were satisfied of the deceased's lunacy. They found accordingly, but coming to be better informed, they insisted upon signing a fresh inquisition, upon which the coroner returned the first in order to cover the goods. But the court stayed the filing of it, and committed the coroner,¹¹ and had it not been for the second inquisition they would have quashed the first finding, and issued the writ of *melius inquirendum*. And where the coroner kept the inquisition in his pocket, instead of returning it, the court removed him and fined him 100*l*.¹² By 3 Hen. 7, c. 1, if the coroner do not return his inquisition to the next gaol delivery, he shall forfeit 5*l*. for every default.

There was a committal for murder by magistrates whilst the coroner's jury were sitting. Application was made to the court

¹ *R. v. Bunney*, 1 Salk. 190; 1073; 2 Show. 199. The case of the coroner of Westminster.

² See *R. v. Barclees*, 2 Sid. 101.

R. v. Clerk, 1 Salk. 377; per Holt, C. J., Holt's Ca., 167. *R. v. Saunders*, 1 Str. 167. *R. v. Hethersal*, 3 Mod. 80; *Anon.* 1 Str. 533.

³ See 12 Mod. 493; 2 Sid. 101.

⁴ *R. v. Mallet and another*, 1 Cox, 336.

⁵ *R. v. Harleston*, Cro. El. 371.

⁶ Per Hale, C. J., 1 Mod. 82.

⁷ *R. v. Stanlake*, 1 Mod. 82;

¹ Ventr. 181. *R. v. Ripley*, 2 Str.

1073; 2 Show. 199. The case of the coroner of Westminster.

⁸ *R. v. Bunney*, 3 Mod. 238.

⁹ *R. v. Storke*, 3 Keb. 800.

¹⁰ *R. v. Ripley alias Oldfield*, Tho. Jones, 198.

¹¹ *R. v. Wakefield*, 1 Str. 69. To the same effect, *R. v. Coates*, 1 Ch. Burn. 941.

¹² *R. v. Lord Buckhurst*, 1 Keb. 280. See also 1 Wms. Saund. 355, n. 2.; Id. 362, n. 1; 2 Hawk, c. 9, s. 56, and as to the mode of proceeding against the coroner for misbehaviour, 3 Ch. Burn. 941.

for a *habeas corpus* to bring up the prisoner, that the witnesses might identify him, but the court would not grant the writ, for he might be identified by the evidence of the witnesses who were examined before the magistrates, or by a witness sent to the prison for that purpose. But Coleridge, J., affirmed that the court had the power to issue such a writ.¹ A coroner may, for the purpose of giving evidence as to a particular fact, use an instrument drawn up by him as an inquisition, whether it be or not a formal or valid inquisition.²

The costs of quashing a coroner's inquisition may be recovered from the coroner.³

An attempt was made to hold a second inquest before the first had been quashed, but the court made the rule absolute for a *certiorari* to remove the inquisition. The coroner cannot hold a second inquest, unless a *melius inquirendum* has been awarded, or unless the first be quashed, and he be set in motion by the court.⁴ An inquisition upon a *melius inquirendum* may be traversed, but not one taken *super visum corporis*.⁵

SURETY OF THE PEACE.

Surety of the peace is the acknowledging of a recognizance or bond to the king, taken by a competent judge of record, for keeping the peace. And this any justice is entitled to require, either as a minister, in obedience, for example, to a writ of *supplicavit*, or as a judge by virtue of his commission.⁶ And it should be understood, that if the justice decline to entertain the application, the Court of Queen's Bench is not precluded from interference.⁷ If any one will make it clear to the justice that he has reasonable ground of apprehension, either for his life, or that he may receive some bodily harm from the defendant, the justice may call upon such defendant to find sureties for a certain period to keep the peace towards all the subjects of the crown, and especially towards the complainant. Threats will be sufficient for this purpose, and so if the defendant declare that he will proceed then to do the mischief, it is the same.⁸ A threat to burn the complainant's dwelling comes within the like rule,⁹ and so does a threat to imprison.¹⁰ And it is no defence to allege that an act of grace has passed, and so that the crime in respect of which the imprisonment was threatened, has been pardoned.¹¹ However, a threat against a man's servants, or cattle, seems to be insufficient;¹² and a mere apprehension of a neighbour because of a quarrel, without more, will not warrant this proceeding.¹³ Although it is

¹ *In re Cooke*, 14 L. J. M. C. 188; 7 Q. B. 653. As to the election of coroner, see 7 & 8 Vict. c. 92.

² *R. v. Gregory*, 8 Q. B. 508.

³ *Foxall v. Barnett*, 2 El. & Bl. 928; 23 L. J. Q. B. 7.

⁴ *R. v. White and another*, 29 L. J. Q. B. 257.

⁵ *R. v. Bonny*, Carth. 72.

⁶ Dalt. c. 116, p. 267.

⁷ *R. v. Mallinson*, 16 Q. B. 367.

⁸ 1 Hawk. c. 60, s. 6.

⁹ Id.

¹⁰ 1 Hawk. c. 60, s. 7.

¹¹ *R. v. Mendez*, 1 Str. 473.

¹² Lamb. 83.

¹³ Dalt. c. 116, p. 269.

added, that there may be a special writ out of chancery directed to the sheriff, commanding him to enforce a surety against damage to the servants or the goods, or, in default, to detain the offender till such surety be found.

A threat to injure the wife or child of a complainant seems to be sufficient to justify sureties.¹ The complaint must be upon oath, and must state that it is not made out of malice nor vexation, and it must relate to a present or future, and not to a past danger,² and an affirmation was held to be insufficient, *although now sufficient*.³ A partner has been allowed to swear in the Queen's Bench that his business leads him to his house of partnership, and that he is in danger from his partner, although he could not swear unqualifiedly to danger. Articles were allowed.⁴ A justice assaulted a person in April, who did not apply to the Queen's Bench till June; but in the interim the defendant renewed his threats of flogging the exhibitant, should the latter persist in writing to a young lady, a relation of the defendant. In the absence of evidence of the fresh threat, Wightman, J., hesitated, but, the articles being amended, an attachment was ordered to issue.⁵ The justice is the source of the discretion which in general governs these points concerning surety of the peace. When he is satisfied that there is a reasonable foundation for fear of injury or worse mischief, the course is to grant the security demanded.⁶ There was a case where some threats were used towards the complainant, but it was insisted for him that the words were used in a metaphorical sense; nevertheless, there was an information duly made upon oath, and the justice ordered sureties to be found. The court would not interfere with that discretion, and refused a rule to remove the recognizances,⁷ and, by the same rule, the court will not reduce the amount of security ordered by the justice.⁸ Moreover, he is not confined to words or blows, but may interpret looks, tones, or general conduct to be threats, provided it be deposed upon oath that the behaviour complained of amounts to a threat of personal violence. The court, however, will not draw the inference, if the exhibitant fail to state it in the articles.⁹ Yet the nature of the threat needs not to appear on the face of the document, nor the time when it was made.¹⁰ And former conduct may be referred to as evidence of an intention to be mischievous,

¹ Dalt. c. 116, p. 269.

² 1 Hawk. c. 60, s. 6; Dalt. c. 116, p. 269; Burn's Just. tit. "Surety of the Peace."

³ *In re Aston*, 12 Mees. & W. 456. *R. v. Green*, 1 Str. 527. *Hilton v. Byron*, 12 Mod. 243. But whether the justice be bound to act upon the oath of the complainant, if he should not think it worthy of credit, is made a query?

⁴ *R. v. Mallinson*, 16 Q. B. 367; 20 L. J. M. C. 33.

⁵ *Ex parte Hulse*, 21 L. J. M. C.

21.

⁶ See *R. v. Lord Vane*, 13 East, 171, n.

⁷ *R. v. Tregarthen*, 5 B. & Adol. 678; 2 Nev. & M. 379.

⁸ *R. v. Holloway*, 2 D. P. C. 525.

⁹ *R. v. Dunn*, 12 Ad. & El. 599; 4 Per. & D. 415.

¹⁰ *In re Aston*, 12 Mees & W.

456.

should the like be repeated. And it is no answer to say, that the defendant has been previously committed upon similar articles, nor is it against the Habeas Corpus Act, 31 Car. 2, c. 2, s. 6, to commit upon such new articles.¹ The court granted an attachment upon articles, although the exhibitant had only been threatened should he write again to a member of the defendant's family. He had not so written, nor did it appear that he would.² All persons of sane memory, an alien, even an attainted person, may demand these sureties.³ As to an insane person, this bond of surety cannot be granted to him, but it is said that the justice ought to provide for his safety.⁴ But an infant under fourteen may have surety.⁵

A husband may require of his wife that she find sureties, and *vice versâ*. If a wife should complain that her husband has threatened to beat her outrageously, she is entitled to protection.⁶ She may sue out a *supplicavit* from the Court of Chancery, that her husband may not beat or evil intreat her, *aliter qua causâ regiminis aut castigationis*.⁷ A defendant, coming to put in bail, insisted that the recognizance should be so taken as not to convey any admission of the marriage. The woman had exhibited articles of the peace, styling herself the wife of the defendant, setting out acts of cruelty, and the pendency of a suit in the ecclesiastical court for the restitution of conjugal rights. Upon which he was ordered to keep the peace, &c., "and particularly towards H. P. who hath exhibited articles of the peace against him the said J. B., by the name of H. B., wife of him the said James," &c.⁸ And the Court of King's Bench may, in all cases of misdemeanor punishable by imprisonment, require sureties for a limited period. And likewise the judge at the trial. It may stand as part of the sentence. The defendant will be discharged at the end of the limited period, no surety being found. There cannot be an unlimited time and perpetual imprisonment.⁹

The surety of the peace may be had against any one, *i. e.*, of sane mind. If the case be that of an infant, his nearest friend should endeavour to be, or to find surety for him, because the infant cannot be bound,¹⁰ and the same may be said of a *feme covert*, whose husband would probably interfere, and probably be himself security.

A peeress may demand surety against her husband,¹¹ therefore a peer is not discharged from this liability, provided the remedy be sought in the right place.¹²

¹ S. C.

² *R. v. Tollemache*, 2 L. & M. Pr. R. 401.

³ 1 Hawk. c. 60, s. 2.

⁴ *R. v. Mackenzie*, 3 Burr. 1922; Dalt. c. 117, p. 271.

⁵ *Id.* c. 117, p. 271.

⁶ 1 Hawk. c. 60, s. 4.

⁷ *R. v. Lord Vane*, 13 East, 172, n.

⁸ *R. v. Bambridge*, 2 Str. 1231;

⁹ *Dunn v. Reg.* (in error), 18 L. J. M. C. 41; 12 Q. B. 1026.

¹⁰ 11 Hawk. c. 60, s. 5.

¹¹ See several cases cited in Burn's Justice, tit. "Surety of the Peace."

¹² *R. v. Marquis of Carmarthen*, Fort. 359.

The mode of compelling sureties is by enforcing the appearance of the offender. Where, therefore, a peer had been arrested upon a warrant of two justices, and bound by recognizance, with two sureties, to keep the peace, the court refused a *certiorari* to bring up the recognizances, because the applicant (Lord Gifford) was not in custody. Had it become necessary to enforce the recognizances, it might have been tried in another way, but as the case stood, the justices had acted without jurisdiction.¹ So it was where the court of quarter sessions had thought fit to order sureties of the peace in the absence of the party complained against. The recognizances directed were for six months. The parties were apprehended and brought before two justices, upon a warrant, reciting the order of sessions, and the personal service of it, and they then refused to enter into the obligation required. The justices upon this committed them to gaol for the residue of the six months, unless, &c. It was held that the justices had done this without jurisdiction, and the defendants were accordingly discharged.² The surety should consequently be demanded in the presence of the accused, and the warrant to compel his appearance should be under seal; should show at whose suit, and be directed to an indifferent person.³ Care must be taken to invite the accused to find security. A commitment is invalid which proceeds upon a neglect of this kind.⁴ So it is if a penalty be added.⁵ So it was once thought to be if the recognizance and complaint were joint. But, upon one occasion, the Court of King's Bench suffered three women to give joint articles against three men.⁶

A peer or peeress can only be bound over in the courts of Queen's Bench or Chancery.⁷

The articles should be exhibited in the neighbourhood where the parties live. And the court will, therefore, decline to receive the articles unless they have been previously tendered before a neighbouring justice.⁸ Where the defendant was seventy years of age, and unable to travel, the court granted a *mandamus* to three justices to take security upon articles exhibited in the King's Bench.⁹ So, a justice, at Portsmouth, (or any justice of the county of Hants,) where the matter happened, was empowered by the Court of King's Bench to take the security, an indorsement being made upon the attachment specifying the sums in which the principal and his sureties should be bound.¹⁰

¹ *Ex parte Lord Gifford*, 1 New. Sess. Ca. 490.

² *R. v. Hunts, JJ. in re Aston*, 14 L. J. M. C. 99. S. C. nom. *R. v. Ashton*, 7 Q. B. 169.

³ 1 Hawk. c. 60, s. 9.

⁴ *R. v. Wilks*, Id. n.

⁵ 3 Com. Dig. 370.

⁶ *R. v. Nettle and others*, 1 Hawk. c. 60, s. 5, n.

⁷ 4 Com. 253; 1 Hawk. c. 60, s. 8, n. 5.

⁸ *R. v. Waite*, 2 Burr. 780; *R. v. A. B.* 2 Lord Kenyon, 511.

⁹ *R. v. Lewis*, 2 Str. 835.

¹⁰ *Martha Hutt's case*, 2 Burr. 1039; *R. v. Bomaster*, Id.; 1 Sir Wm. Bl. 233. S. C.

If the process be issued out of the Chancery or King's Bench the motion must be made in open court, accompanied by a declaration in writing, and upon oath, the motion and declaration to be mentioned on the back of the writ. Should the causes in respect of which the process was granted turn out to be untrue, the court may order costs to the party grieved, and commit the defaulter until such costs be paid.¹

As to the warrant, it may be made by the justice to bring the offender before himself only, or before some other justice, since he who makes the warrant is considered the best able to do what is right in the case.²

The next question is, whether any defence can be made to the charge. Upon this point it seems to be agreed, that the truth of the articles cannot be controverted. The defendants proposed to prove, by affidavit, that the complaint was false, but the court said, they could do no more than receive the articles, and hear any objection arising on the face of them.³ This doctrine has been adhered to in more modern times.⁴ The defendants cannot call on the prosecutor to show cause why the articles should not be discharged.⁵ Articles of the peace had been filed, and an attachment issued against the defendant, upon which he proposed to impeach the validity of the articles, and to obtain costs under 21 Jac. 1, c. 8, s. 2, giving notice to the prosecutor. But the court refused to entertain his motion.⁶ Affidavits in contradiction of the articles are not admissible, not even to supply facts said to be suppressed by the complainant, as, for instance, a correspondence. And the correspondence needs not to be set out unless it contain some part of the menace relied upon.⁷

But there may be affidavits in corroboration of the articles, and affidavits in answer. The former need not be entitled. The latter should have the title of the Queen against the defendant.⁸ But the complainant may go too far. Where he came into court the second time, in order to enforce process upon his articles, the court received an affidavit from the defendant, and other affidavits, tending to prove the complainant guilty of gross perjury, upon which he was committed, and subsequently transported.⁹ Explanation has, however, been allowed of such parts of certain articles which were deemed ambiguous.¹⁰ The stat. 56 Geo. 3, c. 100, (an Act for better securing the liberty of the subject,) s. 3, has made no difference as to the law of refusing leave to controvert the truth of

¹ 21 Jac. 1, c. 8, s. 2. See *R. v. Mallinson*, 16 Q. B. 367.

² 5 Rep. 59.

³ *R. v. Lord Vane*, 2 Str. 1202; 13 East, 171, n. *R. v. Earl Ferrers*, 1 Burr. 635. *R. v. Doherty*, 13 East, 171. *R. v. Bringloe*, cited by Le Blanc, Id. 174, and n.

⁴ *R. v. Dunn*, 12 Ad. & El. 599; 4 Per. & D. 415. *R. v. Stanhope*, 12 Ad. & El. 620, n.

⁵ *Ex parte Mallinson*, 15 Jur. 746; 16 Q. B. 367.

⁶ *R. v. Mallinson*, 16 Q. B. 367.

⁷ S. C.

⁸ *R. v. Jones*, Str. 704.

⁹ *R. v. Parnell*, 2 Burr. 806.

¹⁰ By Lord Hardwicke. *R. v. Bringloe*, ut supra.

articles.¹ In a case of articles demanded by reason of a letter, the setting forth of the whole letter was required.²

Nevertheless, if the defendant be not satisfied, he can remove the articles entered into, either at quarter sessions or elsewhere, by *certiorari*. He may object that the articles were not exhibited upon oath. Although, where other affidavits than that of the exhibitant were put on the same parchment with the articles, and the words, "sworn by the several deponents," appeared at the end, this was held sufficient for the court to consider that the articles themselves had been exhibited upon oath.³ So, the Court of Queen's Bench will examine the articles upon *habeas corpus* and *certiorari*, and if, on the face of these, they appear insufficient, the order of sessions on that behalf will be superseded.⁴ The nature of the required recognizance will be regulated by the justice. It is usual to limit the time to a year or six months, but the party may be bound for two years, if thought fit, and although the binding is frequently to the next sessions, yet a warrant is not illegal if it omit all mention of the sessions.⁵ And the number of sureties lies also in the same discretion.⁶ When, however, there may be no reason to the contrary, it is best to bind over, in the case of a *general* recognizance, to the next sessions.⁷

It has been said, indeed, that the recognizance may be for life, or without expressing a certain time, in which case it shall be understood to be for life.⁸ But it is now the law, that the warrant of commitment must not be general, and that the granting of a warrant, in default of finding sureties for an unlimited time, is illegal; and, moreover, *bonâ fides* is no defence against an action.⁹ And by 16 Vict. c. 30, s. 3, the power of detention for want of sureties is restricted to twelve months. But this Act has no limit as far as the Court of Queen's Bench is concerned. The Court of King's Bench has required bail for fourteen years, although, upon an understanding that an information was pending against the defendant, they lessened the time to two years.¹⁰ The court are by no means bound to the term of twelve months,¹¹ although, if they should require bail for one year, it seems that they have no power to require it again at the end of the year upon the original complaint.¹² The commitment for want of sureties need not mention the sum in which the party and his sureties are to be bound.¹³

This peace warrant is to be executed by the person to whom it is directed, unless it is directed to the sheriff. He may, by parole,

¹ *R. v. Dunn*, 12 Ad. & El. 599; 4 Per. & D. 415.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Willes v. Bridger*, 2 B. & Ald. 278.

⁶ S. C.

⁷ 1 Hawk. c. 60, s. 16; 2 B. & Ald. 290, 291; per Abbott, C. J. See *post*, p. 901.

⁸ 1 Hawk. c. 60, s. 15.

⁹ *Prickett v. Gratrex*, 8 Q. B. 1020. See *O'Connell v. Reg.* (in error), 11 Cl. & F. 155.

¹⁰ *R. v. Bowcs*, 1 T. R. 696.

¹¹ *Id.*

¹² S. C. per Ashhurst, J.

¹³ *Prickett v. Gratrex*, 2 New. Sess. Ca. 429.

or precept in writing, direct an officer, sworn and known, to send it, but otherwise he must proceed by a precept in writing.¹ Doors may be broken, but admittance must first be requested, and the nature of the charge explained.²

The same may be said where the delinquent is sheltered in the house of another, at all events where the *capias* is from the King's Bench or Chancery, if not, indeed, upon the warrant of a justice.³ The officer then executes his warrant. If the warrant be special, the party must be brought before the justice who granted it, otherwise he may go before another justice.⁴ It seems, however, that the constable may not legally convey the accused to gaol for refusing to find sureties, unless he so refused before a justice, because that would be to leave too much to the discretion of the constable. So, even before a justice, there should be a second warrant to commit for want of sureties, whatever might have been the opinions in ancient times.⁵

And supposing the hearing and finding of sureties to take place before another justice than him who granted the warrant, such justice should make out a *supersedeas*.⁶ If it be stated in the warrant that B. was brought up to answer a charge of threats, and that, on due examination he was ordered to find sureties, this is sufficient to show that the justice had heard and adjudicated.⁷

As to the sureties in case of death, since their executors and administrators are liable, there needs not to be any new sureties found.⁸ But there may be new sureties and a new recognizance if the justice was deceived in the sufficiency of the sureties given in the first instance.⁹ When the surety is indebted there must also be a new recognizance.¹⁰ In this last case, however, the defendant must have been previously convicted by due course of law, before he can be so called upon to find fresh sureties.¹¹

Adverting for a moment to the point of *supersedeas*, just mentioned,¹² it may be remarked that the peace warrant itself may be superseded by the defendant repairing to another justice than him who granted the warrant, and then finding sureties. Or he may do this even before any warrant is granted. The justice before whom the surety has been given will then issue his *supersedeas*.¹³

¹ 1 Hawk. c. 60, s. 11.

² 2 Hawk. c. 14, s. 3.

³ Id. s. 2.

⁴ 1 Hawk. c. 60, s. 13.

⁵ See Id. s. 12; Dalt. c. 118; 2 Hale, P. C. 112; Burn's Just., tit., "Surety of the Peace."

⁶ Dalt. c. 118, p. 274. The commitment may be to the common gaol under 6 Geo. 1, c. 19, s. 2, which speaks of "vagrants and other criminal offenders, and persons charged with small offences." In

re Aston, 12 Mees. & W. 456; 1 New. S. C. 73.

⁷ R. v. Aston, *ut supra*.

⁸ Dalt. c. 119, p. 278.

⁹ Id.

¹⁰ Lamb. 78.

¹¹ 5 Burn, Just. 1206; citing Crompt. 125; Semble, Fitzherbert, by Crompton. Burn's Just., tit. "Surety of the Peace."

¹² Ante.

¹³ 1 Hawk. c. 60, s. 14.

Neither the sureties nor the sums in which they are bound need be mentioned in the *supersedeas*, but it is better to express both.¹

As to the certifying of a recognizance, if the recognizance be taken under a *supplicavit*, it need not be certified till the justice receives a writ of *certiorari* for that purpose. But if taken upon a complaint below, it should be certified to the next sessions, under 3 Hen. 7, c. 1, (26,) that the party so bound may be called.²

The last matters to be noticed are, the forfeiture or discharge of the recognizance:—First, there may be a forfeiture if, after having entered into a recognizance to appear at sessions, the defendant absent himself.³ The default must, however, be recorded, and the sessions need not absolutely record the default.⁴ Whether the court can take sureties, in case of sickness, from the friends of the defendant, upon their oath, is made a query by Dalton, who says that he has known it to have been done.⁵

If any violence be committed, whatever it may be, or treason, or an unlawful assembling *in terrorem populi*, or if there be threats, or to beat, or a challenge to fight, these acts are forfeitures of the recognizance.⁶ And if the party threatened be absent, yet if there be any overt act, as lying in wait, or a threat in the absence of the prosecutor, there may be a forfeiture.⁷ Bare words, not amounting to absolute threats, do not incur this penalty.⁸

A recognizance of the peace is not forfeited by necessary acts of violence. As if A. being under a recognizance to keep the peace towards all the Queen's subjects, &c., beats his child in a moderate manner, or commits an assault as an officer in the discharge of his duty, or uses force in defence of himself or of those belonging to him, or in the necessary defence of others, with many other like instances.⁹

Scire facias in one of the courts at Westminster appears to be the proper remedy in case of a forfeiture, but the sessions cannot entertain any proceeding.¹⁰

Then, lastly, with reference to the discharge of the recognizance, it may be vacated if the party bound appear at the stated time, and there be no complaint of his having violated it. But the defendant must record his appearance, even although the complainant be not present.¹¹

It is also discharged by a forfeiture, or by the death of the complainant, or by the demise of the crown.¹² But the property of the

¹ Dalt. 118, p. 274. Burn's Just., tit. "Surety of the Peace." As to *supersedeas* in the Chancery or Queen's Bench, see 21 Jac. 1, c. 8, ss. 2, 3; 1 Hawk. c. 60, s. 14. Burn's Just. *ut supra*.

² 1 Hawk. c. 60, s. 18.

³ 3 Hen. 7, c. 1, (27.)

⁴ 1 Hawk. c. 60, s. 18.

⁵ Dalt. c. 120, p. 278.

⁶ 1 Hawk. c. 60, s. 21.

⁷ Dalt. c. 121, pp. 280, 281.

⁸ 1 Hawk. c. 60, s. 22.

⁹ 1 Hawk. c. 60, ss. 23, 24, where several similar cases are mentioned.

¹⁰ 1 Hawk. c. 60, s. 18.

¹¹ Dalt. c. 120, p. 278.

¹² 1 Hawk. c. 60, s. 17.

sureties is not discharged by death, inasmuch as their executors continue liable,¹ and the justice might either issue his liberate upon the death of the complainant, if the defendant were in prison, or the prisoner may go before a justice upon *habeas corpus*, and offer security, which the said justice may receive.² So, if one be only bound generally, and not especially towards any person, the court may order proclamation, and if no one answers, the bond shall be discharged.³ But if, as is usual, there be an especial binding, it is said that the court may bind over to the next sessions,⁴ although the legality of this practice may be doubted, and it is in fact clearly illegal;⁵ and perhaps a recognizance may be discharged by the release of the party at whose instance it was taken, a certificate of such release being given,⁶ although it is added that as the recognizance is not made to the subject, but to the king, this power of release can hardly exist,⁷ and the king, on the other hand, cannot pardon or release the recognizance, because the subject has a kind of interest in it.⁸ And again, if the justice should take the recognizance during the life of the offender, it is said that neither the king, nor the party, nor the justice can discharge it, and, therefore, the justice "must be well advised how he granteth such surety."⁹

A person committed in default of sureties is not entitled to a copy of the examination under 6 & 7 Will. 4, c. 114, and 11 & 12 Vict. c. 42, s. 17.¹⁰

Surety for the good behaviour.] A surety of this nature is now so rarely thought of that we will merely refer to the text books.¹¹ It is a difficult process to carry out, and there have not been instances of its use since the time of Lord Coke, at least with any degree of security for the justice. There was a case of *Haylock v. Sparke*,¹² where a justice, in libel, required *surety of the peace*, and the court said, that in *some* cases of libel, surety for the good behaviour might be demanded, and that, here, surety for the good behaviour must have been intended, and that although the proceedings were informal, (being for surety of the peace,) and although there was a great want of discretion in the justice in requiring sureties upon such an occasion, yet, as he had jurisdiction, the verdict in his favour must remain.

¹ 1 Hawk. c. 60, s. 17.

² Dalt. c. 118, p. 273.

³ Dalt. c. 120, p. 275.

⁴ Id.

⁵ 5 Burn, Just. 1206.

⁶ 1 Hawk. c. 60, s. 17.

⁷ Id.

⁸ 1 Hawk. c. 60, s. 17.

⁹ Dalt. c. 119, p. 276. As to

surety for the good behaviour, a proceeding now of rare occurrence, see Burn's Justice, under that title.

¹⁰ *Ex parte Humphreys*, 19 L. J. M. C. 189. *R. v. Herefordshire*, JJ. 1 L. & M., Pr. Rep. 323.

¹¹ Dalt. c. 123; 1 Hawk. c. 61; 5 Burn, Just. 1212.

¹² 22 L. J. Q. B. 67.

PART VIII.

Of Offences against the Game Laws.

OFFENCES AGAINST THE GAME LAWS.

Game.] By 9 Geo. 4, c. 69, s. 1, if any person shall, after the passing of this Act, by night, unlawfully take or destroy any game or rabbits in any land, whether open or inclosed, or shall by night unlawfully enter or be in any land, whether open or inclosed, with any gun, net, engine or other instrument, for the purpose of taking or destroying game, such offender shall, upon conviction thereof before two justices of the peace, be committed for the first offence to the common gaol or house of correction for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance, or in Scotland by bond of caution, himself in 10*l.*, and two sureties in 5*l.* each, or one surety in 10*l.*, for his not so offending again for the space of one year next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found; and in case such person shall so offend a second time, and shall be thereof convicted before two justices of the peace, he shall be committed to the common gaol or house of correction for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance, or bond as aforesaid, himself in 20*l.*, and two sureties in 10*l.* each, or one surety in 20*l.*, for his not so offending again for the space of two years next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of one year, unless such sureties are sooner found; and in case such person shall so offend a third time, he shall be guilty of a misdemeanor, and liable to be transported beyond seas for seven years,¹ or to imprisonment and hard labour in the common gaol or house of correction not exceeding two years; and in Scotland, if any person shall so offend a first, second,

¹ Penal servitude not exceeding three years : 20 & 21 Vict. c. 3, s. 2.

or third time, he shall be liable to be punished in like manner as is hereby provided in each case.

By sect. 2, where any person shall be found upon any land committing any such offence as is hereinbefore mentioned, it shall be lawful for the owner or occupier, or for any person having a right or reputed right of free warren or free chase thereon, or for the lord of the manor or reputed manor wherein such land may be situate, and also for any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him, as soon as may be, into the custody of a peace officer, in order to his being conveyed before two justices of the peace; and in case such offender shall assault or offer any violence with any gun, crossbow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorized to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor, and be liable to be transported beyond seas for seven years,¹ or to imprisonment and hard labour in the common gaol or house of correction not exceeding two years; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner.

Sect. 3 gives the power of apprehending for the purpose of summary proceedings; and sect. 4 limits the time for prosecution upon summary conviction or indictment to six and twelve calendar months respectively.

An offence was committed on the 12th of January, 1844. The warrant of commitment bore date 11th December, 1844. The indictment was preferred on the 1st of March, 1845. This was held sufficient evidence of a prosecution within twelve calendar months.² Again, the offence was committed on the 4th of December, 1845. The information and warrant bore date 19th of December, 1845. The apprehension and commitment, 21st of October, 1846. The indictment was preferred, 5th of April, 1847. The judges held the conviction right, on the authority of *R. v. Willace*.³ Again, the warrant of apprehension was held to be no commencement of proceedings, under the 9 Geo. 4, c. 69.⁴ Whether the preferring of an indictment which was ignored be the commencement of a prosecution of a party upon an indictment preferred four years afterwards, is a question.⁵ Gamekeepers were

¹ Penal servitude not exceeding nor less than seven years.

² *R. v. Austin*, 1 Car. & K. 621.

³ East, P. C. 186. *R. v. Brooks and another*, Den. 217; 2 Car. & K. 402.

⁴ *R. v. Hull*, 2 Fost. & F. 16.

⁵ *R. v. Killminster*, 7 C. & P. 228. The 5th sect. of 9 Geo. 4, c. 69, contains the form of conviction. Sect. 6 gives an appeal. Sect. 7 takes away the *certiorari*. Sect. 8, orders the return of convictions to quarter sessions.

out watching, and waited in a turnpike road to apprehend the poachers. An affray ensuing on the road, the keepers were held not to be justified in taking the poachers.¹

By 9 Geo. 4, c. 69, s. 9, if any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, crossbow, fire-arms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanor, and be liable to be transported beyond seas for any term not exceeding fourteen years nor less than seven years,² or to imprisonment and hard labour for any term not exceeding three years; and in Scotland any persons so offending shall be liable to be punished in like manner.

The 10th and 11th sections apply to the Scotch jurisdiction.

By sect. 12, night shall be considered to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the first hour after sunrise.³

And by sect. 13, the word "game" shall be deemed to include hares, pheasants, partridges, grouse, heath and moor game, black game, and bustards.

But this description does not include young pheasants hatched by a hen and not becoming wild, for they are the property of the owner; and as game is not property within the meaning of 9 Geo. 4, c. 69, the prisoners were acquitted for the entry on land.⁴

The presence of the defendants upon the land will satisfy the Act without proving the entry. If several be together, but only one enter armed upon the close, the conviction may be supported, notwithstanding the singular number.⁵ This was not so at one time,⁶ but the principle of constructive arming is now recognized, as where the defendants were respectively armed with guns and bludgeons. It was objected, that a constructive arming could not be entertained, but the judges repelled *R. v. Davis*, and held the conviction right.⁷ With regard to the word "found," the party

¹ *R. v. Meadham*, 2 Car. & K. 633.

² Penal servitude not exceeding fourteen nor less than three years.

³ "Night" in 14 & 15 Vict. c. 19, s. 11, is declared, for the purposes of the Act, to commence and conclude as in burglary. Nevertheless, a person may be apprehended under that Act for night poaching, that being an indictable offence. *R. v. Sanderson*, 1 Fost. & F. 598.

⁴ *R. v. Garnham*, 2 Fost. & F. 347; 8 Cox, 451.

⁵ *R. v. Kendrick and others*, 7 C. & P. 184.

⁶ *R. v. Davis and another*, 8 C. & P. 759.

⁷ *R. v. Goodfellow and others*, Den. 81; 1 Car. & K. 724. *Cor.* Coleridge, J., who overruled the objection that the offensive weapon should have been named in the indictment. Absent: Parke and Platt, Barons; Maule, J. So was *R. v. Smith*, Russ. & Ry. 368.

needs not to be found armed in the actual close where he entered, and where the entry is charged in the indictment. The defendant was not seen in the wood which he was charged with entering, but he was seen in a neighbouring close. The judges said, that as there was evidence to go to the jury of the defendant's presence in the wood armed, it did not signify that he was found armed, not in the wood, but in land adjoining.¹ Still, a general intent to poach will not suffice. There must have been an intent to destroy game in the particular close.² Although Rolfe, B., thought the offence complete if the defendants were in one close, and were to take the game (by nets, for instance,) in the next.³ But he said he would defer to the authorities. It follows, that when all are united for one common intent, all are guilty, although fewer than three be in the close specified.⁴ Nor does it signify that the land consists of several closes, or that it is in the occupation of different persons. The Act speaks of *land*, not of close.⁵ The combination, however, must not be presumed *aliunde*. Two persons remained in a road, and sent a dog into the field adjoining. A third, who had gone out with them armed, went to poach by himself in another place. Here the union between them for the commission of the particular offence was deemed not to have been proved.⁶ Two came out of a coppice, a third came out immediately with a gun and pheasant. Maule, J., was not satisfied, but said he should require proof of association, such as that they were all in company on the previous night.⁷ Where nets were set on the field side of a hedge, upon twigs of trees, so as to be within the field, Alderson, B., said he should hold that an entry had been made.⁸ This ruling, however, of Mr. Baron Alderson was by no means acquiesced in.⁹ And Patteson, J., held that a constructive entering was not sufficient.¹⁰ But *R. v. Uezzell*,

¹ *R. v. Worker*, 1 Moo. C. C. 165. There were three counts, and a general verdict of guilty. See *R. v. Scotton*, 5 Q. B. 493; Dav. & M. 501.

² "There." *R. v. Gainer and another*, 7 C. & P. 231.

³ *R. v. Turner*, 3 Cox, 304.

⁴ *R. v. Passey*, 7 C. & P. 282. *R. v. Lockett*, Id. 300. *R. v. Andrews*, 2 M. & Rob. 37. *R. v. Whittaker*, Den. 310; 2 Car. & K. 636.

⁵ *R. v. Uezzell*, (or *R. v. Easton*, Easton being the only one convicted,) 3 Car. & K. 150; Den. & P. 274; 20 L. J. M. C. 192. Acc.: Lord Denman; Wilde, C. J.; Pollock, C. B.; Rolfe, B.; Coltman,

Wightman, and Erle, JJ. Five *contra*, that there must be a bodily entry: Parke, B.; Patteson, Cresswell, JJ.; Platt, B.; Williams, J.

⁶ *R. v. Nickless*, 8 C. & P. 757. *R. v. Dowsell*, 6 C. & P. 398.

⁷ *R. v. Jones*, 2 Cox, 185. It is doubtful whether this ruling of Maule, J., could have been correct. The case was for the jury.

⁸ *R. v. Athea*, 2 Lew. C. C. 191. *R. v. Passey*, and *R. v. Lockett*, supra.

⁹ *R. v. Britton*, 5 Cox, 180, n. Erskine, J.

¹⁰ *R. v. May and another*, 5 Cox, 176.

with the decision of five judges, seems to be very powerful as to the settlement of the question. Though "the case was not argued by counsel, and the learned judges who dissented from the judgment in *R. v. Whittaker*, were not present on this occasion."¹ By 7 & 8 Vict. c. 29, the Act of 9 Geo. 4, c. 69, is extended to persons destroying game or rabbits on any public road, highways, or path, or on the sides thereof, or at the openings, outlets, or gates from any land into any such road, &c.; and the owner or occupier of any land on either side of the road, or the gamekeeper or servant, or assistant, or any other person authorized by the Act of 9 Geo. 4, may seize and apprehend offenders. Under the statute 1 & 2 Will. 4, c. 32, s. 30, the entry upon the land must be personal. So that where the defendant sent his dog into a plantation, but remained in the highway with his gun, so far no offence had been committed beyond a trespass. But the dog put up a pheasant and the defendant fired at it, so that he was manifestly in pursuit of game. And as the soil and freehold of the highway is in the owner of the adjoining land, here was an entry by the defendant upon the land, and his conviction before justices was affirmed.²

Under 57 Geo. 3, it was held to be immaterial whether the defendants were armed at the time they were perceived or not. Two men were discovered shooting in a wood, but before they were actually seen they had abandoned their guns, and were creeping away, and the question was, whether they could be said to have been armed when they were discovered. The defendants neither had the possession of their guns, nor had them within reach. But a keeper had seen the flash of one of the guns before the defendants themselves were seen, and independently of this evidence, the fact of these weapons being very near the spot where the parties had been, would tend to confirm the circumstance of their being found armed. The judges held that the defendants had been rightly convicted.³ However, the principle of one being answerable for the act of another upon these occasions must be taken with one qualification, and it is, that a guilty knowledge can be brought home to that other person. Southern was charged under 57 Geo. 3, with being found armed with intent to destroy game, together with one Johnson, and it was proved that Johnson had a loaded pistol; but it also appeared to the satisfaction of the jury that Southern was entirely ignorant of that fact. A verdict of guilty having been returned, the judges held, that upon the facts stated, the defendant Southern could not be legally convicted.⁴

We have said, that the term "offensive weapon" is not sufficiently certain to prevent discussion. It occurs in the law of rob-

¹ 5 Cox, 181, n.

³ *R. v. Nash and another*,

² *R. v. Pratt*, Dears. 502; 4 El. & Bl. 860.

Russ. & Ry. 386.

⁴ *R. v. Southern*, Russ. & Ry. 444.

bery under 1 Vict. c. 87, and also in an Act against smuggling.¹ Under the latter Act it seems that the weapon ought to be one of a dangerous, as well as of an offensive nature. But in the clause connected with robbery, and in that of 9 Geo. 4, c. 69, now under our consideration, the idea of danger or mischief does not appear to be so intimately connected with the weapon as in smuggling transactions. Thus, a crutch was clearly considered to be such a weapon in a case under 9 Geo. 4, c. 69, being in fact, large enough to be called a bludgeon. And it was left to the jury to say whether the defendant had taken out this crutch as an offensive weapon, or for the purpose of using it as a crutch. It appeared that he had been in the habit of walking with it, and he was acquitted.²

But, to show the distinction between cases of this nature and of smuggling;—upon another occasion, where a small stick was the weapon in question, it was submitted to the jury, whether it had been taken out for the purpose of offence. And, as it appeared that the stick had been used in a sudden affray with gamekeepers, it was considered not to be an offensive weapon within the Act.³ A stick is not necessarily an offensive weapon, although used offensively.⁴ Had it, therefore, been taken out premeditatedly for a mischievous purpose, the case might have assumed a different complexion. So, again, if large stones be brought for the purpose of offence, and the jury become satisfied that they are capable of inflicting a serious injury, especially if the person assaulted be near enough to be hurt, the defendant who uses them may be convicted of being armed with “offensive weapons” within the meaning of the 9th section.⁵ And if the sticks on the shoulders of the poachers for the purpose of hanging their dead hares, should be found to be meant for *attack or defence* as well, they would be “armed.”⁶

It is, moreover, necessary, that the armed persons should have the intent mentioned in the statute. And we shall see by-and-by that the proof as to this intent must be confined to the cases specified in the indictment.⁷

Indictment.] The charge in general is, that the prisoners and divers other evil disposed persons, to the jurors unknown, on, &c., into a certain close of B.,⁸ called —, situate, &c.,⁹ about the hour of eleven in the night¹⁰ of the — day of —, unlawfully did enter the said —, being then and there in company, and

¹ 3 & 4 Will. 4, c. 53.

² *R. v. Palmer*, 1 M. & Rob. 70.

³ *R. v. Fry*, 2 M. & Rob. 42.

⁴ *R. v. Merry*, 2 Cox, 240.

⁵ *R. v. Grice*, 7 C. & P. 803.

⁶ *R. v. Turner and others*, 3 Cox, 304.

⁷ See *R. v. Barham*, 1 Moo. C. C. 151.

⁸ In the possession or occupation of. *R. v. Mellor*, 2 Dowl. P. C. 173.

⁹ *R. v. Alsop*, 1 Show. 339.

¹⁰ *Fletcher v. Calthrop*, 6 Q. B. 880; 14 L. J. M. C. 49; qu.? *Ex parte Fletcher*, 18 L. J. M. C. 16. *Lansdell v. Bidwell*, Paterson, G. L. 92; 8 J. P. 647.

armed with [guns, &c.,] for the purpose then and there of destroying game,¹ [or rabbits.]

"Unlawfully" is sufficient without showing the means.² The kind of game need not be specified.³

A count for going armed in search of game at night may be joined with one for assaulting a gamekeeper in the execution of his duty, and likewise with a count for assaulting such a person when about to apprehend an offender, as well as with a count for a common assault.⁴ It seems that if some certain description be afforded as to the place in question, it will be sufficient, as if the name of the owner or occupier should be stated, without naming the close, but if the prosecutor should particularize the close, accuracy is imperatively demanded. And if all mention of ownership or description is omitted, the indictment will be clearly insufficient. An indictment under 57 Geo. 3, c. 90, contained two counts, one for entering a certain close, and the other for entering certain inclosed ground. But no names, nor ownership, nor occupation, nor abutments were given. And five learned judges⁵ held, that the defendant was entitled to know to what specific place the evidence was to be directed, the offence being substantially local, and judgment was arrested.⁶ Owen and Prickett were tried and convicted for entering "a certain wood, called the Old Walk," &c., stating the name of the owner, with intent, &c. But it turned out that the name of the place in question was the "Long Walk," and it was objected that this was a fatal variance. And of this opinion were the judges, who held the conviction wrong.⁷ So, upon another occasion, the description of "a certain cover in the parish of A.," was held to be too vague.⁸ So, where the defendants were charged with being in a certain field, with intent, *then and there* to take game, it was held, that proof must be tendered of their purpose to trespass on that particular field. Barham and others were charged with entering a certain close in the parish of B., in the occupation of Thomas Quaife, with intent then and there to destroy game, &c. They were observed in Brook Land in the first instance, but when found by the keepers, they were in the Hop garden. The defendant when taken had a brace of pheasants in his pockets, and there was little doubt but that the whole party had been shooting in an adjoining wood. It was objected, that there was no evidence of the defendant having entered the Hop garden with intent to kill game, that, in fact, he was probably returning home, and the learned judge left the

¹ *Fletcher v. Calthrop*, 1 New. S. C. 529.

² *R. v. May and another*, 5 Cox, 176.

³ *Id.*

⁴ *R. v. Finacane and another*, 5 C. & P. 551. *R. v. Simpson*, 1 Russ. C. M. 481.

⁵ Burrough, Best, Bailey, JJ.; Garrow, and Hullock, BB.; *contra*: Abbott, C. J.; Holroyd, and Park, JJ.

⁶ *R. v. Ridley*, Russ. & Ry. 515.

⁷ *R. v. Owen and another*, 1 Moo. C. C. 118.

⁸ *R. v. Crick*, 5 C. & P. 508.

matter with the jury, who said, that the defendant was in the pursuit of game when he was found, but they could not say whether in the Hop garden or elsewhere. By this finding, the place mentioned in the indictment was virtually laid out of the question, and the judges accordingly held the conviction wrong, inasmuch as the entry with intent to kill game was confined by the indictment to the close specified, and it became necessary on that account to prove the intent as to that close.¹ Had a general verdict of guilty been returned, as in *Worker's case*, or had the jury found the entry to have been into the close specified in the indictment, the question, afterwards determined in *Worker's case*, might have presented itself, and the party, although not seen in the specified close, but, on the contrary, found in another, might, nevertheless, have been held properly convicted. "Of and belonging to W.," is sufficient, "without saying in the occupation of W."²

It has also been more than once since decided, that where a particular close is set out in the indictment, evidence must be given to satisfy the jury that the defendants entered into that same close for the purpose of taking game.³

But it needs not to be stated whether the place was inclosed or not.⁴ We have seen, that the defendants are charged with having been armed in the close specified, and Parke, B., is reported to have said, that in addition to the statement of "being then and there by night as aforesaid armed," it ought to be averred that the defendants were armed. The learned judge, however, said that he should leave the defendants to their writ of error.⁵

It is sufficient to say that the offence was committed by night, without adding an allegation as to the hours of sunset and sunrise. It was once objected, that the indictment had failed to express that the entry of the defendants had been before the expiration of the first hour after sunset, and the first hour before sunrise; but Parke, J., held the count good.⁶ Although the addition of such an allegation has occasionally occurred.⁷ However, it must be alleged that the persons engaged in the transaction were *by night* armed upon the close mentioned, or land belonging to the prosecutor. And the words "by night," must be so introduced as to govern the whole of the charge. An indictment stated that J. D., &c., on the 17th of December, &c., at, &c., being to the number of three or more persons together, *did by night* unlawfully enter divers closes, being in the occupation of E. C., and were then and there armed in the said closes, with intent, &c. After convic-

¹ *R. v. Barham*, 1 Moo. C. C. 151.

² *R. v. Riley*, 3 Car. & K. 116.

³ *R. v. Capewell and another*, 5 C. & P. 549. *R. v. Gainer and another*, 7 C. & P. 231.

⁴ *R. v. Andrews*, 2 M. & Rob. 37.

⁵ *R. v. Wilks and another*, 7 C. & P. 811.

⁶ *R. v. Riley*, 1 Lew. C. C. 149; Id. 154. *R. v. Pearson*, cor. Guiney, B.

⁷ *R. v. Lee and others*, Id. 154.

tion, a writ of error was brought, and the judgment was reversed, for the words "by night" were so placed, as to be incapable of reaching over the material averments of the count. "If," said Lord Tenterden, "the words 'by night' had occurred at the beginning of the sentence, they might have governed the whole, or if they had been at the end of the sentence, they might have referred to the whole; but here they are in the middle of the sentence, and are applied to a particular branch of it, and cannot be extended to that which follows. The two members of the sentence are distinct; the first states the entry into the closes by night, but does not state that the defendants were armed, or the intent with which they entered; the second branch states that they were in the closes armed for the purpose of destroying game, but not that they were there by night. Neither of those branches of the sentence contains all that is requisite to constitute an offence within the statute, and the two being distinct, the indictment is bad, and the judgment must be reversed."¹ Had the sentence run thus, "by night did unlawfully enter," &c., it would also have read, "by night were then and there armed." As it stood, the charge virtually was, that J. D., &c., on the 17th of December, by night unlawfully entered a close, and then and there were armed on the day and place aforesaid,² which was manifestly a bad allegation of the offence contemplated by the statute.³

With respect to time generally, where, by mistake, the indictment ran thus, "On the 7th day of October, in the year —," without saying more, it was once objected, that as time in 9 Geo. 4, c. 69, was of the essence of the offence, the defect could not be considered as cured after verdict by 7 Geo. 4, c. 64, s. 20. Upon this, Alderson, J., took the opinion of the judges, who held, that the fault was that of time imperfectly stated, and thus cured by verdict.⁴

It is observable, that the 2nd section is confined to persons having rights as owners and occupiers, and to their gamekeepers or servants, or assistants to the gamekeepers and servants. And, therefore, where a person was allowed by the owner of land to preserve the game, his servant was not considered to be within the protection of this 2nd section. So that there being no right in such servant to apprehend an individual in quest of game, it was held to be only manslaughter in the trespasser to kill the servant who was pursuing him in order to his apprehension.⁵ It has also been decided upon this section, that where a demand was made by

¹ *Davies v. The King* (in error), 10 B. & C. 89. *R. v. Merry*, 2 Cox, 240.

² See 10 B. & C. 90, 91.

³ It was also objected by the counsel for the defendant in this case, that the hour should have been mentioned; and that the closes were not particularized. 10 B. & C. 90. But it will be noticed, that

the closes were stated to be in the occupation of one E. C., and probably that allegation is sufficient. The hour is matter of evidence.

⁴ *R. v. Hall and another*, 1 Lew. C. C. 232.

⁵ *R. v. Addis*, 6 C. & P. 388. See *R. v. Warner and others*, 5 C. & P. 525.

the defendant upon a gamekeeper to give up some wires and pheasants to him, and the defendant accompanied his demand with violence, upon which the gamekeeper gave them up, the jury were instructed to consider whether this interference had not taken place under a *bonâ fide* impression that the property in question belonged to the defendant.¹

A person who tried to apprehend certain persons for being armed in a preserve at night, was deemed a watcher employed by the head keeper. The keeper had been appointed twenty years before by the owner, but the property was then in the possession of trustees. However, he had been paid by the agent down to the time of the trial. And upon an indictment for wounding with intent to prevent apprehension, this was held a sufficient authority to apprehend.² Evidence, however, of a common intent to poach was not deemed to be evidence of a common intent to wound. The prisoners had escaped into a highway, and the keepers had no intent to arrest them when the assault was committed. This was not an assault under 9 Geo. 4, c. 69.³

Indictment under sect. 2.] This indictment states, that A., on, &c., at the parish of —, in the county of —, a certain close called —, there situate, about the hour of eleven of the night of the said day of —, unlawfully did enter with a certain gun for the purpose of then and there taking and destroying game, and that the said A. afterwards, and before the commission of the offence herein-after mentioned, to wit, on the same day and year aforesaid, at the parish aforesaid, in the county aforesaid, was then and there found by one B., being then and there upon the said close with the intent aforesaid, and that the said B., then and there being the gamekeeper of one C., was then and there about to seize and apprehend the said A. for the offence so committed by him as aforesaid, he the said B. having a lawful right to do so as such gamekeeper, for the cause aforesaid, and that the said A. in and upon the said B., so being such gamekeeper as aforesaid, and so being lawfully authorized to apprehend the said A. as aforesaid, then and there made an assault, and him the said B. did unlawfully beat, offer violence to, and ill-treat, against the form, &c.

An indictment under this section stated, that the defendants were in certain lands of A. by night, armed with guns, for the purpose of destroying game, and that they were, "then and there" in the said lands by night, as aforesaid, found by one W. R., the servant of the said A., then and there having lawful authority to seize and apprehend the said defendants, found, "and that the said defendants assaulted," &c. Here, it will be remarked, that

¹ *R. v. Hall*, 3 C. & P. 409.

³ *R. v. Doddridge and others*,

² *R. v. Fielding*, 2 Car. & K. 8 Cox, 335.
621.

the count merely alleges that the defendants were found by night on certain lands, without mentioning the purpose at the time of their being found. Consequently, they could not be said to have been found in the commission of any offence under the statute 9 Geo. 4, and the indictment was accordingly held bad.¹ The subject of prior convictions has undergone some discussion. The indictment set out the first conviction, and afterwards the second, but it failed to state that the offences therein mentioned had been committed against any statute in particular, and that the instrument for taking the game was not sufficiently set out in alleging the second conviction. But the court said, that these convictions had not been appealed against, that they needed not to have been set out in *hæc verba*, and that the statement, that the prisoner did by night then and there enter, was amply sufficient.²

¹ *R. v. Curnock*, 9 C. & P. 730. ² *Cureton v. The Queen*, 8 Cox, C. C. 481; 30 L. J. M. C. 149.
The reader is referred for the game law as it relates to summary conviction, to 1 Will. 4, c. 32.

The first thing I observed when I stepped out of the train at the station was a sense of relief. The air was fresh and the sun was shining. I had been in the city for several days, and I was finally able to see the world from a different perspective. The people were friendly and the food was delicious. I was in luck. The first thing I did was to go to the bank and get some money. I had heard that the bank was the best place to go for money, and I was not wrong. The bank was a large building with many windows. I went in and asked the teller for some money. He gave me a bundle of banknotes and I was on my way. I went to the hotel and put my things down. I was tired but happy. I had found a new home. I was in luck. The first thing I did was to go to the bank and get some money. I had heard that the bank was the best place to go for money, and I was not wrong. The bank was a large building with many windows. I went in and asked the teller for some money. He gave me a bundle of banknotes and I was on my way. I went to the hotel and put my things down. I was tired but happy. I had found a new home. I was in luck.

The first thing I did was to go to the bank and get some money. I had heard that the bank was the best place to go for money, and I was not wrong. The bank was a large building with many windows. I went in and asked the teller for some money. He gave me a bundle of banknotes and I was on my way. I went to the hotel and put my things down. I was tired but happy. I had found a new home. I was in luck.

The first thing I did was to go to the bank and get some money. I had heard that the bank was the best place to go for money, and I was not wrong. The bank was a large building with many windows. I went in and asked the teller for some money. He gave me a bundle of banknotes and I was on my way. I went to the hotel and put my things down. I was tired but happy. I had found a new home. I was in luck.

The first thing I did was to go to the bank and get some money. I had heard that the bank was the best place to go for money, and I was not wrong. The bank was a large building with many windows. I went in and asked the teller for some money. He gave me a bundle of banknotes and I was on my way. I went to the hotel and put my things down. I was tired but happy. I had found a new home. I was in luck.

The first thing I did was to go to the bank and get some money. I had heard that the bank was the best place to go for money, and I was not wrong. The bank was a large building with many windows. I went in and asked the teller for some money. He gave me a bundle of banknotes and I was on my way. I went to the hotel and put my things down. I was tired but happy. I had found a new home. I was in luck.

The first thing I did was to go to the bank and get some money. I had heard that the bank was the best place to go for money, and I was not wrong. The bank was a large building with many windows. I went in and asked the teller for some money. He gave me a bundle of banknotes and I was on my way. I went to the hotel and put my things down. I was tired but happy. I had found a new home. I was in luck.

The first thing I did was to go to the bank and get some money. I had heard that the bank was the best place to go for money, and I was not wrong. The bank was a large building with many windows. I went in and asked the teller for some money. He gave me a bundle of banknotes and I was on my way. I went to the hotel and put my things down. I was tired but happy. I had found a new home. I was in luck.

The first thing I did was to go to the bank and get some money. I had heard that the bank was the best place to go for money, and I was not wrong. The bank was a large building with many windows. I went in and asked the teller for some money. He gave me a bundle of banknotes and I was on my way. I went to the hotel and put my things down. I was tired but happy. I had found a new home. I was in luck.

The first thing I did was to go to the bank and get some money. I had heard that the bank was the best place to go for money, and I was not wrong. The bank was a large building with many windows. I went in and asked the teller for some money. He gave me a bundle of banknotes and I was on my way. I went to the hotel and put my things down. I was tired but happy. I had found a new home. I was in luck.

The first thing I did was to go to the bank and get some money. I had heard that the bank was the best place to go for money, and I was not wrong. The bank was a large building with many windows. I went in and asked the teller for some money. He gave me a bundle of banknotes and I was on my way. I went to the hotel and put my things down. I was tired but happy. I had found a new home. I was in luck.

The first thing I did was to go to the bank and get some money. I had heard that the bank was the best place to go for money, and I was not wrong. The bank was a large building with many windows. I went in and asked the teller for some money. He gave me a bundle of banknotes and I was on my way. I went to the hotel and put my things down. I was tired but happy. I had found a new home. I was in luck.

PART IX.

Of Indictable Offences against Public Justice.

CHAPTER I.

COMPOUNDING OFFENCES AND MISPRISION OF FELONY.

By 18 El. c. 5, s. 3, no informer shall compound without the order or consent of the court¹ where the suit is depending upon pain of a forfeiture of 10*l.*, and he shall for ever be disabled to be plaintiff or informer in any suit or information upon any statute, popular or penal.²

It is said that this statute extends to penal actions where the whole penalty is given to the prosecutor.³ But it has been held that it is limited to informations before the courts at Westminster. And therefore where the defendant was convicted of making a composition with J. H. for an offence against the Coal Acts, the court arrested the judgment.⁴

It is an offence under 18 El. c. 5, s. 3, to compound a penal action, although no process be sued out, nor information laid before a magistrate. The Act applies to all cases of taking a penalty incurred or pretended so to be, without leave of a court at Westminster, or without judgment on conviction.⁵ The same opinion was adhered to in a case where no penalty had been incurred nor information laid, nor process sued out. And the court considered the words, "*upon colour or pretence of any matter*" of offence to be capable of embracing all such cases.⁶

Judgment of imprisonment, with hard labour, may be passed under 14 & 15 Vict. c. 100, s. 29.

Compounding a felony or misdemeanor.] To compound a felony is an offence of the nature of misdemeanor, and it is a great hindrance to public justice. It is where one not only knows of a felony,

¹ Which cannot be had before plea pleaded. *R. v. Collier*, 2 D. P. C. 581. Nor, where the crown is concerned, without the consent of the attorney-general. *R. v. Gibbs*, 3 D. P. C. 345.

² This statute was made perpetual by 27 El. c. 10.

³ 4 Com. by Christian, 133, n. (3.)

⁴ *R. v. Crisp and others*, 1 B. & Ald. 282. See *R. v. Pie*, Hutt. 35; 6 East, 140.

⁵ *R. v. Gotley*, Russ. & R. 84.

⁶ *R. v. Best*, 2 Moo. C. C. 124; 9 C. & P. 368; see also 27 El. c. 10; 1 Sir Wm. Bl. 443.

but takes his goods again, or other amends, not to prosecute.¹ Nothing, no promise broken, however scandalous the breach, can justify the foregoing of a prosecution upon terms.² But it is not an offence to retake goods, unless some favour be shown to the thief.³ The misdemeanor in question is punishable by fine and imprisonment.⁴ To compound a misdemeanor is likewise, as it should seem, a misdemeanor.⁵ But, after a conviction, a composition does not seem to be looked upon in the same light. For a compromise is often permitted, under such circumstances, with the sanction of the court, as when the defendant is allowed to speak with the prosecutor, before judgment is pronounced, and a less sentence is inflicted if the prosecutor declares himself satisfied.⁶ So, where the chairman of a quarter sessions informed a person convicted of ill-treating his apprentice, that if he would pay forty guineas towards the expenses of the prosecution, he should be imprisoned for six months instead of twelve, a note given by that person was held to be valid. And upon an action brought upon the note, Lord Ellenborough said, that the overseers got no pecuniary benefit to themselves or to the parish, by taking this security, beyond the fair amount of their expenses. The giving of this note did not stifle a public prosecution, nor elude the public interest in bringing such an offender to justice, by way of example to others.⁷ And, of course, if the indictment state that the defendant desisted altogether from prosecuting, and it turn out that the defendant did prosecute to conviction, the judge will direct an acquittal.⁸

By an arrangement fees were divided between the clerk of the borough and the clerk of the peace, who were partners. An indictment was held good under these circumstances, although a pecuniary penalty was also imposed.⁹

Misprision of felony.] If a felony be concealed, or if there be an attempt at such a concealment, the offence is known by the name of misprision, unless there be such circumstances in the case as will make the party accessory after the fact. Thus to observe the commission of a felony silently, without using any endeavours to

¹ 1 Hawk. c. 59, s. 5. See Mo. 8.

² *R. v. Daly*, 9 C. & P. 342.

³ 1 Hawk. c. 59, s. 7; 3 Inst. 133.

⁴ And if any harbouring or maintenance be afforded to a felon, the party so acting becomes an accessory after the fact.

⁵ See 2 Wils. 349; 5 East, 298, 302, by Lord Ellenborough: *contra*, 4 Com. by Christian; 433, n. (3.)

⁶ 4 Com. 364.

⁷ *Beeley v. Wingfield*, 11 East, 46; *Baker v. Townsend*, 7 Taunt, 422, where certain assaults and a disputed right of possession, together with all matters in dispute between parties were referred. See also, *R. v. Rant*, Kyd on Awards, 64. *R. v. Harding*, 2 Salk. 477, which seem to be overruled by this case.

⁸ *R. v. Stone and others*, 4 C. & P. 379.

⁹ *Fox v. Reg.* 29 L. J. M. C. 54.

apprehend the culprit, is misprision.¹ So if the person robbed re-take his goods, and then suffer the felon to depart, he will be guilty of misprision or concealment.² And it is said, that the concealment of treasure trove is misprision of felony, being a kind of negative misprision; that which a man knows, but which he does not assent to.³ The judgment for this offence is fine and imprisonment.⁴ But by the statute of Westminster, 3 Edw. 1, c. 9, if the sheriff, coroner, or any other bailiff, for reward, or for prayer, or for fear, or for any manner of affinity, shall conceal, consent, or procure to conceal the felonies done in their liberties, or otherwise will not attach nor arrest felons, or otherwise act for favour, they shall, upon conviction be imprisoned for one year, and after make a grievous fine at the king's pleasure, if they have wherewith; and if they have not, they shall be imprisoned for three years. And by 3 Hen. 7, c. 1, justices shall take inquests concerning such concealments, and shall amerce persons guilty thereof at the sessions.

¹ 2 Hale, P. C. 75; 1 Hawk. c. 59, s. 2.
² Mo. 8.

³ See 4 Com. 121.
⁴ 1 Hawk. c. 59, s. 6.

CHAPTER II.

OF CHAMPERTY, MAINTENANCE, BARRATRY, EMBRACERY, &c.

Champerty is said to be the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it.¹ At common law it is punishable by fine and imprisonment; and being an act of maintenance, if done in the face of a court of record, may be visited by an immediate committal.² Champerty, however, is forbidden by statute. As by the statute of Westminster, 1, (3 Edw. 1, c. 25,) which declares that no officers of the king by themselves, or by others, shall maintain pleas, suits, &c., in the king's courts,³ for lands, tenements, or other things,⁴ for to have part or profit thereof, by covenant⁵ made between them. And the sentence is, that the party be punished at the king's pleasure. Again, by the statute of Westminster, 2, (13 Edw. 1, c. 49,) the like punishment is awarded against the chancellor, treasurer, justice, king's counsel, clerk of the chancery or exchequer, justice, or other officer,⁶ or any of the king's house, clerk or lay, who shall receive any church, or advowson, land,⁷ or tenement in fee, by gift or by purchase, or to farm, or *by champerty*, or otherwise, so long as the thing is in plea, &c. The 28 Edw. 1, c. 11, extends the prohibition to all officers and others.⁸ It also ordains, that no one, upon such covenant, shall give up his right to another, upon pain of forfeiture by the taker, of so much of his land and goods as amounts to the value of the part which he has purchased⁹ for such maintenance. And in order to obtain this, whosoever will may sue for it on behalf of the king before the jus-

¹ 1 Hawk. c. 86, s. 1.

² Id. c. 83, s. 38.

³ The king's courts of record.
1 Hawk. c. 84, s. 3.

⁴ Personal as well as real actions are included. Id. s. 5. And rent growing out of the land. Id. s. 6. But not rent granted out of other lands. Id. Likewise a tenant or defendant is as much within the statute as a demandant or plaintiff: s. 8.

⁵ All kinds of promises and contracts, whether by writing or parole. Id. s. 4.

⁶ The statute was limited to the

officers named. 1 Hawk. c. 84, s. 11; but see *post*, 28 Edw. 1, c. 11.

⁷ Whether they purchase the land *bonâ fide*, and without maintenance or not, and whether they are or not of affinity to the disputants. 1 Hawk. c. 84, s. 12.

⁸ In any action, whether real, personal, or mixed, or a suit in equity, as it seems. Id. s. 15. A surrender by a lessee to his lessor is not within the Act: s. 17.

⁹ Whether the purchase be for money, or a lease for life or years, or a voluntary gift of land. Id. s. 16.

tices, before whom the plea is. But counsel or pleaders are not to be restrained hereby,¹ nor parents and next friends.²

However, in reading these statutes, it must be understood, that the maintenance is the chief ingredient in the offence. So that if a grant of land in suit be made in consideration of a precedent honest debt, the matter is not tainted by maintenance, and the bargain is good.³ So if the right to an estate be undisputed at the time of the contract, but subsequently litigation becomes necessary, owing to circumstances which have arisen afterwards, the maintenance of a suit to recover this estate is not champerty.⁴ So, if the bargain be made before the suit has been commenced, it is not within the statutes of champerty.⁵ But it may be an offence at common law. The delivery of a gift to an ignorant heir, together with the taking of a bond from him, in order to prosecute suits for the recovery of estates, savours of champerty, if the consideration be inadequate.⁶ So an assignment to navy agents of prize money connected with a depending suit, is champerty.⁷

It is not material that the party suing for the champerty should have suffered any damage by the transaction, nor even that the suit has been determined.⁸ The seller and purchaser made an agreement that the latter should bear the expense of certain suits commenced by the seller for rent, on condition of his having the rents and any sum that could be recovered for dilapidations. The purchaser also was to use the seller's name in any action which might be brought. Judgment was given for the defendant in the King's Bench, and upon error brought in the Exchequer Chamber, it was affirmed. The court said, there was no champerty in an agreement to enable the *bonâ fide* purchaser of an estate to recover for rent due, or injuries done to it previously to the purchase, more especially where such purchaser was not an officer of the king.⁹ Nor is it champerty for a surety to pay a debt.¹⁰

A creditor having instituted proceedings at law and in equity against a debtor, agreed with the debtor that he would abandon all

¹ Provided the matter be given to the counsellor for his wages, and not in consideration of any precedent bargain after the suit commenced. 1 Hawk. c. 84, s. 19. But a strong presumption of champerty will hang about such an unwise proceeding. Id. See *R. v. Penros, a counsel*, 2 Inst. 564.

² As a conveyance or promise by a father to his son, or by an ancestor to his heir apparent, since it only gives them the greater encouragement to do what by nature they are bound to do. 1 Hawk. c. 84, s. 18.

³ Id. s. 9.

⁴ *Wilson v. Short*, 6 Hare, 366.

⁵ 1 Hawk. c. 84, s. 14.

⁶ *Strahan v. Brander*, 1 Eden. 303.

⁷ *Stevens v. Bagwell*, 15 Ves. jun. 139. See 3 Ves. jun. 502; 18 Ves. jun. 128; a bond to an attorney from his client set aside. See 2 Sim. & Stu. 244.

⁸ 1 Hawk. c. 84, s. 7.

⁹ *Williams v. Protheroe*, 5 Bing. 309; 3 Y. & Jer. 129. See likewise 33 Edw. 1, st. 2 & 3; 4 Edw. 3, c. 11; 20 Edw. 3, cc. 4 & 5; 7 Ric. 2, c. 15; 32 Hen. 8, c. 9.

¹⁰ Palm. 190.

proceedings and give up the securities. On the other hand, the debtor was to give him a lien on securities in the hands of another creditor, with authority to sue that other creditor, and make other arrangements. Had this agreement gone further, with a stipulation that the creditor should maintain the proceedings to be instituted by the debtor against the holder of those other securities, champerty would have been committed, for the debtor would have derived profit from the suit.¹ And if an attorney obtains from his client any securities during the suit, the attorney will be declared a trustee, as the transaction savours of champerty.² So, to purchase an interest which is the subject of a suit is not maintenance, but as soon as the purchaser gives an indemnity for the costs incurred, the transaction becomes illegal and amounts to maintenance.³

A stranger may purchase, *pendente lite*, but not the attorney, not if he conduct the case without placing his name as attorney on the record.⁴ However, a material distinction has been taken between an assignment of the estate to the attorney as a security for costs, and an absolute purchase. Thus, where the plaintiff in ejectment assigned in this manner after verdict and before judgment, the court would not set aside the deed, which was duly registered as a bill of sale, for here was neither champerty nor maintenance.⁵ Another point is, that litigation is not to be encouraged. "All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce."⁶ Thus, an assignment of a right to file a bill in equity for a fraud committed on the party who had assigned was held void, being contrary to sound policy. A demurrer was allowed.⁷

The offence of champerty may be laid in any county at the pleasure of the informer.⁸

Maintenance.] Another misdemeanor against the administration of justice, is maintenance, which is the unlawful taking in hand, or upholding of quarrels or sides, to the disturbance or hindrance of common right.⁹ This kind of maintenance differs from champerty, inasmuch as there is no contract to have any part of the thing in suit.¹⁰ Almost any kind of officious¹¹ assistance may be said to amount to maintenance, whether it be tendered in or out of court.¹² A juror is said to be guilty of maintenance who so-

¹ *Wood v. Downes*, 18 Ves. 120.

² *Hartley v. Russell*, 2 Sim. & Stu. 244. See *Strahan v. Brander*, 1 Eden. 303, and 18 Ves. 127.

³ *Harrington v. Long*, 2 Myl. & K. 590.

⁴ *Simpson v. Lamb*, 7 El. & Bl. 84.

⁵ *Anderson v. Radcliffe*, 28 L. J. Q. B. 32. Affirmed in error, 29 L. J. Q. B. 128.

⁶ By Lord Abinger, 1 Y. & Col. 497. Exch. in Equity.

⁷ *Prosser v. Edmonds*, 1 Y. & Col. 481.

⁸ 31 El. c. 5, s. 4.

⁹ 1 Hawk. c. 83, s. 1.

¹⁰ Id. s. 3.

¹¹ Godb. 81.

¹² 1 Hawk. c. 83, ss. 4, 5, 6, 7.

licits the judge to give judgment according to the verdict.¹ But he may exhort his companions to give a just verdict, without incurring this blame.² Even after judgment, a person may be a maintainer, because the party aggrieved by the maintenance might be dissuaded from bringing his writ of error, or attain.³ Unlike the case of champerty, the better opinion seems to be, that money or any other reward given before the commencement of the suit, with an evident design of maintaining the litigation at issue, will constitute maintenance, if the action or defence to the action be prosecuted in consequence.⁴ Although it has been said, that the suit must have previously begun.⁵ Neighbouring advice, given *bonâ fide*, as to the recovery of a debt, or other matter, will not amount to maintenance, provided it do not appear that there has been an officious intermeddling, which is one chief ingredient in this offence.⁶ Nor can a bare promise to maintain be construed into maintenance,⁷ unless the person promising be of great influence, or unless the promise be made in a public manner, so as to produce the excitement to litigation, which the law disapproves.⁸

Maintenance is an offence, both at common law and by statute. At common law, independently of an action against the person maintaining, there is the remedy by indictment, and judgment of fine and imprisonment follows upon conviction. And a court of record may commit for an act of this nature done in the face of the court.⁹ By 1 Edw. 3, c. 14, and 20 Edw. 3, c. 4, the king's ministers, and the great men of the realm, were especially forbidden from interference in quarrels, by sending letters or otherwise, and all other persons, "great [and] small" were likewise generally warned against the offence.¹⁰ A similar ordinance was made by 1 Ric. 2, c. 4,¹¹ where the king's councillors, officers or servants, as well as all others, are mentioned. The punishment in the case of the greater persons was a pain to be ordained by the king himself; and in the case of the less officers and servants, loss of their places, together with imprisonment and ransom at the king's will; and in the case of other persons, imprisonment or ransom as aforesaid.¹² And by 32 Hen. 8, c. 9, maintenance in general is again forbidden, under a penalty of 10*l.*, one moiety to be paid to the king, and the other to him who will sue for the same by action of debt.¹³

It seems that the *apprehension* of maintenance will be sufficient

¹ 1 Hawk. c. 83, s. 9.

² Id. s. 10.

³ Id. s. 13.

⁴ Id. s. 12.

⁵ Id.

⁶ Id. s. 11.

⁷ Cart. Rep. 230, Vaughan, C.J.

⁸ 1 Hawk. c. 83, s. 8.

⁹ Id. s. 38.

¹⁰ A court baron is within the statutes. 1 Hawk. c. 83, s. 41. But

not a suit in a spiritual court, s. 48; Cro. El. 594.

¹¹ See also 3 Edw. 1, cc. 23, 33; 33 Edw. 1, st. 3; 4 Edw. 3, c. 11; 20 Edw. 3, c. 5; 7 Ric. 2, c. 15.

¹² Imprisonment for three years, and fine at the king's pleasure, 33 Edw. 1, st. 3 (Statute of champerty).

¹³ See also 1 Hawk. c. 83, s. 45, citing the various statutes concerning liveries or badges of maintenance.

to warrant the suing out of a writ upon the statute 1 Ric. 2.¹ But in an information upon 32 Hen. 8, it must be said, that a plea was depending.² And under 1 Ric. 2, he who barely assists another in taking out an original, which is never returned, is not liable to any action.³ It is immaterial whether the plaintiff be nonsuited, or whether he recovered in the action alleged to have been the subject of maintenance.⁴

Several justifications, however, are admitted by the law in answer to a charge of maintenance. As kindred or affinity.⁵ But although this exception goes so far as to allow even a godfather to counsel and assist his godson, no relation can lay out his money in a cause unless he be the father, the son, or the heir apparent to the party, or the husband of an heiress.⁶ Again, a landlord may maintain his tenant by laying out his money to defend the title or otherwise. But he cannot do this with respect to lands not holden of him.⁷ And it is said, that the lord of a town may maintain the right of inhabitants to a common burying place in an action brought against them, by showing to the jury authentic evidence of their right.⁸ So, a tenant may maintain his lord.⁹ And the tenants of a manor may join together.¹⁰ A master may maintain his servant,¹¹ yet not beyond the amount of his wages in hand.¹² But the master may not speak to the court in favour of the servant's cause.¹³ So if the servant be arrested in an action of debt, the master may assist him with money to effect his enlargement, in order that he may have the benefit of his service.¹⁴ But the rule is limited to personal actions, so that the master cannot help his servant in matters relating to land, unless he have wages in hand belonging to the servant, in which case he may lay them out, with the consent of the latter, on his behalf.¹⁵ A servant, moreover, may maintain his master, provided he be a general servant; but he may not lay out any of his own money to assist his master in a suit, although he may get counsel for his master, and render him any service of that nature.¹⁶ A trustee may maintain to the amount of his trust.¹⁷ Even a neighbour may help another neighbour with counsel, but he must not ad-

¹ 1 Hawk. c. 83, s. 44.

² Id. s. 49.

³ Id. s. 42. And nul tiel record is a good plea. Id. The word "unlawfully," is necessary in an indictment. Id. s. 47. If a record be made of an information laid upon one of these statutes, as 32 Hen. 8, c. 9, and the indictment conclude *contra formam statuti* generally, the court cannot properly entertain the charge, because maintenance is made penal by other statutes, as 1 Ric. 2, &c. *R. v. Higginson*, 1 Ld. Raym. 537. 12 Mod. 322.

⁴ 1 Hawk. c. 83, s. 43.

⁵ 1 And. 201.

⁶ 1 Hawk. c. 83, s. 26.

⁷ Id. s. 29. See sect. 27.

⁸ Id. s. 28.

⁹ Id. s. 30.

¹⁰ Hob. 92.

¹¹ Mo. 814.

¹² Mo. 6.

¹³ 1 Hawk. c. 84, s. 31.

¹⁴ Id. s. 32.

¹⁵ Id. s. 33.

¹⁶ Id. s. 34.

¹⁷ Mo. 620.

vance money to further his suit.¹ And any one may go to a counsel on behalf of a foreigner who cannot speak English, to inform the counsel concerning his case.² And, again, as a matter of mere charity, money may be given to a poor person, in order to enable him to obtain justice for himself.³

The acts of a counsel or attorney can hardly be called exceptions to the rule concerning maintenance. For they must not work with their own money,⁴ and their interference is particularly sanctioned by the courts where they are concerned. If an attorney, however, should carry on a cause at his own charge with a promise never to expect repayment, he is guilty of this offence;⁵ or if any one should bring an action without the privity of the plaintiff.⁶ So, if a counsellor should contract to receive a sum in gross for his services.⁷ And if any deceitful conduct should be practised by counsel or attorney, the party so acting will be guilty of maintenance. Indeed by the statute of Westminster 1, c. 29, if any serjeant,⁸ pleader, or other, do any manner of deceit or collusion⁹ in the king's court or consent unto it, he shall, being attainted, be imprisoned for a year and a day, and shall not be thenceforth heard to plead in that court for any man. If he be no pleader he shall be imprisoned for a year and a day at the least, and if the trespass require a greater punishment, it shall be at the king's pleasure.

Lastly, there are some circumstances or ties of interest which will form a ground of defence to the charge under our consideration. As where the person in remainder or reversion defends the suit of tenant in tail with his own money.¹⁰ Or the lessor the title of his lessee,¹¹ or the alienee of land in respect of an action brought by the person who sold the inheritance to him.¹² So, the holder of a contingent interest in land may maintain the title although he may never be the better for the contingency;¹³ or the holder of an equitable interest.¹⁴ Commoners, likewise, may maintain those who have common with them. And inhabitants may join to support the right to a way or churchyard.¹⁵ Also, it is said, that he who is bail for another may take care to have his appearance recorded, but that he ought not to intermeddle further.¹⁶

However, as we have seen in champerty, the charge of main-

¹ 1 Hawk. c. 83, s. 35; and see also sect. 11; Dy. 256.

² 1 Hawk. c. 83, s. 37.

³ Id. s. 36; Freem. 71, 81; Godb. 159.

⁴ 1 Hawk. c. 83, ss. 38, 39; Hob. 67, 117.

⁵ 1 Hawk. c. 83, s. 40.

⁶ Mar. 47, pl. 76.

⁷ Rep. T. Finch, 75.

⁸ Counsel not sworn are within this Act as well as serjeants who are sworn. 1 Hawk. c. 83, s. 42.

⁹ All fraud and falsehood tending to impose upon or abuse the justice of the king's courts are within the purview of the statute: s. 33. As a false plea, s. 37, and see ss. 34, 35, 36.

¹⁰ 1 Hawk. c. 83, s. 14.

¹¹ Id. s. 15.

¹² Id. s. 16.

¹³ Id. ss. 17, 18. See also ss. 19, 20.

¹⁴ Id. s. 21. See s. 22.

¹⁵ Id. s. 24.

Id. s. 25.

tenance must rest upon a suit to which the party is a stranger. So that the assignee of a bond or other chose in action, made over to him for good consideration in satisfaction of a precedent debt due *bonâ fide* to him, and not merely in consideration of the intended maintenance, may either maintain the obligee in an action brought by him for the debt, or commence an original action in his name, for he has an equitable interest in the debt.¹

Barratry.] A barrator is a common mover, exciter, or maintainer of vexatious suits or quarrels either in courts or in the county.² A barrator is, therefore, an offender against the due administration of justice, as well as against the public peace. As where a counsellor maliciously abetted the institution of several false actions for debt in a case where the *plaintiff* was the real debtor.³ The barrator is as much mixed up with controversies concerning lands as with calumnies and other such disquieting proceedings.⁴ And the opinion of Hawkins is, that he is a barrator who brings a number of false actions in his own name without any manner of colour,⁵ although the contrary is said to have been holden.⁶ The words "many suits" are important, because no man can be a barrator in respect of one.⁷ So, an attorney who is not privy to a groundless suit is not a barrator,⁸ although he may be engaged in others. It is the opinion of Hawkins also, that a *feme covert* may be charged with this offence, although he cites a decision to the contrary.⁹

The defendant in an indictment for barratry must have a copy of the articles intended to be insisted on against him,¹⁰ and the prosecutor must assign particular instances in the indictment;¹¹ and if he prove them, he shall be admitted to prove as many more as he pleases, to aggravate the fine.¹²

The indictment must call the defendant a common barrator,¹³ and must conclude against the peace, &c.¹⁴ Although a conclusion, against the form of the statute, is sufficient notwithstanding the absence of any such statute, except as far as the proceedings and punishment are concerned.¹⁵ So an indictment may be good without averring the offence to have happened at any particular place, because as the misdemeanor consists in the repetition of several

¹ 1 Hawk. c. 83, s. 23. See also subject, 2 Inst. 215.

² 1 Hawk. c. 81, s. 1; Jenk. 247. See 8 Rep. 36. The case of barratry.

³ *R. v. —*, 3 Mod. 98.

⁴ 1 Hawk. c. 81, s. 2.

⁵ *Id.* s. 3.

⁶ *Id.*

⁷ *Id.* s. 5.

⁸ *Id.* s. 4.

⁹ *Id.* s. 6; 1 Ro. Rep. 39.

¹⁰ *R. v. Ward*, 12 Mod. 516. *R. v. Grove*, 5 Mod. 18; 6 Mod.

262; 1 T. R. 754; 1 Hawk. c. 81, s. 13.

¹¹ *R. v. Cornwall*, Mo. 302.

¹² Lord Raym. 490; 1 T. R. 751, 754; 1 New Rep. 95, Heath, J. See, however, 6 Mod. 311, where Holt, C. J., excepts barrator and scold from the rule which requires particular instances to be set forth.

¹³ *R. v. Palfrey*, Cro. Jac. 527; *R. v. Hardwicke*, 1 Sid. 282; 1 Hawk. c. 81, s. 9.

¹⁴ 1 Sid. 282; 1 Hawk. c. 81, s. 12.

¹⁵ 1 Hawk. c. 81, s. 10.

acts, it must be intended to have happened in several places; wherefore it is said that a trial ought to be by a jury from the body of the county.¹

With respect to the proceedings against barrators and their punishment, it is enacted by 34 Edw. 3, c. 1, that three or four persons shall be assigned in every county for the purpose of restraining offenders, rioters, and all other barrators, and of pursuing and punishing them. And by Hawkins, "It seemeth from these words that justices of the peace, as such, have cognizance of barratry without any other commission; *sed quære*, for the contrary opinion seems to have been holden in Rolle's Reports."² But it has been held that justices of the peace may try this offence without any special commission of oyer and terminer.³

Judgment.] The judgment for barratry is fine and imprisonment, and to be bound to the good behaviour, and, moreover, if any such offenders be of the profession of the law, they ought to be disabled from practising for the future.⁴

Buying or selling titles.] To buy or sell a doubtful title is a species of maintenance. It is forbidden by the common law and by statute. As by 13 Edw. 1, c. 49, where persons of the king's house are prohibited from buying any title whilst the thing is in dispute, upon pain of the punishment both of buyer and seller at the king's pleasure. So by 1 Ric. 2, c. 9, it was forbidden to make gifts of lands in debate, and such gifts were declared to be of no value. And by 32 Hen. 8, c. 9, the act of bargaining for, buying or selling pretended rights or titles is made punishable by a forfeiture of the whole value of the lands both by the buyer and seller, one-half to go to the king and the other half to him who will sue for the same. But there is a proviso enabling a party in lawful possession to buy the pretended right of another person to the same lands.⁵ And this proviso was necessary, for the rule is, that the offence may be committed whether the title be a good or bad one, or whether the seller be in possession or not, unless his possession be lawful and uncontested.⁶ The offence of buying titles may be laid in any county at the pleasure of the informer.⁷ But it is dangerous to misrecite the statute of Hen. 8.⁸

¹ 1 Hawk. c. 81, s. 11. *R. v. Wells*, 1 Ro. Rep. 295. See, however, *R. v. Man*, Godb. 383.

² 1 Hawk. c. 81, s. 8; 2 Ro. Rep. 151. See Yelv. 46.

³ 1 Hawk. c. 81, s. 14. A juror cannot be withdrawn in barratry. *R. v. Jeffs*, Str. 984. See further upon barratry, *R. v. Urlyn*, 2 Saund. 308, and note (1) of Wms. Saund. there. Error: reversal of judgment in barratry. And held that no restitution lay to a stranger on the record. *R. v. Lever*, 1 Show. 261.

⁴ Yelv. 46, recognized in 2 Sir Wm. Bl. 1051; 2 Saund. 308; note (1); and the barrator may be tried on the day when the indictment is found. Jenk. 317; *Rice v. Regem*, Cro. Jac. 404.

⁵ See 1 Hawk. c. 86, s. 7, &c. for the construction of this statute.

⁶ 1 Hawk. c. 86, s. 1.

⁷ 31 El. c. 5, s. 4; and see more upon this subject, 1 Hawk. c. 86; Godb. 450. *R. v. Hill*, 1 And. 76; 2 And. 57; Dy. 52, 74, 374; Mo. 266, 665, 751. Plowd. 77.

⁸ *R. v. Hill and another*, Cro. Car. 232.

Embracery.] Embracery, denoted as another species of maintenance, is any attempt whatever to corrupt, influence, or instruct a jury, or in any way to incline them to one side by money, promises, letters, threats, or persuasions, whether any verdict be given or not, or the verdict given be true or false.¹ And if money be given after verdict, it is an act of embracery, for jurors might entertain an idea that they would be rewarded for their services, if such were the received practice.² So, if A. give B. a sum of money to be distributed amongst jurors, it is embracery, whether the distribution take place or not.³ So, an attempt to gain over a person to offer himself as a juror, or not to appear in that character, is a misdemeanor,⁴ although it is said that there are circumstances where a person may be requested to appear and give a verdict according to his conscience. And the juror himself will be as criminal if he endeavour to seduce his brethren into a verdict by any practice, except argument, with reference to the case laid before them.⁵ So, where persons by indirect means procured themselves to be sworn on a tales, they were found guilty of embracery, and Hale, C. J., refused to hear any motion to arrest the judgment.⁶ But, of course, the arguments of counsel and the strength of evidence are not embraceries. They are the only legitimate means of influencing the jury, and when practised in open court are entirely lawful.⁷ Nor are allowances for travelling acts of embracery.⁸

The proceedings at common law for this misdemeanor may be by indictment, information, or action.⁹ The judgment is fine and imprisonment.

But embracery is likewise pointed at by the legislature. By 5 Edw. 3, c. 10, if any juror shall take of one party or the other, he shall, upon conviction, be imprisoned and ransomed at the king's will, and shall be incapacitated from serving on any assizes, juries, or inquests. By 34 Edw. 3, c. 8, the complaint against a juror shall be held by bill forthwith, and if the juror be attainted at the suit of other than the party, and be fined, the party suing shall have half the fine, and the parties to the plea shall recover their damages by the assessment of the inquest. Moreover, the attainted juror shall be imprisoned for one year. By 38 Edw. 3, c. 12, which contains further provisions, the forfeiture is declared to be ten times as much as the juror has taken, half for the party suing and half for the king, and if the juror have not sufficient to pay the forfeiture he shall be imprisoned for one year.

¹ 1 Hawk. c. 85, ss. 1, 5.

² Id. s. 3.

³ Id. s. 4.

⁴ Id. s. 6.

⁵ Id. s. 4.

⁶ *R. v. Opie and others*, 1 Saund. 301. But Mr. Serjeant Williams, in note (1) to p. 442, note (d), fo. ed. where the serjeant observes,

"In my own experience I never knew such a motion refused to be heard." And the present practice, says Serjeant Williams, is to hear such a motion.

⁷ 1 Hawk. c. 85, s. 1.

⁸ Id. s. 3.

⁹ 1 Hawk. c. 85, s. 7.

Again, the statute 32 Hen. 8, c. 9, inflicts a forfeiture of 10*l.* upon such as "embrace any jurors," one moiety to belong to the king, and the other to him who will sue for the same. By 6 Geo. 4, c. 50, s. 61, if any one be guilty of embracery, or if any juror do wilfully and corruptly consent thereto, he shall be fined and imprisoned. If an act of embracery be not known before the trial of a cause, so that the party whose interests were intended to be prejudiced, has had no opportunity of preventing the evil effects of it by challenging the juror, it will be a good ground to move the court to set aside the verdict.¹

Tampering with witnesses.] It is a great misdemeanor to dissuade a witness from giving his evidence, although the persuasion should not succeed. Upon such an occasion it was excepted that the indictment did not positively aver that there had been an indictment against any one, but the court overruled the objection, thinking it quite sufficient to say that the defendant knowing that such a person had been indicted, did such and such acts, and judgment of fine and imprisonment was given.² And again, where parties had been convicted upon an information for bribing a witness to swear that a certain deed was false, it was unnecessary to aver that the deed in question was true.³ So again, persons conspiring to keep away a witness from giving his testimony, are guilty of conspiracy.⁴

Threatening a prosecutor.] It is likewise a serious misdemeanor and punishable by information, to threaten a prosecutor, as by telling him that he will be hanged; or the court will grant an attachment.⁵

CHAPTER III.

NON-REPAIR OF GAOL AND OBSTRUCTION OF JUSTICES.

Non-repair of a gaol.] If no one were under a legal obligation to repair a gaol, the administration of justice would be defective. The county is usually charged with this liability, but it may also rest upon individuals in respect of their estates. As, for instance, the county gaol of Devonshire was for some time repaired by virtue of a charge upon an estate there. And the Earl of Exeter

¹ 1 Hawk. c. 85, s. 7.

² *R. v. Lady Lawley*, 2 Str. 904. ² East, 362.

³ *R. v. Ireton*, Pollexf. 592.

⁴ *R. v. Steventon and others*,

⁵ *R. v. Carroll*, 1 Wils. 75.

was indicted for the non-repair of a gaol at Peterborough. In this last case there were six counts, the first stating that the defendant and his predecessors, *lords of the liberty*, had immemorially been used and accustomed, &c., to repair, whilst the five other counts alleged simply that the defendant and his predecessors had immemorially been used, &c., without mentioning the franchise. The defendant pleaded not guilty to the first count, and demurred to the five last, and the court were quite clear in favour of the demurrer, observing that the lord of a franchise, as such, was not bound to repair the gaol within it without an immemorial usage to charge him as lord of the franchise.¹

Obstructing justices in holding their court.] A rule was granted to show cause why an information should not issue for refusing to let the justices of peace for Worcester hold their sessions in the town hall of that city.²

CHAPTER IV.

LIBEL, &c.

Cases of libel and slander against legal officers are, however, frequently treated as misdemeanors, and prosecuted accordingly.³ But the right principle seems to be, that words spoken to a magistrate are not indictable, unless they tend immediately to a breach of the peace, or are addressed to him in the execution of his office;⁴ and the better opinion is, that words spoken in the absence of a justice are not indictable.⁵ Libel stands upon a different footing, since every published writing which is calculated to bring a person into contempt, and so injure his fair fame in the world, is punishable by indictment or information.⁶ Hence it follows, that some of the old cases which treat words spoken of a justice as indictable misdemeanors cannot now be looked upon with respect as authorities.⁷

¹ *R. v. Earl of Exeter*, 6 T. R. 373.

² Anon. 2 Barnard. 60.

³ Anon. Lofft. 462.

⁴ See *R. v. Bagg*, 1 Ro. Rep. 79. *R. v. Cranfeild*, 5 Mod. 203. *R. v. Nun*, 10 Mod. 186; *R. v. Revel*, 1 Str. 420. *R. v. Leafe*, Andr. 226.

⁵ 1 Hawk. c. 21, s. 13.

⁶ See *R. v. Sharpe*, Andr. 384.

⁷ See *R. v. Baker*, 1 Mod. 35. *R. v. Darby*, 3 Mod. 139; 11 Mod. 167, note (e). *Note.*—That supposing it to be competent for justices to commit for contempt, the commitment must be for a time

And, indeed, scandalous expressions were not always regarded as indictable, even in more ancient times.¹

But the magistrate is not without redress where the slander is intruded upon him when he is not engaged in his office. He may have an action for such words as the law deems actionable, or he may cause the speaker to be bound over to his good behaviour.² And for such slander uttered behind his back, it seems that suretyship for the good behaviour may be required.³

The defendant was charged with abuse of a justice in the execution of his office, and the court said that the justice might make himself judge and punish immediately; but still, if he should think proper to proceed less summarily by way of indictment,⁴ he might. "The true distinction is, that where the words are spoken in the presence of the justice, there he may commit, *but where it is behind his back, the party can be only indicted for a breach of the peace.*"⁵ So, where the defendant called a magistrate a liar, and accusing him of misconduct, declared he would repeat the language, the court would not grant an information, there appearing no intention of committing a breach of the peace.⁶ And thus, again, where a justice had been slandered, the court denied an information, saying, that it was not the same insult and contempt as if spoken to him in the execution of his office, *which would make it a matter indictable.*⁷ Therefore, the point to be considered is, whether words spoken in the justice's absence might lead to a breach of the peace. One Harrison was indicted for advancing to the bar of the Common Pleas, and saying, whilst the judge was sitting there, "I accuse Mr. Justice Hutton of high treason;" and he was severely fined and imprisoned for the offence.⁸ Here the judge was giving "rules and orders," and thus was in the execution of his office.

certain. *R. v. James*, 5 B. & Ald. 894.

¹ See Sty. 251, Hil. 1650. *R. v. Burford*, 1 Ventr. 16. *R. v. Langley*, 2 Salk. 697. *R. v. Wrightson*, Id. 698. *R. v. Legasley*, 1 Hawk. c. 21, s. 13. *R. v. Broxham*, Id. *R. v. Shaftow*, 11 Mod. 195. *R. v. Granfield*, 12 Mod. 98. *R. v. Lee*, Id. 514. *R. v. Penny*, 1 Lord Raym. 153. *R. v. Pocock*, 2 Str. 1157.

² But he may not commit for contempt, unless he be acting as a magistrate. See likewise *R. v. Cotton*, W. Kel. 133; 2 Barnard. 313, where the defendant was committed for contemptuous language. The court observed, that the usual course was to fine the offender, and to commit him in case of nonpayment; but they

would not grant an information against the justice.

³ 1 Ventr. 16; Holt's Ca. 331. But the justice who has been slandered ought not to bind the party over, but he should get one of his brethren to do it for him. 12 Mod. *ut supra*, by Holt, C. J.; 1 Hawk. c. 21, s. 13.

⁴ As in *R. v. Collyer and another*, 1 Wils. 332; Say. Rep. 44; and the death of the justice will not work the discharge of the recognizance. *R. v. Ellers*, Id. 222.

⁵ *R. v. Revel*, 1 Str. 420. See, however, *R. v. Rogers*, Holt's Ca. 331.

⁶ *Ex parte Chapman*, 4 Ad. & El. 773.

⁷ *R. v. Pocock*, 2 Str. 1157.

⁸ *R. v. Harrison*, Cro. Car. 503.

This matter was discussed in a comparatively modern case. The defendant said of one G., a justice of Middlesex, that he was a scoundrel and a liar. The words were charged in an indictment preferred against the defendant as having spoken of the prosecutor in his character of justice, and with intent to defame him in that capacity. Lord Ellenborough interposed, and said, that as the words were not spoken to the justice, they were not indictable; and his lordship referred to 2 Salk. 698, and *R. v. Pocock*, 2 Str. 1157. But as the matter was upon the record, Lord Ellenborough would not direct an acquittal, but left the facts to the jury, who found a verdict of not guilty.¹ Where a defendant was committed and fined at the sessions for saying, "If I cannot have justice at the sessions here, I will have justice elsewhere." Twisden, J., understood the words to savour of an appeal, and he observed, that every subject had a right to demand that privilege, but the other judges were of a different opinion.²

But judges and magistrates are not the only persons connected with the law who may be the subjects of slander. One S. was indicted for speaking evil of a grand jury, who had presented him, imputing perjury to them, and the court held that the charge was valid.³ So, a constable may indict for words spoken to him in the execution of his office, or may have the party bound over to his good behaviour, but the court will not grant an information.⁴

The indictment, however, for slandering officers must set out the words, or the court will not be able to judge whether they were such as would warrant the indictment.⁵

Little need be said concerning *libels* upon legal officers. They are *à fortiori*, punishable. And they may be the subjects of indictment, upon publication, in like manner as other libels. As where the defendant printed concerning one R. T., an alderman, that he was "scandalously guilty of telling a lie in divers companies," the court granted an information.⁶ So, where one had been indicted for perjury, and acquitted, upon which he brought an action for a malicious prosecution, and recovered heavy damages, the verdict in his favour being likewise confirmed in the Common Pleas; it was held, that an order entered in the corporation book of Yarmouth, stating that the person who had prosecuted, and against whom damages were recovered, had been actuated by motives of public justice, &c., was a libel reflecting upon the administration of the law. And the court granted an information against twenty persons, being the majority of the corporation present at the making of the order.⁷

Where the indictment charged the defendant with having pub-

¹ *R. v. Weltje*, 2 Campb. 142.

² *R. v. Mayo*, 1 Sid. 144; and the man was fined 5*l.* and discharged.

³ *R. v. Spiller*, 2 Show. 207.

⁴ *R. v. Whitfield*, Cun. Rep. 100.

⁵ *R. v. Bagg*, 1 Ro. Rep. 79.
R. v. How, 2 Str. 699.

⁶ *R. v. Staples*, Andr. 228. See other cases of libels on justices of the peace, *R. v. Alderton*, 5 B. & Ald. 596, cited. *R. v. Holloway and another*, Id. cited.

⁷ *R. v. Watson and others*, 2 T. R. 199.

lished a libel concerning certain magistrates, and the intent was said to defame them, and also to bring the administration of justice into contempt, Bayley, J., told the jury that if they were of opinion that the defendant had published the libel with either of those intentions, they ought to convict him.¹ The allegations were, therefore, divisible, according to the principle usually applicable to the statement of different intents.

CHAPTER V.

MISCONDUCT BY LEGAL OFFICERS.

Misconduct by legal officers.] Another class of misdemeanors against the administration of justice consists in misconduct, either by officers intrusted with the authority of the law, or towards them.

Thus, if a judge were to transgress his powers, and invade the liberty of the subject, or were to be guilty of a gross dereliction of duty, although he might be open to other proceedings, he might still be prosecuted for a misdemeanor.²

By 24 & 25 Vict. c. 134, s. 43, if any judge, commissioner, registrar, &c., shall fraudulently and wilfully demand, or allow any one to take on his account, any fee, emolument, gratuity, or anything of value, other than is allowed by that Act,³ or any other Act relating to bankruptcy, or under colour of doing anything under such Acts, he shall incur a penalty of 500*l.*, and be incapable of holding any office or place under Her Majesty. The like penalty is awarded by 3 & 4 Will. 4, c. 94, s. 41, against any master in chancery, or any person holding any situation or employment in the said court, who shall be guilty of similar conduct.

The committal of a person who had used indecent and violent language towards a legal authority was visited by a prosecution by reason of an excess of jurisdiction.⁴ So, where a magistrate is

¹ *R. v. Evans*, 3 Stark. 35.

² In former days the default of a judge with reference to any matter connected with his oath was thought highly of. See 18 Edw. 3, st. 4; 20 Edw. 3, c. 1; likewise 8 Ric. 2, c. 4, which enacted, that any judge or clerk who should falsely enter pleas, rase rolls, or change verdicts, so as to produce disherison, should be fined and ransomed at the king's will; the prosecution to be within two years after the default, if the party grieved

were of age, otherwise within two years afterwards. See also 16 Car. 1, c. 10, s. 6, as to the third offence against that Act (for regulating the privy council and taking away the star chamber) on the part of any chancellor, judge, or other great officer, whose names are enumerated in the Act. These respective statutes still remain unrepealed.

³ An Act to amend the law relating to bankruptcy and insolvency.

⁴ *W. Kel.* 133.

neglectful of his office, or goes beyond the authority which the law has awarded him, or becomes guilty of corruption in the execution of his employment, or acts in a wilful or tyrannical manner in opposition to justice, he may be tried upon a criminal information, or may be indicted.

In 1780 the lord mayor of London was charged with a breach of duty in not resisting the outrages of the rioters of 1780. It was proved that he failed to read the proclamation ordered by the Riot Act; that he neither restrained nor took the proper steps to apprehend the rioters; that he did not give any order to fire on them; and that he did not make use of the military force under his command. The defendant pleaded fear, and the surprise of the attack; but the court held that no incidents which would not produce a terror sufficient to appal a firm man could be called in aid. For a magistrate has not only the military under his orders, he may likewise call all the king's subjects to his assistance, and at the time of a riot he may even repel force by force before the reading of the proclamation from the Riot Act. The defendant was found guilty.¹ The mayor of Bristol was charged with neglect in not having done his utmost to repress the riots in that city, but he was acquitted. It was held, however, in this case, that he could not be made responsible for not swearing in special constables, under 1 & 2 Will. 4, c. 41, unless an information on oath had been previously made before him; nor could he be arraigned for an omission in not calling out the *posse comitatus* if he had given timely notice of the impending riot to the inhabitants. Nor need he marshal nor head the constables or the military, nor accompany the soldiers. The part expected of him is, that he should exhibit that energy which a man of honesty and of ordinary prudence, firmness and activity might reasonably be expected, under the circumstances, to possess. It would not, however, be a defence to plead honesty of intention.²

False process.] By 9 & 10 Vict. c. 95, s. 57, to forge the seal of any process of the county court, or knowingly to serve or enforce it, or to deliver a paper falsely purporting to be a copy of any summons or process of the court, or to act, or profess to act, under any false colour or pretence of the process of the court, is a felony. Bramwell, B., imagined that there must be a real process or a fraudulent use of real process. But the other judges held, that a mere fictitious process was within the Act.³ Still there must be a process. A notice to produce accounts and memoranda is not a process.⁴ False representations likewise are insufficient. There must be a false instrument.⁵

¹ *R. v. Kennett*, 5 C. & P. 282, n.

M. C. 188. Bramwell, B., adhered to his opinion, but held himself bound by *R. v. Evans*.

² *R. v. Pinney*, 3 B. & Adol. 947; 5 C. & P. 254, 282.

⁴ *R. v. Castle*, Dears. & B. 363; 27 L. J. M. C. 70.

³ *R. v. Evans*, Dears. & B. 236; 26 L. J. M. C. 92. *R. v. Richmond*, Bell. 142; 28 L. J.

⁵ *R. v. Myott*, 6 Cox, 406.

Acknowledging false recognizances.] By 24 & 25 Vict. c. 98, s. 34, whosoever, without lawful authority or excuse, the proof to lie on the accused, shall, in the name of any other person, acknowledge any recognizance or bail, or any *cognovit actionem*, or judgment, or any deed or other instrument, before any court, judge, or other person lawfully authorized in that behalf, shall be guilty of felony, and liable to penal servitude not exceeding seven years, and not less than three years,—or to imprisonment not exceeding two years, with or without hard labour, or solitary confinement. Where bail was put in under feigned names, the offence was held not to be within the old statute, 21 Jac. 1, c. 26,¹ but the bail and the attorney were ordered to be put in the pillory.

CHAPTER VI.

JUSTICES ADMINISTERING UNSTATUTORY OATHS.

Justices administering unstatutory oaths.] By 5 & 6 Will. 4, c. 62, s. 13, it shall not be lawful for a justice of the peace or other person to administer, or cause or allow to be administered, or receive or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person has not jurisdiction or cognizance by some statute in force at the time being: Provided, that nothing in this section contained shall extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the houses of parliament, or any committee thereof respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively.

The offence, therefore, is a misdemeanor.

The proceeding against the justice is by indictment. As, where the defendant thought fit to swear witnesses before himself with reference to the ecclesiastical conduct of two of the Bishop of Exeter's clergy.² Yet it was made a question, whether this offence

¹ Anon. Str. 384. See East, P. C. 1009; Stark. Cr. Pl. 529.

² *R. v. Nott*, Car. & M. 288.

is indictable, although the statute said—"It shall not be lawful," &c.¹ The indictment in this case was held bad, in arrest of judgment, because it failed to set out the deposition, so that the court could not judge whether or not it came within the statute.² It merely stated that "a certain oath or affidavit" was administered,³ and that the defendant had no cognizance nor jurisdiction thereof, and it negatived the proviso in the section. But it seemed to Williams and Coleridge, JJ., that the particulars of the oath needed not to be set out.⁴

Frauds against public justice, as the doing of judicial acts in the name of another, are cheats.⁵ So, where the defendant personated a justice's clerk with intent to extort money from several persons, in order to procure their discharge from certain misdemeanors, the court, from a notion that the matter concerned the public justice of the kingdom, would not quash the indictment, but put the defendant to demur to it.⁶ So, the use of a false instrument connected with the administration of the law is punishable. As a counterfeit fine levied by a fictitious person.⁷ Putting in bail in a feigned name.⁸ And uttering a false affidavit to hold to bail, or making or knowingly using it is a misdemeanor, and punishable, whether the instrument be made here or abroad.⁹ So, the execution of a bail bond by a married woman, under the pretence of her being a widow, was held to be a fraud at common law.¹⁰

CHAPTER VII.

DISOBEDIENCE TO ORDERS OF JUDGES, &c.

*Disobedience to orders of judges, &c.*¹¹ To set at nought the command of the judge of a court of record is a very serious offence. Where the misdeed takes place in his presence, he will

¹ *R. v. Nott*, 4 Q. B. 768 ;
Dav. & M. 1.

² S. C.

³ S. C.

⁴ S. C. 7 Jur. 621.

⁵ East, P. C. 821.

⁶ *R. v. Dupee*, East, P. C. 1010.

⁷ *R. v. Hubert*, Cro. Eliz. 531.

⁸ See 1 Str. 384 ; and also Tho. Jones, 64 ; 1 Mod. 46.

⁹ *Omealey v. Newell*, 8 East, 364.

¹⁰ East, P. C. 821 ; citing *R. v. Blackburn*, Trem. P. C. 101.

¹¹ A company may be indicted in its name of incorporation for disobedience as well as an individual, and the course seems to be, to remove the indictment by *certiorari* into the King's Bench, where the defendants must plead by attorney, which they cannot do at the assizes. *R. v. Birmingham and Gloucester Railway Company*, 9 C. & P. 469 ; 2 Gale, & D. 236.

impose a fine for the contempt, or commit the party,¹ and for other such neglects an attachment will frequently be issued.² Yet there is no doubt but that the person so misconducting himself is liable to be indicted at common law.

So, in the case of magistrates, a similar proceeding is often resorted to. As where the defendant ventures to disobey an order of sessions. So, two overseers were indicted for not paying over the balance of their accounts to the new churchwardens and overseers.³ And a parish officer for refusing to receive a pauper sent regularly to his parish.⁴ This matter came before the court in another case, where the principal point made was, whether the particular order disobeyed was not punishable by statute as a distinct offence; but no question was made as to the general law of punishment for disobedience.⁵ So, upon a discussion as to the power of justices to compel a person to take an apprentice, the court said, "when we allow them such a power, of necessary consequence, we must allow an indictment for disobedience to their orders."⁶ So, an indictment will lie against the treasurer of a county for not paying the expenses of a witness.⁷ And for not paying over a fine to the county treasurer instead of the borough treasurer, where the borough had no separate grant of quarter sessions, but only a commission of the peace.⁸ So, an indictment will lie for not paying the costs of an appeal against a poor's rate, in conformity with an order.⁹ An indictment stated, that "a true copy of the order was served on the defendants, who then and there had notice of the said order." It was moved to arrest the judgment, but the statement was held sufficient.¹⁰ The order in this case was drawn upon paper from the minutes of the sessions, and was signed by the clerk of the peace. It was then read over to each of the defendants, and the clerk served them at the same time with a true copy. This was held sufficient, and that it was not necessary to give notice to produce the copy served, in order to let in such evidence.¹¹ Still the costs were not then taxed, but they were inserted in the order at an adjourned sessions, yet this was deemed no good objection, because it must be taken that the

¹ See 3 Burr. 1257.

² See *R. v. Smithies*, 3 T. R. 351. *R. v. Edyvean*, Id. 352; disobedience to a *mandamus*. *R. v. Wallace*, Id. 403; 5 T. R. 159; bad return to *habeas corpus*, 6 Mod. 97. *R. v. Beardmore*, 2 Burr. 792. For not carrying a sentence properly into execution.

³ *R. v. Bill and another*, 2 Burr. 805.

⁴ *R. v. Davis*, Say. Rep. 163; 2 Burr. 802. *R. v. Boys*, cited, S. P. Id. See also *R. v. Fearnley*, 1 T. R. 316.

⁵ *R. v. Robinson*, 2 Burr. 799; 2 Ld. K. 513. *R. v. Bristow*, 6

T. R. 168. See also *R. v. Turner*, 5 Mod. 329; 2 Salk. 474.

⁶ *R. v. Gold*, 6 Mod. 164; Salk. 381; 1 Russ. C. M. 364; citing 4 Burn. Just., *verba* Foster, J. See *R. v. Shipton*, 8 B. & C. 772.

⁷ *R. v. Surry Treasurer*, 1 Ch. Rep. 650. Or an attachment, but not a *mandamus*. *R. v. Bristow*, 6 T. R. 168. *R. v. Jeyes*, 3 Ad. & El. 416.

⁸ *R. v. Dale*, Dears. 37; 22 L. J. M. C. 44.

⁹ *R. v. Byce*, 1 Bott, P. L. 324.

¹⁰ *R. v. Mortlock*, 2 New. S. C. 108; 7 Q. B. 459.

¹¹ S. C.

parties had assented to that course.¹ So, where surveyors of the highway neglected to obey an order for repair, they were held indictable.² So, again, persons connected with friendly societies have frequently been the subjects of an indictment for this misdemeanor. So it is a misdemeanor to refuse duly to collect and pay over rates in pursuance of a legitimate order. Or to refuse the payment of the costs of prosecutions when directed in like manner. Or to neglect obedience to an order, either to receive or to deliver up a felon, as the case may be. The third offence of disobedience to the orders and regulations of the poor law commissioners, or of contempt towards them as a board, is a misdemeanor, and subjects the party to a fine of not less than 20*l.*, and imprisonment, with or without hard labour.³ A soldier may be indicted for disobedience for not paying a weekly sum for the maintenance of a bastard child, although Pollock, C. B., observed upon the incongruity of the law in this respect.⁴

It is not, however, to be supposed, that defences may not be made successfully to indictments of the nature above mentioned. Where there is no jurisdiction, for example, on the part of the authorities making the order, the judge will direct an acquittal, even although the objection appears on the record.⁵ It is no defence that the justices who had made an order in bastardy are guardians of the union *ex officio* to which the child would become chargeable if such justices did not attend, nor take any proceedings with reference to such order.⁶ Nor is it any defence that the same case in bastardy was tried at a prior petty sessions, and the order made at such sessions was withdrawn on the ground of its being a nullity on the face of it. A second order was held good under such circumstances, and an indictment for disobedience against the putative father was sustained. A *supersedeas* of the first order had been issued by the justices, and served upon the defendant, and a tender was made to him of all costs incurred under the first order. The case was argued, and the verdict of guilty was ordered to stand.⁷ And by Parke, B., the first order could not be superseded. It was a nullity.⁸ Whether, had the case

¹ *R. v. Mortlock*, 2 New. S. C. 108; 7 Q. B. 459. But whether without such consent the costs would have been so inserted, qu.? By Coleridge, J.

² *R. v. Balme and another*, Cowp. 648.

³ 4 & 5 Will. 4, c. 76. s. 98. An information under the 97th section of this statute was held bad for want of the word "wilfully," *Carpenter v. Mason*, 12 Ad. & El. 629; 4 Per. & D. 439.

⁴ *R. v. Ferrall*, 20 L. J. M. C. 39; Den. & P. 51. Because three calendar months are prescribed for nonpayment under 7 & 8 Vict. c.

101, s. 3, and the term of imprisonment for disobedience at common law is indefinite.

⁵ *R. v. Hollis*, 2 Stark. 536; where the defendant was indicted for not having removed an encroachment, pursuant to an order founded upon the Building Act.

⁶ *R. v. Cant*, 2 Moo. C. C. 271. *R. v. Brisby*, 18 L. J. M. C. 157.

⁷ *R. v. Brisby*, Den. 406. See *R. v. Hinchliffe*, 10 Q. B. 356. *R. v. Jenkin*, Ca. Temp. Hard. 301. *R. v. Buck*, 18 L. J. M. C. 113.

⁸ Den. 428.

been dismissed, the matter could have been reheard, was questioned by Patteson, J.¹ The question, therefore, whether, if a good order be abandoned, or the case dismissed, there can be a second hearing of the case, seems to be still open. Defences are not unfrequently resorted to to try rights and obligations between different jurisdictions. And, in the case of a ministerial officer, a *mandamus*, instead of an indictment, will sometimes be allowed, where it is evident that the officer has been put forward as a nominal party.²

Certain defendants were indicted for disobedience in not producing the parish books of rates before some justice of the peace, appointed by their brethren. But the indictment was quashed, for, by Holt, C. J.: the justices cannot refer the examination of the matter to a certain number of themselves, because they are all judges of the fact.³ An order for payment of money to a surgeon has been held bad, and therefore not the subject of an indictment for disobedience.⁴ And where an attorney tore off the items of an order for costs, under 7 Geo. 4, c. 64, made at an assize for Anglesey, it was held that the treasurer was justified in refusing to pay the demand. The entire unmutated order should have been exhibited, and the conviction was accordingly annulled.⁵

Friendly societies.] The rules and management of friendly societies have caused some discussion upon this point of disobedience. For accuracy is requisite in propounding orders concerning these societies, and the Acts of parliament must be strictly adhered to. Therefore, where the indictment was for refusing to re-admit a party who had been expelled, and no proof was given that the rules and regulations of the society had been enrolled at the sessions, the court made the rule for entering a verdict of acquittal absolute, for the recital of the order of justices could not be deemed sufficient.⁶ The old Act, 33 Geo. 3, c. 54, gave justices a power to hear and determine complaints, and to make such orders therein as to them shall seem just. Certain justices upon a complaint made, ordered relief to be given to the person applying, and they further adjudged that he should be continued a member of the society. But when the proof of complaint and the order were produced in evidence, it appeared that the individual who considered himself aggrieved, had confined his story to the want of relief, and had not required his re-admission to the society. The defendants being found guilty, a rule was moved for to have a

¹ Den. 432.

² *R. v. Wood Ditton Surveyor*, 18 L. J. M. C. 218.

³ *R. v. Glin and another*, 6 Mod. 87; Ca. Sett. 219.

⁴ *R. v. Smith*, 1 Bott, P. L. 403. See also *R. v. West*, 2 Ld. R. 1157; where the defendant, although discharged by the Court of King's Bench, was obliged to enter

into a recognizance until the validity of the order should be determined.

⁵ *R. v. Jones*, 2 Moo. C. C. 171; 9 C. & P. 401. See also upon this subject, *R. v. Pierce*, 3 M. & S. 62.

⁶ *R. v. Gilkes and others*, 8 B. & C. 439; 2 M. & Ry. 454; S. C. at N. P., 3 C. & P. 52.

new trial, and the court made it absolute, for the justices had only power to adjudicate upon the particular complaint addressed to them.¹ It is, however, no ground of defence to allege that the power of re-admission resides in a committee, so that the defendants, as president and stewards, are consequently not responsible. It was, indeed, held in one case, that it ought to appear by the constitution of the society, that the defendants had the power to restore the complainant.² But upon a late trial, Lord Tenterden observed, that if this answer were admitted, all the Acts regulating these societies might be utterly evaded.³ And Taunton, J., remarked, that the decision in *R. v. Inge*, was before the passing of 49 Geo. 3, c. 125, an Act to amend the 33 Geo. 3, c. 54.⁴ Therefore, in this last case it was held no good objection to say, that it did not appear upon the evidence that the president had any power to re-admit.⁵ It was likewise held, that an indictment stating that the society had been established under the Act, and the rules duly confirmed, was not invalid because it omitted to say that such rules had been filed, the word "filing" not being mentioned in the section⁶ which gave the justices jurisdiction in cases of complaint.⁷ Nor is it any defence that the parties have ceased to be stewards, where an order is made by justices to reinstate a person who has been excluded. It might be a ground of excuse that they had done their best to effect that object, but entire neglect cannot be justified. In such a case the court held, that if the defendant had shown at the trial, that they had done all they could to restore the party in obedience to the order, they might have given the fact in evidence by way of excuse.⁸ The order must find the party

¹ *R. v. Soper and another*, 3 B. & C. 857; 5 D. & Ry. 669. The court were also with the defendant upon another ground; the complainant having alleged, according to the indictment, that he had been deprived of the relief he had been entitled to from the stewards of the society for the time being, whereas the proof was that he had only complained of his having been deprived of relief.

² *R. v. Inge and another*, 2 Smith, Rep. 56.

³ 1 B. & Ald. 870.

⁴ *Id.*

⁵ *R. v. Wade and another*, *Id.* 861.

⁶ 33 Geo. 3, c. 54, s. 15.

⁷ S. C. as above, 1 B. & Ald. 861. Sect. 2 of the stat. 33 Geo. 3, c. 54, directed that duplicates of the rules should be deposited with the clerk of the peace, and filed by

him. It was held no objection to urge that these duplicates should have been signed by the clerk as well as the original rules which the Act expressly required to be so signed. S. C.

⁸ *R. v. Gash and another*, 1 Stark. 441. The society's rules were confirmed in London, but they afterwards held their meetings in Middlesex. It was held that they were an ambulatory body, and thus might change their residence: so that the justices of Middlesex might well have jurisdiction over their proceedings. And it was also considered, that the word "established" in the statute 33 Geo. 3, c. 54, s. 15, did not exclusively mean the place where the society was originally brought together, but might apply to any place where they should think fit to hold their meetings. S. C.

to be an officer. If it be directed to A. B., steward, &c., it is not sufficient. Nor if it recite a complaint upon oath stating the fact. Nor does an order show the applicant to be a member, by reciting a complaint upon oath, in which the party called himself a member, though the order direct certain monies to be paid.¹

By 18 & 19 Vict. c. 63, s. 29, if any person shall give to any member of a friendly society established under this Act or under any of the said repealed Acts, or to any person intending or applying to become a member of such society, a copy of any rules, or of any alterations or amendments of the same, other than those respectively which have been enrolled with any clerk of the peace or certified by the registrar, with a copy of his certificate appended thereto, under colour that the same are binding upon the members of such society, or shall make any alterations in or addition to any of the rules or tables of such society after they shall have been respectively enrolled or certified by the registrar, and shall circulate the same, purporting that they have been duly enrolled or certified under this or any of the said repealed Acts, when they have not been so duly enrolled or certified, every person so offending shall be deemed guilty of a misdemeanor. And with respect to frauds in withholding money, such offences are punishable upon summary conviction under the 24th section. But the proceeding by indictment is saved, provided that no person shall be indicted if he should have been summarily convicted.

We have said, however, that an indictment for disobedience is sometimes resorted to, for the purpose of trying questions of law. It might in that case be considered almost in the light of a civil action. Not but that the law still looks upon the neglect charged in the light of a misdemeanor, for some person in particular must be fixed with an obligation which exists in point of law, and he is criminally answerable for slighting it, yet it is customary, where an individual or a corporation decline to fulfil a supposed duty for the purpose of obtaining the opinion of the court as to their liability, merely to inflict a nominal fine, should the judicial decision be unfavourable. Thus, where there was a dispute between the justices of Liverpool and of the county of Lancaster, whether the former could commit to the Preston house of correction, the matter came to be tried through the means of an indictment against the governor of the house of correction at Preston, and the points raised were made the subjects of a special verdict.² A similar dispute was brought before the court upon a special case, and was decided upon the particular provisions of a local Act.³ So, where the matter at issue was whether

¹ *Day v. King and others*, 5 Ad. & El. 359.

² *R. v. Houghton*, 5 M. & S. 300. The statutes referred to in this case were, 5 Ann. c. 6, s. 2; 6 Geo. 1, c. 19, s. 2; 15 Geo. 2, c. 24; 53 Geo. 3, c. 162. The judgment was given for the crown.

³ *R. v. Houghton*, 5 M. & S. 311. The statutes referred to were, 51 Geo. 3, c. 143, local and personal, 17 Geo. 2, c. 5. Concerning rogues and vagabonds. Judgment for the defendant.

the Liverpool justices could demand the delivery of prisoners for trial from the governor of Lancaster gaol, the matter was argued for the crown against the governor upon a special case reserved after verdict. And the principle prevailing in this, as well as in other cases of the same kind, seems to have been, that where a borough or other jurisdiction is contributory to the county rate, there is, at common law, a right to enjoy advantages legally incident to such payment. And as the old adage runs thus, "*qui sentit commodum, sentire debet et onus*," the sentence must be read likewise *mutatis mutandis*: "they who contribute to the burthen shall partake of the benefit."¹ The court, therefore, construed the stat. 15 Geo. 2, c. 24, which places borough magistrates on a footing with county magistrates, upon the liberal principle above mentioned, and gave judgment for the crown.² So, the costs of a prosecution in the borough court of Liverpool were rightly ordered to be paid by the treasurer of the county of Lancaster, there being no exclusive jurisdiction exercised by the borough, nor any distinct treasurer in the nature of a county treasurer, nor rate similar to a county rate. The borough, on the contrary, contributed, as a part of the county, to the county rate.³ But, where the inferior jurisdiction has exclusive power, and raises a rate in the nature of a county rate, the case is altered, and a verdict of acquittal was ordered to be entered in favour of the treasurer of Kesteven, in Lincolnshire, under such circumstances.⁴ So, where the justices of Leicester borough had an exclusive jurisdiction within the borough, but a concurrent power with the county justices with reference to the liberties of the borough: upon an indictment for not delivering up a prisoner charged with felony, in that part of a parish where the concurrent jurisdiction existed, the court said they could not distinguish the case from *R. v. Amos*, notwithstanding an argument for the defendants, that in *R. v. Amos*, the borough magistrates had no exclusive jurisdiction.⁵

The indictment against Mr. Cope stated his refusal to receive a prisoner in wilful and contemptuous disobedience, &c. The warrant in question was directed, not "to the keeper of Newgate," as usual, but "to the keeper of the common gaol in and for the county of Middlesex." In the margin, was "for trial at Clerkenwell." This was the form of the warrants for the new prison at Clerkenwell; Newgate was the common gaol for Middlesex; yet the court held that the non-compliance with the warrant in question was not a wilful and contemptuous disobedience.⁶ In this case it was held, however, that the court of aldermen could not restrict the gaol of Newgate to prisoners for felony, so as to exclude persons committed by the Middlesex magistrates for misdemeanors, and that returns by previous keepers under 4 Geo. 4, c. 64, and

¹ 5 M. & S. 310, by Abbott, J.

⁵ *R. v. Musson*, 6 B. & C. 74.

² *R. v. Amos*, 2 B. & Ald. 533.

⁶ *R. v. Cope*, 7 C. & P. 720;

³ *R. v. Johnson*, 4 M. & S. 515.

6 Ad. & El. 226.

⁴ *R. v. Myers*, 6 T. R. 237.

returns by the court of aldermen, were evidence to show how the prison had been used.¹

These indictments, again, come into question occasionally upon discussions relative to the collection of the county rate. As where the justices of Somerset caused the defendant, a constable of Bath, to be indicted for not levying a sum of money within that city, for the purposes of the county rate, according to their order. The case was tried in Dorsetshire, and a verdict was found for the crown. The stat. 55 Geo. 3, c. 51, s. 1, enabled justices to tax any parish or other place within the limits of their commission. They alone had the power of trying felonies within the city of Bath. But that Act exempted liberties or franchises having a separate jurisdiction, and as Bath had a separate jurisdiction, it was contended that it was excluded. But the court said, that the Act must be construed to mean such places as might have a separate jurisdiction coextensive with that possessed by the county justices. Now here the Bath justices had no jurisdiction in cases of felony, and therefore they had not an exclusive separate jurisdiction. It is true that the courts attending prosecutions for felony were ordered by 55 Geo. 3, c. 51,² to be raised by a separate rate in cities, towns corporate, &c.; but those words would only provide for the expenses of the trial. The costs of maintenance in gaol, and other incidental expenses, were not provided for.³ Judgment was given for the crown.⁴

So, the maintenance of the family of a substitute for a militiaman has come into consideration, upon an indictment for disobedience to a justice's order.⁵

Circumstances, indeed, may happen, which entirely put it out of the power of persons to yield obedience to a magistrate's order. As where an Act ordained that a poor-house should be built, and, that after the building, the poor, who were under the management of the overseers, should be transferred to the care of guardians appointed by the Act. The house being built, the overseers of a parish affected by the statute in question refused to obey the order of a justice directing them to relieve a pauper. And the court held they were right, for the jurisdiction of the magistrate was at an end. Judgment of acquittal was given upon a special verdict.⁶

Recital of order.] The order must be carefully recited in the indictment. Where the defendants were charged with refusing to receive a bastard child, the indictments were quashed for want of an averment of the order.⁷ So, in the case of an order of the

¹ *R. v. Cope*, 7 C. & P. 720 ;
6 Ad. & El. 226.

² Repealed by 15 & 16 Vict. c. 81,
s. 1

³ 5 B. & Ald. 671, by Abbott,
C. J.

⁴ *R. v. Clarke*, 5 B. & Ald. 665.

⁵ *R. v. Willis*, 6 T. R. 179.

Upon a special verdict.

⁶ *R. v. Keer and another*, 5

T. R. 159.

⁷ *R. v. Whitehead*, 1 Salk. 371.

poor law commissioners, the count omitted to allege that the commissioners had made an order for the defendants, who were overseers, to account to the auditor; and for this reason it was held not sustainable.¹ A recital is not sufficient where such an allegation is wanting.² So it is, again, in the case of a warrant which an overseer or other officer is bound to execute.³ And service of the order must be alleged.⁴ It was considered to be a decisive objection to an indictment against six persons, that it charged a contempt by six persons of an order which was stated to have been served on four only. There ought to have been personal service⁵ on all to whom a contempt of the order might be imputed.⁶ And a request to the defendants that they would perform the duties required, was deemed insufficient to supply the omission.⁷ But a direct allegation of the foundation of the order is not necessary, if there be a positive averment of disobedience. The only defence in such a case is want of jurisdiction. Thus, the foundation of an indictment is the order of sessions, and until the order is shown to be reversed, it must be obeyed.⁸

"By the court," without more, will not support an indictment for disobedience, upon a charge for not obeying an order of restitution; the order should be signed by the justices of assize and proved in the ordinary way.⁹

Attornies and solicitors.] By 6 & 7 Vict. c. 73, s. 2, unless a person be regularly admitted and enrolled as an attorney or solicitor, he may not act as such, and to disobey the Act in this respect is an indictable misdemeanor. By sect. 35 certain incapacities and penalties are awarded against persons so doing. Here it appears that the prohibition and penalty take effect under different sections, and, therefore, it was held that an indictment would lie; whereas had both been in the same section, the penalty would have superseded the indictment.¹⁰

¹ *R. v. Crossley and another*, 2 Per. & D. 319; 10 Ad. & El. 132. After verdict an allegation stating an order to have been made by "the poor law commissioners," &c., without naming each commissioner, is good. And the words "duly sent" will suffice, without alleging actual service. S. C. But whether disobedience of an order of the commissioners within sect. 98, be indictable until the third offence, might have been a point. It was, however, not raised. 10 Ad. & El. 138, Patteson, J.

² *R. v. Crouchurst*, 2 Ld. Raym. 1363. *R. v. White and another*, Cald. 183.

³ *R. v. Burrough*, 1 Vent. 305.

⁴ *R. v. Moorhouse*, Cald. 554; 4 Dougl. 388.

⁵ Unless a particular Act of parliament, as the Poor Law Act, should dispense with personal service. *R. v. Crossley*, ut supra.

⁶ *R. v. Kingston*, 8 East, 41.

⁷ Id.

⁸ *R. v. Mytton*, Cald. 536; 4 Dougl. 333.

⁹ *R. v. Sewell*, 1 Cox, 255.

¹⁰ *R. v. Buchanan*, 15 L. J. Q. B. 227; 1 Cox, 200. Judgment being given on demurrer leave to plead was refused, but the facts were allowed to be stated in mitigation.

Church rate.] The facts connected with the rate need not to be set out in an indictment. It is sufficient to say that the rate was duly made and allowed, and that the defendant was duly rated. It would be otherwise as to the offence itself. The count then sets forth the information and the refusal to pay. This is sufficient without entering into the truth of the facts deposed to. The jurisdiction of the justices was made complete by the information. And thus the count would have sufficed, even had the indictment been faulty.

There needs not to be, *de facto*, a proper rate and a proper demand and refusal. It is, likewise, enough to aver that A. and B. were churchwardens at the time of the refusal, without adding that they were churchwardens at the time of the demand. The warrant mentioned a recital, but did not set out the recital. This was held sufficient. It will be intended that the warrant was served at a reasonable time before appearance. This will be presumed in favour of the justices, and the substance of the order is alone required without the tenor. Nor needs it to be averred that the rate was in force, if that fact can be gathered from the indictment. In this case there were three counts on different rates. One rate only was proved, and consequently judgment was entered for the defendant on two counts, and for the crown on the remaining count.¹

Contemptuous words of the court, &c.] There can be but little doubt than an indictment will lie at common law for speaking contemptuous words concerning a court of justice. But we shall not enlarge upon this, because the usual course is to proceed at once against the offender by attachment, and this course has been very frequently pursued without a rule upon the defendant to show cause.²

CHAPTER VIII.

OF MISCONDUCT BY JUSTICES AND OTHERS.

If a justice discharge a prisoner improperly, or take insufficient bail, he is liable to an information.³ On the other hand, should he

¹ *R. v. Bidwell*, Den. 222; 2 *R. v. Crosse*, 6 Mod. 43. *R. v. Car. & K.* 564. *Unitt*, 1 Str. 567.

² See 1 Salk. 84. *R. v. Jones*, Str. 185. *R. v. Jermy*, Say. Rep. 47. *R. v. Kendrick*, Id. 114; 2 Str. 1068. ³ *R. v. Lediard*, Say. Rep. 242. *R. v. Clarke*, 2 Str. 1216.

violate the liberty of the subject, he may be prosecuted.¹ As if he should proceed against a party without a summons or warrant.² So where a justice took an examination alone in order to make out an order of removal, an information was granted against him;³ and because two other justices signed the order upon that sole examination, without summoning the party or demanding security, the court awarded an information against them, likewise, for returning a falsehood upon the order, which recited that a complaint had been made, and that the party had been examined upon oath.⁴ The conviction or proceeding must, however, be removed before the court will grant an information.⁵ So, where a justice added the name of his father to an order of removal, an information was granted.⁶ So, where he antedated an order.⁷ But an information has been refused against a magistrate for denying to grant his warrant, no corruption being alleged.⁸

Extortion is, of course, a ground for proceeding against a justice.⁹

Corruption or favour¹⁰ is a manifest ground for proceeding against magistrates. This matter has often come before the court, upon the point of granting or withholding licences. The power to award the licence is discretionary with the justice, and the court will not grant an information against that officer because of his refusal to comply with the request of the publican,¹¹ but because of the corrupt motive which actuates him. So that where the defendant withheld licences from those voters who opposed their recommendation of candidates for the representation of Penryn, threatening that they would ruin the publicans who had so acted in opposition to their wishes, an information was readily issued by the court against them.¹² So, where two justices had improperly concurred in granting a licence which had previously been re-

¹ See *R. v. Birnie*, 1 M. & Rob. 160. *R. v. Okey*, 8 Mod. 45.

² *R. v. Venables*, 2 Ld. Raym. 1405. *R. v. Allington*, Str. 678. *R. v. Wykes and others*, Andr. 238. *R. v. Cotten*, W. Kel. 125; *R. v. Taylor and another*, 2 Sess. Ca. 350. See also 1 Salk. 181. But the appearance of the party will cure the defect of a want of summons. *R. v. Johnson*, Str. 261. An information has been refused against a party for executing a blank warrant. Anon. 2 Barnard, 198.

³ *R. v. Wykes and others*, Andr. 238.

⁴ S. C. *diss.* as to this point, Lee, C. J., because he conceived the two justices to have acted under a mistake.

⁵ *R. v. Heber*, 2 Str. 905.

⁶ *R. v. Howard*, 7 Mod. 307.

⁷ 1 Sess. Ca. 59.

⁸ *R. v. Nicholls*, 8 Mod. 337.

⁹ *R. v. Jones*, 1 Wils. 7.

¹⁰ *R. v. Newton and others*, 1 Str. 413.

¹¹ See *R. v. Gyles*, 180, Andr. where a *mandamus* was refused; although it was a case in which great hardship and oppression appeared on behalf of the justices. *Id.*

¹² *R. v. Williams*, *R. v. Davis*, 3 Burr. 1317. See also *R. v. Baylis and others*, *Id.* 1318. *R. v. Hann and another*, *Id.* 1716. *R. v. Nottingham Justices*, Say. Rep. 216. *R. v. Temple*, 1 Keb. 727. *R. v. Bingham*, 1 Ch. Barn. 100.

fused, on the ground of misbehaviour,¹ the court granted an information against one of them, who was the principal, and only discharged the rule against the other without costs, as it appeared that the latter, although deceived by his fellow justice, was not altogether blameless in the transaction.² And the court observed, that an information might be had as well for granting a licence improperly as for refusing one in the same manner.³ So, an information was granted against justices for refusing to relieve persons who were left out of a rate in order to prevent them from voting at elections.⁴ And against a justice who sat as judge in his own cause.⁵ But the absence of corrupt motives puts an end to the proceeding by information against the magistrates,⁶ and also by indictment if they have acted regularly.

Many other cases besides those of dealing with ale licences have occasionally come before the court. As where justices had interfered in an election struggle, and had granted a warrant to distrain for poor rates, in order to serve the purpose alluded to.⁷ So, where a magistrate had committed certain players under the Vagrant Act, upon which other magistrates thought fit to discharge the players upon their appealing and giving bail, the court granted an information against them for having taken upon themselves to supersede a warrant of justice of peace having competent jurisdiction, before the matter had been inquired into at all, and without having any evidence before them.⁸ And by Ashhurst, J., "Though they have denied generally that they acted from any interested motives in this business, yet that is not sufficient, for if they acted from passion or from opposition, that is equally corrupt as if they acted from pecuniary considerations."⁹ So, where a false certificate as to the condition of a highway was given by justices, an indictment against them was successful.¹⁰ And there may have been many other instances.

However, it should be remarked that an entire absence of cor-

¹ If the licence should have been refused for cause, the party applying for the information must allege that he was innocent of the offence charged as the reason for refusal. *R. v. Athay*, 2 Burr. 653.

² *R. v. Holland and another*, 1 T. R. 692.

³ *R. v. Filewood*, Id. cited by the court. *R. v. Mercer*, 2 Stark. 366.

⁴ *R. v. Phelps and others*, 2 Ld. Keny. 570.

⁵ *R. v. Davis*, Lofft. 62.

⁶ *R. v. Baylis and others*, 3 Burr. 1318. *R. v. Young and another*, 1 Burr. 557. See also

R. v. Halford, 7 Mod. 193, where an information was denied against a mayor for refusing to hold a borough sessions, there being no proof of wilfulness or corruption. Although costs will not always be awarded to the magistrate. See *R. v. Wallis and another*, Lofft. 38. And there are many other cases to the same effect.

⁷ *R. v. Cozens and another*, 2 Dougl. 426.

⁸ *R. v. Brooke and others*, 2 T. R. 190.

⁹ 2 T. R. 195.

¹⁰ *R. v. Mawbey and others*, 6 T. R. 619.

rupt motives will not discharge the justice from an indictment, although the court will not grant an information. As where a dispute happened between certain justices of London and of Surrey as to their jurisdiction in granting ale licences. The one party met legally and disposed of the business, upon which the others assembled on a subsequent day for the same object, which was an illegal act, and, accordingly, the latter were held liable to an indictment for their irregularity in granting licences on the second day.¹ And Ashhurst, J., said, that "although the want of corruption might be an answer to an application for an information, which is made to the extraordinary jurisdiction of the court, yet it is no answer to an indictment where the judges are bound by the strict rule of law."²

But a justice is not responsible by indictment for acting without a qualification, inasmuch as the statute has appointed a penalty for that which was no offence at common law, so that the act is not a misdemeanor at common law, but only punishable under the statute.³

Serjeant or pleader.] If any serjeant, pleader, or other, shall do any manner of deceit or collusion in the king's courts, or beguile the court or the party, he shall be imprisoned for a year and a day, or shall receive greater punishment according to the trespass.⁴

Under-sheriff.] An under-sheriff who practises as an attorney is liable to an information, but it must be shown to the court that he did acts which would amount to such practising.⁵

False return to mandamus.] An information will lie for a false return to a *mandamus*,⁶ or to a *habeas corpus*,⁷ or for disobedience to that writ.⁸

Riot Act.] But it will not be granted for acting upon emergency without reading the Riot Act,⁹ nor for pretending to read the Riot Act.¹⁰

¹ *R. v. Sainsbury and another*, 4 T. R. 451. *R. v. Fielding*, Burr. 720.

² 4 T. R. 457. As to the power of indicting justices for a false return to a *mandamus* without corrupt or improper motives, see *R. v. Lancashire Justices*, 1 Dowl. & Ry. 485.

³ *R. v. Castle*, Cro. Jac. 644. See *R. v. Wright*, 1 Burr. 543, a particular remedy being pointed out. *R. v. Douse*, 1 Ld. Raym. 672. *R. v. Glass*, 3 Salk. 350. See likewise 1 Salk. by Evans, 45, note (a) where the cases are collected. *R. v. Watson*, 3 Salk. 26. *R. v. Edwards*, Id. 27; Id. 189;

2 Ld. Raym. 991. *R. v. Chatley and another*, Say. Rep. 152. *R. v. James*, *R. v. Buck*, 2 Str. 679. *R. v. Malland*, Id. 828. *R. v. Bright*, 2 Lord Keny. 274.

⁴ 3 Edw. 1, c. 29; and see 6 Mod. 137.

⁵ *R. v. Bull*, 1 Wils. 93.

⁶ Lofft. 185.

⁷ *R. v. Viner*, 1 Freem. 522.

⁸ *R. v. Falkingham*, 1 Sir Wm. Bl. 269.

⁹ Anon. Lofft. 253.

¹⁰ *R. v. Spriggins*, 1 Sir Wm. Bl. 2.

Churchwardens and overseers.] If an overseer should corruptly allow a poor's rate, an information will lie against him, or he may be indicted. But the court refused to grant an information where the overseer had made an alteration with the approbation of the justices.¹ And overseers are indictable for not making a rate where it is their duty to do so.² But not for removing a pauper without fraud or menace during the pending of a special case after the order of justices has been confirmed by the court of quarter sessions.³

Juryman.] A juryman who falsely pretends to be another person, in order that he may be sworn in, is guilty of a misdemeanor.⁴

Constables.] A breach of duty by a constable is likewise in many instances punishable by indictment. As where upon the commission of a burglary, the constable refused to make a hue and cry according to a requisition made to him. But it was deemed to be a material exception to the indictment that the place of notice to the constable was not shown,⁵ and that it was not averred to the constable when the warrant was delivered.⁶ So a constable may be indicted for not obeying the warrant of a justice,⁷ or for not returning a warrant.⁸ So, where the defendant suffered a street-walker to escape out of his custody, the judgment for a misdemeanor was confirmed.⁹ And where the constable failed to carry a person to prison whom the justice had committed for further examination, he was held to be indictable, although he produced his prisoner at the time of the next hearing.¹⁰ So, a person may be indicted for not doing his best as constable to apprehend offenders. And a party is subject to such a proceeding for not aiding the constable when he is called upon to give his assistance.¹¹ But this case does not apply to the case of searching for nets or engines used to take game.¹² A watchman likewise might be indicted for a breach of duty.¹³ Where there has been a riot, the proofs are,—1st, that the constable saw a breach of the peace com-

¹ *R. v. Barrat*, 2 Dougl. 465. Perhaps an information might have gone against the justices. *Id.*

² *R. v. Barlow and others*, Ca. Sett. 214.

³ *R. v. Cooper*, 18 L. J. M. C. 16.

⁴ March, 81, pl. 132.

⁵ *R. v. Crouther*, Cro. El. 654.

⁶ 1 Freem. 524.

⁷ See *R. v. Pawlett*, 11 Mod. 114. And it is sufficient to state in the indictment that the party was in due form convicted. *R. v. Wyat*, 1 Salk. 380. S. C. 2 Lord Raym. 1189.

⁸ *R. v. Wyat*, Fort. 127.

⁹ *R. v. Bootie*, 2 Burr. 865. And it was held to be no objection that the indictment did not aver knowledge in the defendant of the party being a street-walker, and that it was not positively averred that the woman was such a disorderly person.

¹⁰ *R. v. Johnson*, 11 Mod. 62. *R. v. Belwood*, *Id.* 79.

¹¹ See 3 Edw. 1, c. 9; 2 Hen. 5, c. 8.

¹² *R. v. Wildbore*, Comb. 309.

¹³ *R. v. Stainford*, 5 Mod. 393.

mitted; 2nd, that there was good cause for interference; 3rd, that the defendant was without lawful excuse. It seems to be no excuse that the single aid of the defendant would not have availed against a number of rioters.¹

Commissioners.] An information lies against commissioners who exceed their powers.² But it has been refused against the commissioners of a turnpike road for irregularity.³

CHAPTER IX.

ILLEGAL DISTRESS.

Distresses.] To distrain beasts or sheep for the debt of the king, or any other, whilst another distress can be found sufficient to answer the demand, is a misdemeanor.⁴ And by the same statute, to take great and unreasonable distresses was declared to be punishable by a grievous amercement.⁵ By 52 Hen. 3, c. 1, no distress can be taken without an award of the king's court, upon pain of a fine, according to the trespass. By c. 2 & 4, the like punishment was ordained against such as should take out a distress out of the particular bailiwick or jurisdiction; and by 3 Edw. 1, c. 16, even a more grievous punishment was ordained, if the trespass required it. Again, by 52 Hen. 3, c. 1, such as would not suffer the distresses to be replevied, or should hinder the execution of summonses, attachments, or judgments given in the king's court, were to be punished in like manner. So again, by c. 4, and 3 Edw. 1, c. 16, there is the same penalty against any neighbour for driving a distress out of the county. And by 3 Edw. 1, c. 23, to distrain any foreign person which is of this realm, "for any debt whereof he is not debtor or pledge, is punishable by the grievous punishment."

Malicious impressment.] Malicious impressment is likewise a misdemeanor.⁶

¹ *R. v. Brown*, Car. & M. 314. Such a person, when acting, is protected, *eundo, redeundo et morando*. *R. v. Phelps*, Id. 180.

² *R. v. Friar*, 1 Ch. Rep. 702.

³ Anon. Lofft. 199.

⁴ 51 Hen. 3, st. 4; 28 Edw. 1,

st. 3, c. 12. Except beasts impounded damage feasant.

⁵ See *R. v. Leginham*, 1 Mod. 71. *R. v. Lesingham*, Tho. Raym. 205. *Semb.* S. C.

⁶ 1 Sir Wm. Bl. 19.

CHAPTER X.

MISDEMEANORS COMMITTED AGAINST LEGAL OFFICERS.

Misdemeanors committed against legal officers.] By 1 Ric. 2, c. 13, to procure any indictment by malice against the judges of holy church, or against any other persons meddling according to law, for having cognizance in cases of tithes or other matters pertaining to the spiritual court, is an offence punishable by one year's imprisonment and grievous fine to the king, as in the case of false appeals.¹

Amongst the various misdemeanors of this class, that of obstructing process is not uncommon. As where a sheriff's officer is interrupted in the execution of his duty.² Or a custom-house officer.³ Or a magistrate.⁴ But some act of obstruction must be set forth in the indictment, or the prosecution will fail.⁵ So, obstructing a coroner in the due discharge of his office, is an offence for which an information will be granted.⁶ And it is likewise a misdemeanor to bury a body before the coroner's inquest shall have set upon it.⁷ So, obstructing process for debt within certain districts is punishable as a misdemeanor.⁸ Again, rescuers, whether of goods,⁹ or persons in contravention of law, are very frequently of the nature of misdemeanor. As where the defendants were charged with riotously and routously rising against bailiffs, and rescuing goods levied under a *fieri facias*.¹⁰ But the indictment

¹ 13 Edw. 1, st. 1, c. 12; 2 Inst. 489.

² *R. v. Howe*, 6 Esp. 124.

³ *R. v. Akers*, Id. 125, n.

⁴ *R. v. How*, 2 Str. 699. See *R. v. Eastaff*, Gow. Rep. 138, where it was held, that the secretary of state's warrant to keep persons in close and safe custody, enabled a gaoler to refuse any but the visiting magistrates access to prisoners. The defendant was therefore acquitted under the direction of Park, J., for denying such access to a party, who, although in the commission, was not a visiting justice.

⁵ 2 Str. 699.

⁶ *R. v. Soleguard and another*, Andr. 231. See East, P. C. 378.

⁷ Anon., 7 Mod. 10, per Holt, C.J.

⁸ By 8 & 9 Will. 3, c. 27, s. 15, by fine or imprisonment, or both, and a penalty of 50*l.* may likewise be sued for.

⁹ An indictment for rescous need not state the non-consent of the plaintiff. *R. v. Hoskins*, 12 Mod. 324. And the rescue cannot be returned, where the sheriff has goods taken in execution, so that the rule will go without such return. 2 Barnard. 58. It is usual to say, *vi et armis*, although there are authorities, both as to the necessity as well as the immateriality of these words. See Fort. 302. *R. v. Tucker*, Jenk. 315.

¹⁰ *R. v. Westbury*, 8 Mod. 357.

in this case was adjudged ill, for want of setting forth the writ in full, and mentioning the name of the party whose goods were taken and rescued.¹ So it is indictable to rescue cattle impounded by the hayward. But it is to be understood that the cattle must be in the custody of the law before the responsibility of rescue attaches. And therefore if the hayward take cattle damage feasant in the grounds of an occupier, the rescue is not indictable till the distress reaches the pound; whereas, if the hayward take the cattle in a common or lane, the case is altered, for they are then immediately in the custody of the law, and not of a mere servant of the occupier, as when they are taken in a field.² So the rescue of a distress taken for a church rate is indictable, but the warrant of distress must specify the time when it is to be sold. It will otherwise be bad.³ "Forthwith" is an insufficient satisfaction of not less than four days, nor more than eight days.⁴

The rescue of prisoners charged with misdemeanor is indictable as a misdemeanor.⁵ And the same might be said of other rescues, as from the custody of one of the superior courts. But this is also a great misprision, and may be punished by the forfeiture of goods and of the profits of lands, and by imprisonment for life.⁶ So a rescue from bail is a misdemeanor.⁷ And it makes no difference if a warrant be directed to two, and the arrest be made by one only. Nor does it signify that the bailiff was intimidated by a comparatively harmless instrument, supposing it to have been a pistol.⁸ In fact, every rescue is a misdemeanor, if made from lawful custody.⁹

It is likewise an indictable matter not to aid a constable, but the constable must not select the parties he calls upon to assist him. He has no power to require particular persons to attend him.¹⁰ So, to aid an escape from prison for an offence less than felony is, in most cases, a misdemeanor; and a negligent escape, as of a person going to a prison for an offence, would be indictable at common law.¹¹ So, an escape by the party himself is an indictable offence at common law. So, a violent rescue is, of course, an offence.¹² So, to facilitate the escape of a person when pursued by officers of justice for an offence in respect of which no warrant has

¹ *R. v. Westbury*, 8 Mod. 357.]

² *R. v. Bradshaw*, 7 C. & P. 233.

³ *R. v. Williams*, 2 Car. & K. 1001; Den. 529.

⁴ S. C.

⁵ 1 Russ. C. M. 385, and is likewise punishable by attachment. *R. v. Wilkins*, 1 Str. 624. *R. v. Horsley*, 5 T. R. 362. *R. v. Elkins*, 4 Burr. 2129. See 2 Barnard, 88, 90.

⁶ 1 Hawk. c. 21, s. 5.

⁷ *R. v. Butcher and others*, Peake, N. P. C. 170.

⁸ *R. v. Bachhouse*, Lofft. 61.

⁹ *R. v. Almey*, 3 Jur. (N. S.), 750, Erle, J.

¹⁰ *R. v. Wildbore*, Ca. Sett. 214.

¹¹ East, P. C. 378.

¹² But the nature of the offence must be set out. *R. v. Freeman*, Str. 1226; and the writ described. *R. v. Westly and others*, 2 Sess. Ca. 96. See Keilw. 194.

been granted, is a misdemeanor. As where the relation of one O., who was pursued by officers for forgery, conveyed him secretly on board a vessel, and actively engaged himself in promoting the escape of O. from England in a West Indian vessel.¹ So, cattle when impounded for damage feasant, is an indictable offence.²

CHAPTER XI.

RETURNING FROM TRANSPORTATION.

Returning from transportation.] By 5 Geo. 4, c. 84, s. 22, and 4 & 5 Will. 4, c. 67, all persons under sentence, &c., of transportation or banishment, or who shall be under agreement to that effect, for life or any number of years, under the provisions of any Act, and shall be afterwards at large without lawful cause, before the expiration of the term, shall be guilty of felony, and liable to be transported for life;³ and previously to such transportation, shall be imprisoned for any term not exceeding four years, with or without hard labour, and may be tried either in the county or place where he shall be apprehended, or in that from whence he was ordered to be transported or banished.

The punishment by penal servitude having superseded that of transportation, it is observable that those who return from any place assigned them under a sentence of penal servitude, incur the same penalty as returned convicts from transportation; and the statute still embraces the ancient offence, because there are still many persons under sentence of transportation whose illegal return is, by the continuance of the original ordinance in this respect, sufficiently provided against.

Under the annual Mutiny Act, all persons ordered to be kept in penal servitude shall be subject to every provision concerning any persons under sentence of penal servitude; and from the time when such order shall be made, every Act in force touching the escape of felons, or their afterwards returning, or their being at

¹ *R. v. Buckle*, 1 Russ. C. M. 409. But the defendant was acquitted, because the knowledge of O.'s crime was not proved against him. Advertisements offering a large reward for the apprehension of O. had been circulated, but there was no evidence that the defendant had ever seen one of them, nor that he was acquainted with the charge against his relation.

² See *R. v. Arnold*, 2 Keb. 526.

³ Then by 20 & 21 Vict. c. 3, s. 2, penal servitude is substituted for transportation. But by sect. 3, amongst other matters, the punishment of offenders at large without lawful cause before the expiration of their sentence, and all other provisions applicable to persons under sentence of transportation, shall apply to penal servitude, in lieu of transportation.

large without leave, shall apply to such offenders, and to all persons aiding and abetting, contriving, or assisting in, any escape or intended escape, or returning without leave, of every such offender. But if required, the clerk shall deliver a certificate to the offender containing his christian and surname, his offence, and the place of trial, and the conditions on which the order was made, and this certificate shall be sufficient proof of the conviction and sentence.¹ It is to be remarked, that the regulation extends not merely to persons adjudged to transportation, but likewise to those who receive Her Majesty's mercy upon condition of transportation.

If it should be thought fit, the convict may be remitted to his former sentence; still, as the Act has these words,—“who shall have agreed or shall agree, to transport or banish himself or herself on certain conditions under the provisions of this or of any former Act,” it is certainly possible that it may please the sovereign to offer a condition of mercy to an offender, and in that case, the old decisions will apply, and may with propriety be briefly noticed. Thus it was clearly held, that if the prisoner had an intention of quitting the kingdom according to the rule prescribed, but through distress of poverty and ill health, had been unable to do so, he might be said to have a lawful excuse;² and whether these impediments have really hindered the person from fulfilling the condition of his pardon, is a question for the jury.³ It lies, however, upon the prisoner to prove his incompetency, and it has been usual upon his failure to do this, not to prosecute him afresh, but to remit him to his former sentence.⁴ In *Aickles's case* it was made a question, whether the breach of the condition did or not make the whole pardon null and void, but it was not decided.⁵ The party, in capital cases, lay under sentence of death, with a respite of that sentence during pleasure, or became liable to be immediately transported, if his original judgment were one of transportation. There is, however, one other question which, it seems, has not been determined. If one under sentence of transportation, or now, penal servitude for years, be pardoned on condition of transporting himself for that period, and be found at large, the condition being broken, can he be indicted, and suffer penal servitude for life under 4 & 5 Will. 4, c. 67, and 20 & 21 Vict. c. 3, s. 2, or shall he be merely remitted to his former sentence?

This was the point in *Aickles's case*, with the exception, that under the old Act, 8 Geo. 3, c. 15, the prisoner was liable to a capital punishment instead of a heavier sentence of transportation.⁶ By 5 Geo. 4, c. 84, s. 23, it shall be sufficient to allege the

¹ 24 Vict. c. 7, s. 18; as to penal servitude in the colonies, s. 19. By s. 20, a sentence of penal servitude may be commuted to imprisonment. So is the Marine Mutiny Act, 24 Vict. c. 8, ss. 23, 24, 28.

² *R. v. Aickles*, Leach, 390.

³ *R. v. Thorpe*, Leach, 396, n.

⁴ See *R. v. Miller*, Id. 74; *R. v. Madan*, Id. 223; *R. v. Aickles*, Id. 390.

⁵ *Vide supra*.

⁶ *R. v. Thorpe*, Leach, 396, n.

order for transportation without alleging the indictment, trials, pardon, &c. But the clerk of the court or other officer having the custody of the records of the court where such sentence or order for transportation or banishment shall have been passed, shall, at the request of any person on Her Majesty's behalf, give a certificate in writing, signed by him, containing the *effect* and *substance* only (omitting the formal part) of every indictment and conviction of such offender, and of the sentence or order for his transportation or banishment, (not taking for the same more than 6s. 8d.,) which certificate shall be sufficient evidence of the conviction and sentence, &c., and every such certificate, if made by the clerk or officer of any court in Great Britain, shall be received in evidence, upon proof of the signature and official character of the person signing the same; and every such certificate, if made by the clerk or officer of any court out of Great Britain, shall be received in evidence if verified by the seal of the court or by the signature of the judge or one of the judges of the court, without further proof. Hence it follows, that although the indictment needs not to allege any offence,¹ &c., the *certificate* must contain the effect and substance of the indictment and conviction, where a certificate merely stated that the prisoner had been convicted.

Indictment.] The indictment states, that at the general sessions, &c., on, &c., before, &c. A., according to due course of law, was tried, for that he [state the charge], and thereupon by a certain jury of the country before our said Lady the Queen, and the said A. in that behalf then, to wit, on, &c., at, &c., in the court of the said session so holden as aforesaid, he the said A., was duly convicted of the said felony upon the indictment aforesaid, and thereupon the said A., by the above-named justices, &c., assigned, &c., was ordered to be kept in penal servitude for the term of —, as by the record, &c.; and that the said A. afterwards, to wit, on, &c., feloniously and without lawful cause, was at large within this kingdom of Great Britain, before the expiration of the said term of — years, against the form, &c.

Where a certificate merely stated that the prisoner had been convicted of felony, without mentioning the nature of that felony, the judges held it insufficient. The indictment was likewise held faulty, for a similar omission.² Whereas, where the offence was set forth on the face of the certificate, namely, larceny, it was held to be no objection that the sentence was transportation for fourteen years, and so far illegal, the judgment remaining unreversed.³ A certificate was put in which stated that the prisoner had been convicted of two larcenies, and sentenced to two several terms of transportation of seven years each for the said larcenies; this was held sufficient.⁴ The certificate purported to be that of

¹ *R. v. Treadwell*, 1 Russ. C. M. 451. *Sutcliffe*, cited Id. 469. And see *R. v. Fitzpatrick*, Id. 512.

² *R. v. Watson*, Russ. & Ry. 468, decided on the authority of *R. v.* ³ *R. v. Finney*, 2 Car. & K. 774. ⁴ *R. v. Russell*, 1 Cox, C. C. 81.

I. G., deputy clerk of the peace, for the county of L., and clerk of the courts of general quarter sessions, &c. It appeared in evidence that the clerk of the peace for L. had three deputies, partners, of whom, I. G. was one; each acted as clerk of the peace, and the partners had kept the sessions records at their office for forty years. This proof of the conviction and sentence was held sufficient.¹ So, where the record stood thus,—“At the general quarter sessions of the peace of our Lady the Queen, holden at M., in and for the county of K., on, &c., J. H., late of, &c., was in due form of law tried and convicted on a certain indictment:” this was held sufficient, without any more formal caption.² The word “feloniously” must be used in the indictment, for the words in the old statute were “suffer death as in cases of felony,” and the present has the terms “guilty of felony.”³

A similar certificate is made available by the Mutiny Act. Thus, it shall contain the christian and surname of the offender, his offence, the place where the court was held, before whom he was convicted, and the conditions on which the order of transportation was given. The certificate shall then be sufficient proof of the conviction and sentence of such offender, and also of the terms on which such order for his transportation was given. There is a similar provision in the Marine Mutiny Act.

It was held in *Miller's case*, that the king's sign manual ought to have been received in evidence upon an indictment for returning from transportation, because, although only significant of the king's intention to pardon, and therefore revocable; yet, as it was an authority for the judge to admit the prisoner to bail, it was evidence of a lawful excuse for his appearing at large.⁴

¹ *R. v. Jones*, 2 Car. & K. 524.

³ *R. v. Horne*, 4 Cox, C. C. 263.

² *R. v. Horne*, 4 Cox, C. C. 263.

⁴ *R. v. Miller*, Leach, 74; 2

See also *R. v. Ambury*, 6 Cox, C. Sir Wm. Bl. 797.
C. 263.

CHAPTER XII.

OF RESCUES.

Rescues.] It is said, that whenever the arrest of a felon is lawful, the rescue of him is felony ; and also that, in the case of a rescue from the custody of a private person, the rescuer should have the knowledge of the party being under arrest for felony.¹ By the same rule, the rescue of a person apprehended for treason is treason at common law, as in the case of felony.² By 1 & 2 Geo. 4, c. 88, s. 1, if any person shall rescue, or aid, &c., in rescuing, any one charged with, suspected of, or committed for felony, then, if the person charged, &c., be convicted of felony, and entitled to clergy, and liable to imprisonment not exceeding one year, the rescuer *may* be transported for seven years, or imprisoned, with or without hard labour, for a term not less than one year, nor exceeding three years.

The rescue of persons for offences under the Black Act was mitigated as to punishment by 4 Geo. 4, c. 54, s. 1 ; but as the Black Act was repealed by 7 & 8 Geo. 4, c. 27, the other Act of Geo. 4, although unrepealed, is superseded.

The rescue of a prisoner from the superior courts is a great misprision, and punishable, at common law, by imprisonment for life, forfeiture of lands for life, and of goods and chattels, though no stroke be given.³ And as to transportation,⁴ any act of rescuing, or attempting or aiding to rescue any one sentenced to transportation or banishment from custody, shall be punishable as if the offender had been himself sentenced to the same term of exile.⁵

A rescue is commonly accomplished either when a person is charged with and committed for felony, or when he is being conveyed to gaol after his conviction, or when he is about to undergo his sentence.

Rescues, therefore, in the popular sense of the word, may be understood to apply to those who are *out of prison* at the time of the attempt to deliver them ; but it also signifies any attempt to release a party from gaol, if attended with success.

¹ 1 Hale, 606.

² See 1 Russ. C. M. 434.

³ 1 Russ. C. M. 435. See *R. v. Lord Thanet and others*, East, P. C. 408.

⁴ Now applicable to penal servitude : 20 & 21 Vict. c. 3, s. 2.

⁵ 5 Geo. 4, c. 84, s. 22. See 56 Geo. 3, c. 27, ss. 7, 13.

Indictment.] The cases for rescue are rare, and we will, therefore, merely refer to the books on criminal pleading for precedents.¹ The nature and cause of the imprisonment, together with the special circumstances of the case, must in general be set forth;² and it is said to be necessary to use some word importing that the rescue was forcible, and against the will of the officer who had the prisoner in custody.³

Prison-breach.] The law of prison breaking is in a great measure governed by 1 Edw. 2, st. 2, "*De frangentibus prisonom.*" That statute (which is unrepealed) declared, that the offender should not sustain any judgment of life or member, unless the cause for which he was taken and imprisoned required such a judgment, in case of his conviction. This provision seems, at first sight, to respect those only who have been committed for trial, and not such as are convicted of the offences imputed to them, but it is laid down, as a matter beyond doubt, that persons attainted who break prison, are as much guilty as the others who break out before trial.⁴

Prison-breach, as rescue, is still felony at common law, where the original offence is a common law felony, or a felony made capital by statute, but it is only a misdemeanor in respect of offences less than felony at common law, or statutable felonies which are not capital. The common law, says Mr. Serjeant Hawkins, is restrained by the statutes in respect only of imprisonment for offences and capital; when an offence becomes capital, it is as much out of the benefit of the statute as if it had always been so;⁵ and, thence it follows, that it is immaterial whether the offence were capital at the time of the statute 1 Edw. 2, or were made such by subsequent statutes,⁶ provided it were capital at the time of the prison-breach.⁷

However, although a party cannot defend himself against a charge of prison-breach upon a plea, that no felony has, in reality, been committed, seeing that it is a great misdemeanor for a person to shrink from an accusation by those means, it seems that he can relieve himself from a charge of felonious prison-breaking by negating the circumstance of the felony;⁸ and that means the existence of the felony itself. For if a person be accused of a felony, however wrongfully, but which has, in reality, happened, he cannot justify beaking his prison.⁹ The production of the record of acquittal for the felony by the party breaking prison, if he himself was the person acquitted, will probably answer a subsequent charge for breaking prison.¹⁰

¹ Stark. Cr. Pl. 421, 642, 643.

² 1 Russ. C. M. 434.

³ Id.

⁴ 2 Hawk. c. 18, s. 16. See also, as to persons brought into England from abroad in order to be transported. 5 Geo. 4, c. 84, s. 1.

⁵ 2 Hawk. c. 18, s. 13.

⁶ See 2 Hawk. *ut supra*.

⁷ Id. s. 14.

⁸ Id. s. 15.

⁹ See 2 Hawk. c. 18, ss. 5, 6, 7, and likewise s. 8.

¹⁰ See *post*.

On the other hand, it may be suggested, that if the commitment be for an offence less than a capital felony, and it turns out upon the trial for breaking prison, that the crime committed was, in reality, capital, the *mittimus* will not govern the result, and the prisoner may be convicted.¹ There are, however, opinions to the contrary of the last proposition.²

Moreover, a party does not seem to be guilty of a higher offence than felony, if he break prison under a charge of high treason, although the case may be different if he simultaneously assist the escape of others accused of that crime.³

What, a prison.] Any place where liberty is restrained seems to be a prison within the meaning of the law. Thus, the stocks, although the party had not been yet indicted for the felony.⁴ The house of a constable or private person, or other such places, and *à fortiori*, a common gaol, are prisons for this purpose.⁵

What a breaking.] Further, in order to complete the offence, there must be both a breaking and an escape. A prisoner who leaves the gaol without using violence, cannot be said to have broken his prison,⁶ nor can one who has either failed or forborne to escape, be said to be a prison-breaker, although he may in the first instance, have used violence.⁷ And clearly, if he break his place of confinement in order to save his life, in case of fire, for example, he is not to be considered a transgressor against the law.⁸ And again, if he should actually escape through the medium of others, who break the prison, but without his procurement, however he may be answerable for his escape, he is certainly not guilty of prison breaking.⁹

A very slight degree of force has been deemed sufficient to constitute a breaking. A prisoner who had been confined under a commuted sentence for horse-stealing, tied two ladders together, and placed them against the wall of the yard of the prison; but in making his escape he threw down some of the bricks of the wall; the evidence upon this occasion, likewise, went the length of showing that these bricks were purposely left in a loose condition, so that by their falling, an alarm might quickly be given to the gaoler. It was doubted whether this were prison breaking, or merely an escape, and the opinion of the judges was requested. The judges held it to be a prison breach, but Richardson, J., added, that had there been an escape by only using the ladders, the offence would not have amounted to felony.¹⁰

It is settled, that a person who breaks prison may be charged with that offence before he is convicted of the crime for which he

¹ 2 Hawk. c. 18, s. 15.

² Id.

³ 2 Hawk. c. 18, s. 17. *R. v. Bensted*, Cro. Car. 583.

⁴ Dy. 99, pl. 60.

⁵ 2 Hawk. c. 18, s. 4.

⁶ 1 Hale, P. C. 611.

⁷ 2 Hawk. c. 18, ss. 9, 12.

⁸ Id. s. 11.

⁹ Id. s. 10.

¹⁰ *R. v. Haswell*, Russ. & Ry. 458.

was originally imprisoned;¹ and so says Lord Hale, "it differs from the case of a rescue or escape before, and the reason is, because here it is the same person, there they are divers, and therefore, in the latter cases the principal felony shall be first tried."² But if the prisoner should chance to be put upon his trial for the capital felony before he is indicted for the prison breach, and an acquittal should be the result, he becomes immediately in a condition to plead that acquittal in bar to the indictment. And so it was done by Lord Hale in the case of *Mrs. Sanford*, whom he defended.³

Indictment.] The indictment charges, that A., being a prisoner in Her Majesty's gaol at B., on, &c., wilfully and feloniously did break the said gaol and rescue one C., then and there being in the said gaol, convicted of, [set out the offence] and committed upon, and in execution of the said judgment for the said felony as aforesaid, from and out of the said gaol, so that the said C., by the aid and assistance of him the said A., did then make his escape from and out of the said gaol, and did go at large, against the form, &c.

It is not sufficient to say in an indictment for this offence that the offender feloniously "broke prison;" his case must be specially set forth, so that it may appear that he has been lawfully imprisoned.⁴ Nevertheless, the breaking must be likewise stated, for one of these allegations cannot be introduced without the other.⁵

Aiding escapes.] It is a misdemeanor at common law for a gaoler to suffer an escape.⁶ But the indictment must show a custody on the defendant's part as keeper of the prison,⁷ and that the person escaping had been legally committed. The words "*so being such*" street-walker were held to be an averment of that fact.⁸ But an indictment which alleged that the party had been charged with high treason was considered sufficient.⁹ The offence, however, as well as the authority, must appear.¹⁰ So that a yeoman warder of the Tower, and a gentleman gaoler, were held punishable for an escape, as officers, not being persons known to the law in that capacity.¹¹ Again, it is an offence at common law to permit an escape, and a person who bribes the constable is

¹ 2 Hawk. c. 18, s. 18.

² 1 Hale, P. C. 611.

³ Id. 612. As to the offence of breaking prison for the second time at Millbank, see *ante*.

⁴ 2 Hawk. c. 18, s. 20.

⁵ *R. v. Burridge*, 3 P. Wms. 483.

⁶ *R. v. Wright*, 1 Ventr. 169.

⁷ *R. v. Fells*, 5 Mod. 414; S. C. Holt's Ca. 279.

⁸ *R. v. Booty*, 2 Ld. Keny. 575.

⁹ 5 Mod. 414.

¹⁰ *R. v. Plowman*, Cro. El. 752. The warrant was to two, and the arrest by one, and it was held good. *R. v. Roe and others*, 1 Str. 117.

¹¹ 2 Ch. Burn. 6. *R. v. Hill and Dod*, 1 Russ. C. M. 421. *R. v. Rich*, Id.

punishable,¹ and it is no defence to say that the prisoner was not confined upon any criminal charge, but otherwise; for example, under remand of the commissioner for the relief of insolvent debtors.² Again, where the defendant harboured one O., his relation, when he was under pursuit by the officers of justice, no objection was made upon general grounds; but the indictment was held not to be sustainable, because it could not be brought home to the defendant that he participated in the knowledge of his relation's guilt.³ An indictment for suffering an escape in a case of forcible entry did not state how the commitment was made, whether upon view of the force by the justices, or upon an indictment found, but by Holt, C. J., it is only inducement, and, after verdict, it shall be intended that the commitment was legal.⁴

An indictment for rescue may be supported upon the certificate of the clerk of the peace vouching that an indictment for a misdemeanor has been found against A.; against whom a warrant is accordingly granted, and who is rescued upon the execution of it.⁵ The proceeding may be by information.⁶

Rescue implies that some kind of force has been used, but the act of aiding an attempt to escape may, evidently, be performed without violence. It is in this latter view that we purpose to consider the subject of escapes in the present section. It is felony at common law to assist a felon to escape out of his lawful custody.⁷ A rule, however, which must be restricted to capital offences; and it has, moreover, been held that a person who aids a convict under sentence of transportation to escape from custody, is, independently of any statutable enactment, an accessory after the fact to the felony.⁸

Nevertheless, the offence of aiding escapes depends, at the present day, in a great measure upon the acts of the legislature.

By 4 Geo. 4, c. 64, s. 43, to aid and assist any prisoner in escaping from gaol, or in the attempt, is felony, and punishable with transportation (now penal servitude) not exceeding fourteen years.⁹

¹ *R. v. Vaughan*, 1 Wils. 22.

² *R. v. Allan*, Car. & M. 295.

³ *R. v. Buckle*, 1 Russ. C. & M. 409. Advertisements had been published, but there was no proof to affect the defendant with notice of any one of them.

⁴ *R. v. Wright*, 3 Salk. 93.

⁵ *R. v. Stokes*, 5 C. & P. 148. See also as to rescous, Mar. 67, pl. 165.

⁶ *R. v. Gaoler of Shrewsbury*, 1 Str. 532.

⁷ 2 Hawk. c. 18, s. 1.

⁸ *R. v. Burridge*, 3 P. Wms.

483. See also *R. v. Scadding*, Yelv. 134.

⁹ By sect. 44, in case of a conviction the certificate of the clerk of assize, &c., and proof of the identity of the offender, shall be deemed evidence of the return and fact of the conviction, and of the species and period of the confinement. Moreover, by 4 Geo. 4, c. 64, s. 43, to convey into a prison any mask, visor, &c., instruments or arms fitted for escape, and to deliver the same to a prisoner without consent, shall be deemed a delivery coupled with an intent to further an escape.

Should the party be in the custody of a private individual, it seems necessary that the rescuer should be affected with notice that the arrest was for felony;¹ but if the custody be that of an officer, the rescuer must at his peril take notice of it;² and, it may be added, that a prison at common law, the stocks for instance,³ is one from which a stranger may be guilty of rescuing a criminal.⁴

In treating of prison-breaking, rescues, and returning from transportation, we have so fully noticed several points relating to the prison, the nature of the offence, and other incidental circumstances nearly common to all these matters concerning *escapes*, that a repetition of them would be unnecessary. The kind of prison is the same;⁵ the contributing to the escape of a traitor is governed by the same rule,⁶ and the same notice in the case of a private person is requisite, as upon the occasions just mentioned; but where the prisoner is charged with assisting the escape of a convict, it is not necessary that he should be proved to have been cognizant of the specific offence of which the person whose escape he has been attempting was convicted.⁷ In this same case it was held, that a conviction for conveying and delivering instruments in prison was good, although the party sought to be delivered had, in fact, been pardoned, for a capital felony of which he had been convicted, and on account of which he was then in gaol.⁸

It is to be noted, that the words in 16 Geo. 2, c. 31, s. 1,⁹ are "for treason, or any felony expressed in the warrant of commitment or detainer;" so that where an indictment was preferred upon that statute, and the commitment appeared to have been "on suspicion only," the charge was not supported.¹⁰

Indictment and evidence.] At common law it is necessary to state that the rescuer, or accessory, knew of the offence of which the prisoner was convicted, or for which he was committed.¹¹ But we have seen that this is not required under the statutes;¹² and under 16 Geo. 2, c. 31, it has been held that an indictment was not informal for want of stating, that the party himself attempted his own escape, for the averment that the prisoners aided and assisted in the attempt, was considered by the judges quite sufficient to show that such an attempt had been made.¹³ Nor, under 4 Geo. 4, c. 64, s. 43, was it necessary to set out

¹ 1 Hale, P. C. 606.

² Id.

³ Dy. 99.

⁴ 2 Hawk. c. 21, s. 1.

⁵ See Id.

⁶ East, P. C. 101.

⁷ *R. v. Shaw and others*, Russ. & Ry. 526.

⁸ Id.

⁹ This Act is repealed by 4 Geo. 4, c. 64.

¹⁰ *R. v. Walker*, Leach, 97. *R. v. Greeniff*, Id. 363; and see Id. 98, n. This objection is now provided against.

¹¹ *R. v. Young*, 1 Russ. C. M. 440.

¹² *R. v. Shaw and others*, Russ. & Ry. 526, ante.

¹³ *R. v. Tilley and others*, Leach, 662. See also *R. v. Glover*, and *R. v. Manlove*, Id. 670.

the means employed to effect the escape, for the statute had the words, "by any means whatsoever."¹ The delivery of a key by the prisoner to a turnkey in order to aid in his escape, is within the statute, and supports the indictment.² Nor was it necessary to show that the prosecution was commenced within a year after the offence, as required by the repealed Act, 16 Geo. 2, c. 31, s. 4.³ An indictment charged the defendant as accessory to the escape of a felon by harbouring him. It was objected, that since 1 Edw. 2, st. 2, s. 1, the offence of prison-breach was only a misdemeanor, but the prisoner was acquitted. The judge would otherwise have reserved the point.⁴

When the certificate is once made, it cannot afterwards be impeached in any of its formal parts.⁵ A similar certificate, together with the proof of the identity of the person, is, as we have already seen, sufficient evidence under the statute 4 Geo. 4, c. 64.⁶ And, lastly, it is to be remarked, that although the indictment under some of the statutable provisions referred to need not state any prior conviction nor sentence, the certificate of the clerk of assize, or other officer, must nevertheless give the substance and effect of both the indictment and the conviction of the party whose escape comes in question, although the formal parts may certainly be omitted under the express provisions of such statutes to that effect. The aiding, &c., being a substantive felony, the objection that the principal should be tried before the defendant failed.⁷

By 4 Geo. 4, c. 64, s. 44, escapes and prison-breaches may be tried either in the jurisdiction where the offence was committed, or where the party is apprehended or retaken.

Millbank Penitentiary.] By 6 & 7 Vict. c. 26, s. 22, every convict in the Millbank Prison who shall break prison or escape while being conveyed thither, from lawful custody, shall for the second offence be deemed guilty of felony. The first offence is punishable with an additional term of imprisonment not exceeding three years.

By sect. 26, every convict as above may be tried before the Central Criminal Court, or in the county where he shall be taken; and, whether the prosecution be against a convict, or any

¹ *Holloway v. The Queen*, Den. & P. 287.

² S. C.

³ S. C.

⁴ *R. v. Green*, 8 Cox, 441. Nevertheless, it is settled that the statute of Edward mitigated the common law which made *all* prison-breaches felony, and restrained the *felonious* breach to rescues or escapes for treason and felony. See further as to prisons generally, 4

Geo. 4, c. 64; 5 Geo. 4, c. 84; 13 & 14 Vict. c. 39; 16 & 17 Vict. c. 121; 22 Vict. c. 25, as to the government of convict prisons abroad, and especially ss. 13 to 19, inclusive, as to escapes, rescues, and attempts, &c.

⁵ *R. v. Shaw and others*, Russ. & Ry. 526.

⁶ *Ante*.

⁷ *Holloway v. The Queen*, Den. & P. 287.

other person as accessory, a copy, properly attested, of the order of commitment, with proof of indenture, with the production of the register, shall be sufficient evidence of the facts contained in the register, without the production of any record or conviction, or other proof that such convict had been convicted of felony.

And the said judgment is penal servitude for not less than three years, or imprisonment not exceeding two years, with or without hard labour, and once, twice, or thrice, public or private whipping, if the offender be a male, in addition to the imprisonment.¹ The hard labour, together with solitary confinement, are added at the discretion of the court.²

Rescue from Millbank Penitentiary.] By 6 & 7 Vict. c. 26, s. 23, to rescue any convict during his conveyance to the penitentiary at Millbank, or during his confinement there, or to aid in any such rescue, is made felony.³ By the same section the keeper of convicts there is guilty of felony if he suffer an escape; so it is if any person supplies arms, &c., or in any manner whatever aids in an escape from that prison, though no escape be made;⁴ and a negligent escape is a misdemeanor, and punishable by fine and imprisonment, and a copy of the commitment, together with proof of identity, will be sufficient to make out the charge.⁵

Parkhurst Prison.] Similar provisions are enacted with regard to Parkhurst Prison:⁶

Pentonville.] And Pentonville;⁷ and, so again, as to naval prisons.⁸

Mint offences.] By 9 Geo. 1, c. 28, s. 1,⁹ to resist or oppose any officer executing any process or warrant within Suffolk Place or the Mint, or to rescue any prisoner taken upon any such writ or warrant, or to harbour or conceal any prisoner or person rescuing such prisoner, or to aid and abet such offences, is made felony, and punishable with transportation.¹⁰

Wapping, Stepney—Process.] By 11 Geo. 1, c. 22, s. 2,¹¹ making rescue of any prisoner taken upon process, execution, or extent within Wapping, Stepney, and the places adjacent, &c., or aiding,

¹ 7 & 8 Geo. 4, c. 28, ss. 8, 9.

² Sect. 9.

³ And punishable as above.

⁴ Punishable as above.

⁵ Sect. 26.

⁶ 1 & 2 Vict. c. 82. See sects. 12, 13, 14.

⁷ 5 & 6 Vict. c. 29, s. 25. See sects. 28, 31.

⁸ 10 & 11 Vict. c. 62, s. 8.

⁹ This statute is obsolete, but not repealed.

¹⁰ Now penal servitude: 20 & 21 Vict. c. 3, s. 2.

¹¹ See n. 9.

&c. in such rescue, is made felony, and punishable with transportation for seven years.¹ But the indictment or information must be filed within six months.

Rescuing murderers.] By 1 Vict. c. 91, s. 1, the rescue or attempt to rescue any person *out of prison* committed for or convicted of murder, or going to or during execution, is punishable with transportation for life (now penal servitude) or for not less than fifteen years, or imprisonment not exceeding three years;² and to rescue any person going to execution for felony, is a high misdemeanor.

¹ Penal servitude, but the Act is out of date.

² This Act supersedes the 25 Geo. 2, c. 37, s. 9, which is not repealed,

and sect. 10 is obsolete, because the murderer is now buried in the gaol, so that no provision against rescue of the corpse seems necessary.

The first part of the history of the United States is the history of the discovery and settlement of the continent. The second part is the history of the growth and development of the country. The third part is the history of the political and social changes that have taken place in the United States. The fourth part is the history of the United States in the world.

The first part of the history of the United States is the history of the discovery and settlement of the continent. The second part is the history of the growth and development of the country. The third part is the history of the political and social changes that have taken place in the United States. The fourth part is the history of the United States in the world.

The first part of the history of the United States is the history of the discovery and settlement of the continent. The second part is the history of the growth and development of the country. The third part is the history of the political and social changes that have taken place in the United States. The fourth part is the history of the United States in the world.

The first part of the history of the United States is the history of the discovery and settlement of the continent. The second part is the history of the growth and development of the country. The third part is the history of the political and social changes that have taken place in the United States. The fourth part is the history of the United States in the world.

The first part of the history of the United States is the history of the discovery and settlement of the continent. The second part is the history of the growth and development of the country. The third part is the history of the political and social changes that have taken place in the United States. The fourth part is the history of the United States in the world.

The first part of the history of the United States is the history of the discovery and settlement of the continent. The second part is the history of the growth and development of the country. The third part is the history of the political and social changes that have taken place in the United States. The fourth part is the history of the United States in the world.

The first part of the history of the United States is the history of the discovery and settlement of the continent. The second part is the history of the growth and development of the country. The third part is the history of the political and social changes that have taken place in the United States. The fourth part is the history of the United States in the world.

PART X.

Of Perjury, Conspiracy, and Extortion.

CHAPTER I.

OF PERJURY AND SUBORNATION OF PERJURY.

The offence of taking a false oath is perjury ; that of procuring another to swear falsely is subornation of perjury.¹ The former consists in a wilful violation of the truth in some matter stated on oath, before a person competent to administer it, in a judicial proceeding, and, at common law, whether material to the issue or not. Perjury, by statute, is capable of the same definition, with this qualification, that the thing sworn must have been material to the issue.²

Subornation is the persuading of another to commit perjury, from whence it must be understood that the false oath is actually taken, otherwise there is no subornation of perjury, although the bare endeavour to incite to such a crime was highly penal at common law.

First, of perjury at common law, or by statute. What shall be said to be perjury. Then what is perjury at common law. Thirdly, what the statutes have enacted with respect to that crime, and, the procedure.

What perjury shall be said to be.] Perjury must be wilful—absolute—corrupt—positive³—an oath which errs through mistake or inadvertency is not perjury.⁴ On the other hand, if a man swear the truth unwittingly, it is now admitted that he is guilty at common law of taking a corrupt oath, although not under the stat. of Eliz.⁵ It is true that the court said, upon one occasion, that there was a difference when one swears to a thing which is true in fact, but which the swearer does not know to be so, and when

¹ See 3 Inst. 164 ; 4 Com. 137 ; statements at variance with each other, one of which must, of necessity, be incorrect. *R. v. Jackson*, 1 Hawk. c. 69, s. 1. 1 Lew. C. C. 270.

² Both false and material by statute. See 8 Ves. jun. 38.

³ See 4 Com. 137.

⁴ As if one should make two

⁵ *R. v. Edwards*, 2 Russ. C. & M. 518.

one swears wilfully to a falsehood;—the first is perjury before God, and the other is an offence of which the law takes notice.¹ But this was said in an indictment for subornation, which was probably brought upon the statute. At common law the ruling has been otherwise. As in the star chamber, where damages having been awarded to the plaintiff *according to the value* of his goods, which the defendant had riotously taken away, he caused two men to swear to the value of these goods, who never saw nor knew them, and this was held to be a false oath, and both the procurer and witnesses were sentenced accordingly.² So, where one swore how a will had been revoked in his hearing, when, in fact, the words of revocation were spoken to another in the absence of the witness, it was deemed a corrupt oath within the statute,³ and, therefore, *à fortiori*, at common law. Again, where one J. S. had done a certain act which he was to prove, but in lieu thereof, another person procured W. R. to swear to this fact in the room of J. S., it was held perjury at common law in W. R.⁴ Again, in former days, cases of inadvertency were sometimes considered by the judges in the light of perjury, although they were wont to pass a lenient sentence; and now, if the court should be satisfied upon affidavit that the falsehood arose from carelessness or inadvertence, they would probably treat the verdict as one against evidence, and grant a new trial, or, if at the trial, would direct an acquittal.⁵ However, it was not always so, since we find, that where one swore that he was servant to J. S., whereas it turned out that he was servant to the servant of J. S. he was convicted of perjury. And, moreover, although it was alleged on his behalf that there was no malice in this case, the court fined him 10*l*. Wild had moved for an abatement, because one Tiler had been fined but 5*l*. in such a case.⁶

Again, one Bellingham had a process to serve from the Court of Wards. He served it on the 9th of the month, but he swore upon the return that he made it on the 8th. It clearly appeared that this was an inadvertent oath, yet he was convicted of perjury,

¹ *R. v. Hinton and Brown*, 3 Mod. 122.

² *R. v. Gurnei*, 3 Inst. 166.

³ *R. v. Styles*, Hetl. 97, cited there in *Allen v. Westley*. But see 1 Hawk. c. 69, s. 22, who takes a distinction between oaths on the statute and at common law in this respect. 3 Inst. 166, acc.

⁴ *R. v. Whicksley*, 2 Ro. Rep. 244. Palm. 294. Nom. *R. v. Ockley and Whitlesbye*, 1 Hawk. c. 69, s. 2. Mr. Tidd observes, that where there have been mu-

tual dealings between parties, the balance is considered as the debt at law, as well as in equity, so that if a plaintiff were to swear to the sum due to him upon the debtor side only, *if it were not a ground for an indictment for perjury*, at least, the defendant would be entitled to sue for a malicious arrest.—Tidd's Practice, 7th ed. p. 195.

⁵ See *R. v. Burton*, 3 Keb. 345; 1 Hawk. c. 69, s. 2.

⁶ Al. 79.

and fined 10*l*.¹ Then, again, the perjury proved and relied on was, that the defendant had sworn concerning J. S. that he was in London to be arrested. This was material, inasmuch as the issue was on the taking of J. S. by the sheriff. J. S., it appeared, was in Southwark, out of the liberties, at that time. In general acceptance Southwark was held to be a part of London, but the sheriff of London could not have any power to arrest there. The court, upon this occasion, fined the defendant 20*l*. *because of inadvertency*.² However, it is said, that falsehood which does not strictly amount to perjury, is, nevertheless, a misdemeanor.³ And it should be observed that false swearing cannot be purged by the subsequent withdrawal of the evidence, if that evidence be material to the issue.⁴ And Maule, J., said, that false swearing in a judicial proceeding, in a matter material to that judicial proceeding, was perjury, whether the false oath were or not relevant to the issue then being tried.⁵

Direct.] The perjury charged must be directly fixed upon the point sworn to. A man was examined upon interrogatories in chancery, whether J. S. were of sound mind at the time of his decease. The answer was, that J. S., five days before his death, was not of sane mind. The person examined was indicted for perjury, but it was obvious that J. S. might be insane five days before his death, as the answer stated, and yet might be in his right mind when he died. The indictment was quashed, because the oath was not effectually false.⁶ But, if the evidence be direct, it is sufficient, for an evidence may be very material, and yet not full enough to prove directly the point in question.⁷

Other cases may be furnished to illustrate this point, namely, that no conviction for perjury can take place upon a supposition. Thus, the defendant was procurator-general of the Court of Admiralty, and he resigned that office to H., reserving to himself the emoluments of suits then pending. Subsequently, he treated with the prosecutor, and assigned over to him the rights which he had before reserved, giving the prosecutor a power by deed to prosecute all actions then depending in his, the defendant's name, but to receive the profits on his, the prosecutor's account. Then one U. having become indebted to the prosecutor for business done in the admiralty, the latter sued him in the defendant's name, upon which the defendant made an affidavit to the following effect on a motion to stay proceedings. First, that he had resigned his place to H., and that from that period, he had not authorized any person to sue in his name; and, then, that

¹ *R. v. Bellingham*, Sty. 126.

² *R. v. Lewen*, 1 Sid. 405.

³ *Ex parte Overton*, 2 Rose, B. L. 257.

⁴ *R. v. Philpotts*, Den. & P. 302; 21 L. J. M. C. 18.

⁵ See Den. & P. 305—307. *R.*

v. Murray, 1 Fost. & F. 80.

⁶ Palm. 383, citing *R. v. Manton*, 14 Jac. 1.

⁷ 2 Ld. Raym. 889, by Holt, C. J.

that the action depending against U. had been brought in his name without his authority. Perjury being assigned upon this affidavit, Lord Kenyon inquired whether the perjury would not depend on the construction of this deed. The counsel for the prosecution replied in the affirmative, on which the learned lord directed an acquittal. Had the defendant acted inconsistently with the obligation entered into by his deed, he might have been liable to a civil action, but an indictment for perjury could not be maintained for an injury arising out of a misconception, or mistake in the construction of a clause in a deed. A question would be made as to what passed under the deed from the defendant to the prosecutor. The defendant was then acquitted.¹ And there must not be any uncertainty as to the matter sworn to, so that perjury cannot be assigned upon evidence relating to the value of land, for that is the most uncertain thing in nature.² Nor signed upon an answer in chancery which has denied a promise absolutely void by the statute of frauds.³ Again, a man was indicted for perjury for denying that he had entered into a certain agreement. It was in the case of an agreement alleged by a bill in chancery to have been the defendant's. Abbott, C. J., was of opinion, that as the defendants in equity had pleaded the statute of frauds in their answer, and had thus relied upon an apparent ground for relief, the defendant should be acquitted.⁴

The attorney-general, in support of the prosecution in this instance, cited a case where a defendant, who denied a trust in his answer to a bill, was convicted subsequently for perjury.⁵ But the lord chief justice said, that it did not appear from the short statement of that case, and which was not very distinctly reported, whether the statute of frauds had been pleaded and relied on there.⁶

A. and C. were sworn brokers, and could not accordingly trade in drugs. With B.'s consent they made speculations in his name, B. agreeing to divide the profits and loss with A. and C. A. swore that he did not enter into an agreement with B. and C. jointly, to deal and be a co-partner with them in the trade or business of druggists. Abbott, C. J., held that the indictment was not supported, as the above was not the kind of co-partnership denied by A. upon oath.⁷ Lastly, if a statute create a penalty in respect of mistakes upon oath which are not *positive affirmations*, an indictment will not lie cumulatively. Thus the 70th section of an Insolvent Act⁸ punishes the omissions of property in the schedule as a misdemeanor; the 71st section inflicts the pains of perjury against false swearers. Lord Tenterden held, in such a case, that the legislature had, in the 70th section, con-

¹ *R. v. Crespigny*, 1 Esp. 280.

² 3 Mod. 134. See 2 Ld. Raym. 1118.

³ Peake, Add. Ca. 93.

⁴ *R. v. Dunston*, Ry. & M. N. P. C. 109.

⁵ *Bartlett v. Pickersgill*, cited,

⁴ Burr. 2255, and 4 East, 577, n.

⁶ *R. v. Benesech*, Peake, Add. Ca. 93; Ry. & M. 111.

⁷ *R. v. Tucker*, 2 C. & P. 500.

⁸ 7 Geo. 4, c. 57.

templated the particular case of omissions, and directed an acquittal.¹

It is not the less a perjury because the jury disbelieve the witness, and thus that no mischief ensues. True it is that the party cannot sue him under the statute, because no damage has accrued, but he may be punished at the suit of the king.²

A man was said to have rolled up a declaration in ejectment like a piece of tobacco pipe, to have hid it in his box, and then to have delivered it to the tenant in possession. He swore to the delivery of the declaration upon this, but, we are informed that this could not avail him, for it was equivocation; he was set in the pillory.³ The defendant was charged with having sworn falsely as to his charging no more than 6*d.* a quarter as commission beyond the purchase of certain corn and grain. It was objected, that the defendant's oath might be understood to include collateral expenses, and, therefore, that the perjury could not be called positive and direct. But the indictment was held sufficient.⁴ Moreover, a defendant is not allowed to escape who comes to persuade a jury of false facts under colour of a *belief* in that which he ventures to affirm. "Mankind had fallen into a mistake," said Lord C. J. De Grey, "by supposing that a person who *thinks* or *believes* that a fact is true, cannot be convicted of perjury."⁵ So, again, by Lord Mansfield, "It is certainly true, that a man may be indicted for perjury in swearing that he *believes* a fact to be true, which he must know to be false."⁶ So, again, the point being moved in C. B., by Walker, Serjeant, Lord Loughborough, and all the judges there, were unanimous that *belief* was to be considered as an absolute term, and that an indictment might be supported upon it.⁷ So, where the defendant swore that he thought that a writing was not his, when, in truth, he thought that *it was*. Care, however, must be taken of the proof of the assignment.⁸

So, if a witness should consent to be sworn upon a book which he does not think sacred. As where a Jew had been sworn upon the Gospels as a Christian, and there was a verdict for the plaintiff. A new trial having been moved for upon an affidavit, although the court denied the application, the objection being too late, yet the

¹ *R. v. Mudie*, 1 Moo. & Rob. 128; 5 C. & P. 23.

² Said per cur. in *R. v. Hamper*, 2 Leon. 230; 1 Hawk. c. 69, s. 9.

³ Dict. per Allibone, J., Comb. 62.

⁴ *R. v. Atkinson*, 2 Russ. C. M. 542.

⁵ *R. v. Miller*, 2 Sir W. Bl. 881; and see 3 Wils. 427; 1 Leach, 327; 1 Hawk. c. 69, s. 7.

⁶ *R. v. Pedley*, 1 Leach, 327; 2 Russ. C. M. 518.

⁷ Suppl. to Vin. Abr. tit. "Perjury," vol. 5, p. 376, A. 2.

⁸ *R. v. Schlesinger*, 17 L. J. M. C. 29; 10 Q. B. 670. In this case a writ of trial was properly alleged to have been before the sheriff, although the trial was had before the secondary, the sheriff's deputy. And the record of the writ which showed that two issues were joined, proved the allegation that two issues came on to be tried, though the *postea* showed a finding upon one issue only.

oath was one upon which perjury might be assigned: it imposed on the party taking it a religious and moral obligation.¹ So, where the defendant, a Scotch covenanter, had been sworn, first, in the usual way on the testament, and then, at the desire of the counsel, by holding up his hand according to the ceremony of his own country, Lord Kenyon held the indictment good charging him with having sworn upon the Holy Gospels of God.² So, as to a marksman, if proof be given of the document having been read over to him, and of his knowledge of the contents.³ And where by statute disability on the subject of oaths is removed, the falsehood of *affirmations* or *declarations* is made punishable by the penalties of perjury.

Before we quit this general head of our subject, it may be right to advert for a moment to the description of persons who may be convicted of perjury. This might, indeed, be deemed a strange position, were it not that a difference exists between the common law and the statute in respect of persons. For the statute of Eliz. extends to witnesses only in suits between party and party, whereas the common law is universal, and includes every one of competent mind who violates its provision on this behalf. The statute, in truth, makes nothing perjury which was not so before;⁴ it pursues the common law, and adds nothing new excepting the penalty.⁵ Nevertheless, as it confines the description of offenders to perjured witnesses, its provisions have been frequently taken advantage of by parties indicted under it, whose crimes, however punishable at common law, have had no reference to suits between individuals, and, therefore, were not within the statute.

Thus it was that the court held on one occasion, that a man could not be punished under the statute of Eliz. for perjury in his own cause, as in wager of law, but that he ought to be indicted at common law. It was said to have been so adjudged before that time.⁶ So again, where in trespass in an inferior court, the defendant had pleaded his freehold for the purpose of ousting the court of jurisdiction, it was urged, that the defendant might be sworn to the truth of his plea. Twisden, J., denied this, and the court said, that an indictment would not lie for perjury upon such an oath more than upon a wager of law.⁷

At common law, witnesses for the crown might always be indicted for perjury, but they were held irresponsible under the stat. 5 Eliz., as far as the usual proceeding by indictment could affect them.⁸ Nevertheless, an information would lie upon the statute.⁹

¹ *Sells v. Hoare*, 3 Br. & B. 232.
Richardson, J. A finding upon one issue only.

² *R. v. M'Carther*, Peake, 155.

³ *R. v. Spencer*, 1 C. & P. 260.

⁴ By Holt, C. J., Carth. 422.

⁵ By Eyre, J., Id.

⁶ *R. v. Sir Robert Miller*, Noy. Rep. 128; S. C. Yelv. 120.

⁷ Anon. 1 Ventr. 296.

⁸ See *R. v. Price*, Cro. Jac. 120; *R. v. Lane*, 3 Salk. 270; Cro. El. 148. See 1 Hawk. c. 69, s. 3. *Nannge v. Rowland Ap. Ellis and others*, Cro. Jac. 212. S. C. nom. *case of Rowland Ap. Eliza*. Inst. 164. S. C. nom. *R. v. Hugh Manney*, 12 Rep. 101.

⁹ 3 Inst. 164.

Jurors, &c.] Persons also, who, although under the sanction of an oath, do not take such a one as relates to evidence, are not punishable in general for perjury. Jurors who give a verdict contrary to the plainest testimony are not guilty of perjury, because they are not sworn to depose the truth, but only to give a true judgment upon the depositions of others.¹ So also, ministers and officers of justice are, in general, dispunishable for a breach of their oaths of office, but there are some occasions upon which they may be convicted, as for specific acts of misconduct at variance with their general oaths.

Bail.] Bail who prevaricate or swear falsely are open to an indictment for perjury. This was distinctly laid down by Abbott, C. J., in a case where Mr. Justice Best had committed two persons for gross equivocation. They were ultimately discharged, but the lord chief justice intimated, that if any one chose to indict them, they were clearly liable to the charge.²

So, if one, brought in upon a contempt, deny all upon oath, it is said that he shall be discharged of the contempt, but that he may be prosecuted for perjury.³

Subornation of perjury.] Secondly, of subornation of perjury. If, says Fleta, a servant be compelled by his master to swear falsely, both are perjured; but he who incites the other to swear, whom he knows to be a false swearer, or who requires, or receives such an oath, is worse than a murderer. For a murderer only kills the body, but this man destroys both the body and soul of the other. Moreover, continues Fleta, he who wittingly hears another using a false oath, and is silent, is also guilty of a transgression.⁴ And the statute of Elizabeth makes this distinction between the crimes of two parties, since the suborner is mulcted 40*l.*, the person suborned 20*l.*, or only half.⁵

Every subornation is a distinct offence.⁶

First, there must be an oath. Thus, by Holt, C. J., a man cannot be guilty of subornation of perjury, unless perjury be actually committed.⁷ And the nature of the oath must be shown.⁸ Secondly, the oath must have taken place wilfully,—in a judicial proceeding,—and, in respect of the issue. Thus Holt, C. J., distinctly laid it down, that if a man be indicted

¹ Vaugh. 152; Gouldsb. 51; 1 Hawk. c. 69, s. 5. See as to the old writ of attain, now entirely out of use, 3 Inst. 164.

² *Curtis v. Smith*, 1 Chit. Rep. 116. *R. v. Royson*, Cro. Car. 146; 1 Hawk. c. 69, s. 4.

³ *R. v. Sims*, 12 Mod. 511.

⁴ Flet. lib. 5, cap. 21; cited, 3 Inst. 167.

⁵ 3 Inst. 167; Sav. 46, in pl. 98.

See also 5 Rep. 99; *plus peccat author quam actor*.

⁶ *R. v. Lambert*, 12 Mod. 154.

⁷ *Shore v. Meddison*, Holt's Cases, 536; 1 Hawk. c. 69, s. 10; 6 Mod. 202, by Powell, J. See likewise, *R. v. Turvy and others*, Holt's Ca. 364.

⁸ *R. v. Hinton and Brown*, 3 Mod. 122.

for perjury, and it do not appear what he swears, whether or not it were in a cause depending and material to the issue, the indictment must fail. The court is to judge of the materiality, and they cannot do this if the matter sworn to be not set forth. By the same reason, subornation must be of such a thing as would be perjury if sworn, and so must be shown certainly.¹

Action for imputing subornation.] But although in an *action* for imputing subornation, it is necessary that the oath proposed to have been suborned should have been such as that the breach of it must have amounted to perjury, it is not required that the oath should have been taken.² Yet, in cases of this sort, the court will lean against the suborner. It is a matter *in malam partem*, a scandal, and a great imputation.

Some difference of opinion, however, has prevailed amongst learned judges, in cases where words imputing subornation not actionable in themselves, have been used towards official persons. Thus, in an action on the case, for these words, "Your master's witnesses, (that is to say, a justice of the peace,) in such a cause were perjured, and your master is the maintainer and upholder of them," it was moved to arrest the judgment, on the ground that the words were not actionable. Rainsford and Turner, BB., were of that opinion, because the words did not relate to the office of justice, but were spoken as of a private person; and also, because it was not said that he upheld their perjury, but only countenanced their persons. But by Hale, C.B., these words, if true, are a scandal to his office, and upholding, here, can have no other meaning than abetting them in their perjury. But the defendant had judgment, there being two to one for him.³ Again, the words were, "There goes your rare chancellor, (innuendo the plaintiff) to suborn witnesses to swear against the parson." The court were divided: Gould and Powys, JJ., held, that the action lay; Holt, C.J., and Powell, J., on the contrary, that it did not lie.⁴

However, the endeavour to excite to that crime is punishable. Holt, C.J., was heard to say, that he had known one set in the pillory for an *attempt* to suborn, that being a great offence.⁵ Again, upon a consultation as to the amount of a fine, where there was an endeavour to procure the forgery of a certain writing, Jones, J., said, that this was not subornation of perjury, for there had been no perjury committed, and that this was not so great a crime as subornation of perjury. But he, in common with the rest

¹ *The Queen v. Darby*, 7 Mod. 101.

² Anon. Cro. Car. 337. *Harris v. Dixon*, Cro. Jac. 158. It must be confessed, however, that this case is reported in Yelverton with a decidedly opposite issue. Yelv. 72. *Prowse v. Cary*, Cro. El. 93.

³ *Pugh v. Owen*, Hardr. 501.

⁴ *Walmsley v. Russel*, 6 Mod. 200; 2 Salk. 696. See *Croford v. Blisse*, 2 Bulst. 150.

⁵ Comb. 450; Holt's Cases, 536. The case, probably, was *R. v. Tayler and Card*, 2 Keb. 399.

of the court, agreed to fine the defendant for his attempt to commit fraud.¹ So, again, the inciting of a witness to give evidence as to a particular fact, when the inciter is ignorant whether it be true or false, is a high misdemeanor.² But it seems that the false oath should be actually taken; and it is worthy of remark, that this is not subornation, because the inciter is assumed not to have known the falsehood of the evidence he may have been recommending.³

Perjury at common law.] Perjury at common law must be wilful and corrupt; the oath must have been taken before a competent authority, and before courts capable of administering such oaths. We shall also speak of perjury by affidavit, of the persons, individually considered, before whom parties may be sworn, and of extrajudicial or idle oaths, which do not, even when broken, warrant the penalties of perjury. It will then be shown that the oath must take place in some judicial proceedings, but that at common law, it need not be concerning a matter immediately material to or bearing upon the issue.

Wilful.] One of the clearest requisites to support a prosecution for perjury is, that the act must be *wilful*. A man was asked his name at a conventicle, and, upon his answering that he was A., the defendant swore that A. had been at the conventicle, whereas, in fact, the answer was false, but the defendant was ignorant of the deceit. Here the court set aside a verdict for the crown on an *information*, because there was a "plain mistake."⁴ So where one swore that he had seen and read a certain deed, but this turned out to be only the *counterpart*.⁵ It was said of a man that he swore through thick and thin, yet this did not impute perjury, and a criminal information was refused.⁶

A competent authority.] Moreover, the oath must be administered by a competent authority.⁷ Therefore, a merely idle oath taken before persons not qualified, or an oath made before individuals in their private capacity, will not warrant proceedings for perjury. Thus it was, that the judges resolved in the star chamber, that a man was not guilty of perjury who swore concerning the title to certain land in the Court of Requests, because there was a want of jurisdiction in that place over real actions.⁸ So it was also where the plaintiff presented the defendant at a visitation, which was no part of his duty, and the defendant having slandered him, the plaintiff brought an action. The judges held, that

¹ *R. v. Johnson*, 2 Show. 1, 4.

² *Ex parte Overton*, 2 Rose, B. L. 257.

³ *R. v. Edwards*, 2 Russ. C. & M. 518, *cor.* Adams, B.

⁴ *R. v. Smith*, 2 Show. 165; Sir Tho. Jones, 163.

⁵ *R. v. Muscot*, 10 Mod. 195, per Parker, C. J.

⁶ *R. v. Marshall*, 2 Jur. 254.

⁷ 3 Inst. 164, 166; 2 Show. 33; 4 Com. 137.

⁸ *R. v. Paine*, Yelv. 111; 1 Hawk. c. 69, s. 4.

the action did not lie, because the plaintiff could not have committed perjury.¹

What courts.] This case naturally leads us to consider before what courts the offence under discussion may be committed, and we will then shortly mention the description of persons competent to administer oaths. First, a false oath in any court of record is punishable at common law, and by the statute of 2 Geo. 2, c. 25.² And, at *common law*, such a crime, if done in a court *not* of record, is perjury, and punishable at common law, or by virtue of 2 Geo. 2. A spiritual court, for example, is a court not of record, and yet perjury may happen there. In an action for imputing perjury it was objected, that the consistory court at Exeter was not within 5 Eliz. by reason of its being a spiritual court; but the court observed, that the statute did not alter the liability to punishment, and, consequently, that the common-law penalty attached.³ So, again, upon a similar objection, the court said, that the action well lay, because the ecclesiastical court is a judicial court, and well known;⁴ and it is desirable to add here, that the right to sue under these circumstances is only consistent with a legal indictment and acquittal, supposing that the perjury were made the subject of a charge. In an action for imputing subornation, it was said, that the Bishop of Winchester was not a person before whom perjury might be committed, and that no *court* had been mentioned. But the judges said, that it was a great imputation, and judgment passed for the plaintiff.⁵ The same point as to perjury in a Court Christian was ruled in the reign of Charles the Second.⁶

However, it must be confessed, that some cases decided about the same time as the former, are contrary to those already cited. Thus, the words, "Thou art perjured, for thou art forsworn in the Bishop of Gloucester's court," was held not to be actionable.⁷ And so again, were these, "Thou art forsworn in Collet court," for it was said, that Collet court could not be presumed to be of record.⁸

So, again, in the hundred court.⁹

¹ *Stile v. Heape*, Yelv. 72.

² As the Leet, *Wild v. Cope-man*, Mo. 404. S. C. nom. *Wilde v. Cookeman*, Noy. 34, *Spencer v. Shory*, Cro. El. 709; Godb. 179. *Corbet v. Hill*, the star chamber, Cro. El. 609.

³ *Plaice v. Howe*, Cro. El. 185, of course before the stat. 2 Geo. 2. *Lee v. Secombe*, Id. 297.

⁴ *Shaw v. Tompson*, Cro. El. 609. See also *R. v. Dr. Porye*, 1 Keb. 545.

⁵ *Harris v. Dixon*, Cro. Jac. 158. Nevertheless, this case is reported by Yelverton, with a con-

clusion entirely different, *ante*, 972; but in 6 Mod. 201, &c., where it was cited by the judges, the report in Croke James was preferred.

⁶ 1 Sid. 454. See also *Pole v. Carrel*, 2 Ro. Rep. 410; 5 Mod. 348; 1 Lord Raym. 451; 1 Hawk. c. 69, s. 3.

⁷ *Page v. Keble*, Cro. Jac. 436.

⁸ *Skinner v. Trobe*, Id. 190. See however, *Walmsley v. Russel*, 6 Mod. 200, and the observations of Powys, J., upon these cases at p. 201.

⁹ *Gore v. Moorton*, Cro. El. 905.

Doctors' Commons.] With respect to perjuries in Doctors' Commons, the point does not seem to be fully settled, whether proceedings can be taken upon such occasions or not. A negro servant was charged with swearing that a young lady had attained the age of twenty-one, whereas, in fact, she was but sixteen at the time in question. He was married to her by virtue of the false oath, which procured him a licence, and the case was reserved for the opinion of the judges, but the prisoner died in Newgate, and no opinion was publicly delivered.¹

However, in a more recent case the judges held, that perjury could not be charged upon a false oath taken before a surrogate to obtain a marriage licence; and as the indictment in this case neither alleged that the defendant took the oath for the purpose of procuring a licence, nor that he did procure one, the judges thought, that no punishment could be inflicted as for a simple misdemeanor.²

With reference to the misdemeanor, the judges now hold, that such a false oath is a misdemeanor, as being made in a public matter, especially after 4 Geo. 4, c. 76. They have declined to say whether it is or is not perjury. It is immaterial whether the marriage ensues or not. And the surrogate has a general power to administer such an oath.³ Whether such an act as this in official matters be accomplished or not, is immaterial, neither needs the intent of the party to be proved, for every step towards the commission of a misdemeanor by an act done, is a misdemeanor.⁴ And if, in such a count, the description of the deponent, and other things material, are alleged to be falsely sworn (but without alleging that fact in an affidavit), proof of the false swearing, as to any one of the things, will sustain the count.⁵

And a clergyman may be indicted for perjury by taking a false oath at his admission to a living, if he have been convicted of simony. The court refused an information upon one occasion, where affidavits were produced showing that the presentation had been simoniacal, because there had been no conviction for the simony.⁶

Statutory oaths.] Where the defendant made a false declaration as to a fire in his house, in order to obtain 15*l.* from a benefit society, it was held, that the rules of a benefit society, which had been put into the indictment, might be regarded as surplusage. For the offence would have been within the statute had no benefit

¹ *R. v. Alexander*, 1 Leach, 63. *R. v. Woodman*, Id. 64, n. But the judges in this last case did not communicate their opinion publicly. See *R. v. Beck*, 2 Stra. 1160. And as to the spiritual court, see *Buxton v. Gouch*, 3 Salk. 269. 1 Sid. 454.

² *R. v. Foster*, Russ. & Ry. 459.

³ *R. v. Chapman*, Den. 432; 18 L. J. M. C. 152; 2 Car. & K. 846.

⁴ S. C.

⁵ 2 Car. & K. 846, *ut supra*.

⁶ *R. v. Lewis*, 1 Str. 70.

society existed.¹ Likewise, it was held in this case that evidence might be given of the defendant having sent in a certificate with forged signatures, for this would go to prove the falsehood of the declaration.² The statute reaches declarations generally, and is not limited to the proof of written instruments, &c.³

House of Commons.] The House of Commons has no power to administer an oath upon the general authority of their constitution; but Acts of parliament have been passed from time to time giving power to that house to cause witnesses to be sworn, as in cases of election petitions.

Chancery.] Perjury may be committed by giving an answer into chancery.⁴ So may this offence also be complete by swearing falsely upon interrogatories, yet the indictment should here likewise be preferred at common law, and not upon the statute.⁵

Superior courts.] So again, in any of the superior courts, or at *nisi prius*. In the caption of an indictment for perjury both the judges of assize were mentioned, but the false oath was alleged to have been taken before one judge only. Eyre, B., expressed some doubt upon this, but the judges were unanimously in favour of the conviction.⁶

So, where at an admiralty session the commission was directed to A., B. and C. and others not named, of whom A., B. and C. were amongst others to be *one*, the court held that this was a clerical error.⁷ It may be added here, that it is the practice of the Central Criminal Court not to try an indictment for perjury arising out of a civil suit until that suit be determined, unless the court where the suit is pending should think fit to postpone the decision of the case for the purpose of ascertaining the truth of the criminal charge.⁸

And hence justices who declined to entertain proceedings for perjury whilst the cause connected with the alleged false oath was pending in the ecclesiastical court, were held to have acted rightly, and the rule for a *mandamus* was discharged. In this case, the informant and the person charged were parties to the suit.⁹ The complainant may, if he please, lay his complaint before the grand jury.¹⁰

Court Baron.] So, in a court baron, although it is not a court of record.¹¹ If a man be forsworn in a court baron before the steward,

¹ *R. v. Boyne*, 1 Car. & K. 65.

² *Id.* 72.

³ *Id.* 70.

⁴ Although the fact relate to a thing not charged in the bill, 5 Mod. 348; 3 Inst. 166. S. P. per Hutton, J., Winch. Rep. 3.

⁵ *R. v. Sir Robert Miller*, Yelv. 120.

⁶ *R. v. Alford*, 1 Leach, 150; S. C. 14 East, 218, n.

⁷ *R. v. Dowlin*, 5 T. R. 311.

⁸ *R. v. Ashburn*, 8 C. & P. 50.

⁹ *R. v. Ingham and another*, 19 L. J. M. C. 69; 14 Q. B. 396.

¹⁰ S. C.

¹¹ 1 Sid. 454; 1 Mod. 55; 1 Freem. Rep. 506.

this is perjury;¹ and in the principal case, the same doctrine was maintained, although judgment was arrested because the authority of the commissioners of the high commission court was not declared, nor how the party was forsworn.² But, as to the court baron, the perjury, except in the cases of subornation of witnesses, and false oaths by them, must be assigned at common law. For where a bill of perjury *tam quam* was sued, because the defendant, one of the homage, had presented with other homagers, that the plaintiff had cut down certain trees, which he had not so cut, the judges held, that the proceeding was bad, being upon the stat. of Eliz. which had reference to the testimony of witnesses only.³

County court.] The following evidence was admitted as proof of the jurisdiction of the county court. 1st, by parol testimony of the appearance of the defendant; 2nd, the fact of such appearance as dispensing with any proof of summons; 3rd, the minute book as proof of the proceedings, and evidence, the judge having summary jurisdiction; 4th, the allegation of the constitution of the court by an order in council proved by the judge himself, showing that he had acted in that capacity.⁴ In another case the judge's notes were considered unnecessary, if the witnesses present could prove the matters in question.⁵

The proceedings in a county court were made the subject of an indictment for perjury, but the description of this court was held wrong in every one of three counts. It was said to have been holden before H. M. B. High Sheriff, and the oath to have been sworn before him; 2ndly, before G. B., gent., the county clerk, and the oath, &c.; 3rdly, before G. B., gent., and the suitors who were named, and the oath, &c.; and although it was said that the county clerk was a freeholder, it was held to make no difference.⁶ But it is not necessary to say that the court in which the perjury is alleged, was constituted under 9 & 10 Vict. c. 95; and an allegation that the action was pending in the court, and came on to be tried, and that the judge had sufficient and competent authority to administer the oath, was deemed correct.⁷ With regard to the evidence under 9 & 10 Vict. c. 95, s. 111, the clerk's book, or a certified copy of entries from it, is the best evidence, and not the evidence of the assistant clerk, without more.⁸

Court of sewers.] So, in a court of sewers, being of record. And a false oath, taken before commissioners whose commission is determined by the demise of the crown, is punishable if the commissioners have not previously any notice of the demise,

¹ Winch. 3. Hobart, C. J.

² *King v. Bowen*, Id. 2.

³ *R. v. Matthews*, 3 Leon. 201.

⁴ *R. v. Ward*, 3 Cox, 279.

⁵ *R. v. Morgan*, 6 Cox, 107.

⁶ *R. v. Fellowes*, 1 Car. & K. 115.

⁷ *Lavey v. Reg.* 21 L. J. M. C.

10; Den. & P. 504; 17 Q. B. 496.

⁸ *R. v. Rowland*, 1 Fost. & F.

72. But see 14 & 15 Vict. c. 100, s. 21.

for it is said, that it would be of very ill consequence to make their proceedings wholly void.¹

Sheriff's court.] In an action on the case for words charging the plaintiff with a false oath in the Sheriff's Court, it was objected, that this was not a court of record, but as judgment was ultimately given for the plaintiff, it was clear that the objection did not prevail.²

Council of the marches.] A similar judgment had been previously given for a slander imputing perjury before the council of the Marches in Wales, and the case was relied on by the plaintiff's counsel in *Brumrig v. Hanger*.³

The courts above mentioned are either courts of record, or courts judicially holden by some title, and not by usurpation. In the latter case, perjury could not be committed; and so it was once resolved by all the judges, that this offence could not take place in the lord's court of copyholds, or in any court holden by usurpation, but that it was otherwise in a court baron, or court leet, which were holden by title.⁴

Inquest of office.] Perjury, moreover, may be committed before an inquest of office. And thus it was held, that a false oath taken before commissioners upon such an occasion, was a great offence, and punishable at common law, though not by the statute of Elizabeth.⁵

Commissioners of bankruptcy.] It was said, upon one occasion, that the clause in 5 Geo. 2, c. 30, s. 16, authorizing the commissioners to examine the bankrupt, gave them power to administer an oath, and, consequently, that an indictment for perjury might be well founded upon a breach of that oath.⁶ But the stat. 24 & 25 Vict. c. 134, s. 189, gives an express power to examine upon oath. At another time it was made a question whether perjury could be assigned upon an affidavit in support of a petition in bankruptcy before the filing of the petition.⁷

A. being adjudged a bankrupt, B. was examined touching his estate, and gave, as it was said, a false account; B. was then in-

¹ Cro. Car. 99; see 16 Vin. Ab. 309, A. 15; 313, C. 6. It was once incidentally asked by the court, whether any one giving his testimony under a commission from a court of equity to examine witnesses in Scotland could be convicted of perjury. *Calliand v. Vaughan*, 1 B. & P. 210.

² *Brumrig v. Hanger and ux.* Hardr. 151.

³ *Adams v. Flemming*, Hob. 283; S. C. Hutt. 324.

⁴ Godb. 179, Mich. 7 Jac. 1, in

C. B. See also as to the Court of Requests, and the old court at Whitehall. 4 Inst. 97, 98; 3 Salk. 269. And the court will exercise a right of committing upon the spot a party apparently guilty of perjury. See *R. v. Parnell*, 2 Burr. 806.

⁵ *R. v. Agar*, Mo. 627; Noy. 100. See 4 Inst. 278.

⁶ *R. v. Raphael*, Mann. N. P. Digest, 232.

⁷ *R. v. Dudman*, 2 Glyn & J. 389.

dicted for perjury, but it turned out that the petitioning creditor's debt was not of sufficient amount, and the judges held his conviction invalid, although other debts by A. were due, sufficient to have sustained the fiat.¹ Yet he might have been rightly convicted, had he sworn falsely upon the preliminary examination before the adjudication, notwithstanding the insufficiency of the debt;² or had the lord chancellor, by order, substituted a good petitioning creditor.³ A question arose, what was the nature and extent of L.'s connection with M. The words used were, "Mr. M. is not in trade, he is a speculator in anything and everything. I have known Mr. M. about two or three years. He was always a speculator, and never in business." This Mr. M. was a Mr. S. M. L., the father of L., the defendant. L., the defendant, had known him twenty years and upwards. This was considered insufficient, and judgment was arrested.⁴

Two persons were indicted for perjury committed upon an indictment for barratry, and being convicted, judgment was passed upon them. They had, however, brought error, and pointed out objections to the former proceedings as being *coram non judice*, but the court said, that that circumstance made the proceedings only erroneous, and that while the record stood unreversed, perjury might still be assigned.⁵ Even if reversed, Mr. Serjeant Hawkins makes a *quære*, whether perjury might not be, nevertheless, assignable.⁶ And it seems clear that, at all events, the party convicted of perjury cannot himself take advantage of any default in the record of the proceedings at which he took the false oath.⁷

Before arbitrators.] A cause was referred by a judge's order, and it was directed, that the witness should be sworn before a judge, or before a commissioner duly authorized. A witness was sworn before a commissioner for taking affidavits, and he was examined *vivâ voce* before the arbitrator. Gaselee, J., held, that the witness was not indictable for perjury.⁸

There was an indictment for perjury under 9 & 10 Vict. c. 95, s. 77. The court held that the proceedings were not sustainable, and the conviction was quashed; for the power here given was not according to the course of the common law; neither by that law nor by statute is the arbitrator warranted in administering an oath.⁹ There is a distinction which must be attended to in perjury, between matters in issue and matters in difference, where the question of materiality comes to be considered.¹⁰

¹ *R. v. Ewington*, Car. & M. 319; 2 Moo. C. C. 223.

² S. C.

³ 2 Moo. C. C. 227.

⁴ *R. v. Legge*, 6 Cox, C. C. 220.

⁵ *R. v. Serjeant and Annis*, 1 Ventr. 181.

⁶ 1 Hawk. c. 69, s. 4.

⁷ *R. v. Wright*, 1 Sid. 148.

⁸ *R. v. Hanks*, 3 C. & P. 419.

⁹ *R. v. Hallett*, 20 L. J. M. C.

197; Den. & P. 237.

¹⁰ *R. v. Ball*, 6 Cox, 360.

Perjury by affidavit.] The subject of perjury by affidavit is very nearly allied to that which has been the last discussed. There was never any doubt but that an indictment might be preferred at common law for an offence of this nature.¹ The affidavit should name all the plaintiffs and the defendants. And also, that a party may be punished for using a false affidavit made abroad, though not for perjury, yet, as for a misdemeanor.² And at common law, it is not necessary in order to maintain the charge, that the affidavit should have been filed of record, or exhibited to the court.³ Thus, where an indictment at common law neglected to mention these particulars, the judges were of opinion, that the guilt or innocence of the defendant could not be said to depend on the circumstances of the use of the affidavit, that it did not signify whether it had or not been used at the trial, and that the use could not be supplied by intendment.⁴ So, where it seemed to be agreed, that from certain omissions in the jurat, an affidavit upon which perjury had been assigned, could not have been received in the Court of Chancery, Littledale, J., said, that the offence was complete at the time of the swearing, notwithstanding the impossibility of making use of the instrument. It appearing, however, that the affidavit was not read over to the defendant, she was acquitted.⁵ So, again, where the defendant had filed a bill for an injunction, and at the same time had made an affidavit of matters which were material to the question, it was urged, that he could not be convicted of perjury, because no motion had ever been made for the injunction, but Lord Tenterden refused to stop the case, observing, that the objection was upon the record, that the crime was, morally, the same, whether the motion were made or not, but the defendant was acquitted.⁶ It seems, that in indictments upon the statute, the production and use of affidavits are essential to sustain the charge, because, as Lord Kenyon observed, an action is there given to the party injured by the false oath.⁷ And several precedents were cited in *R. v. Crossley*, from Tremaine's Pleas of the Crown, to this effect.⁸ So, in a case before Holt, C. J., also upon the statute, the learned chief justice took notice of the necessity of reading and using the affidavit against the party, for that the bare making of it was not sufficient.⁹

¹ 1 Ro. Rep. 79, per Coke, C. J., 1 Hawk. c. 69, s. 21; 8 East, 364, c. 69, s. 21.

² By Lord Ellenborough.

³ *R. v. Taylor*, Skin. 403; S. C. Holt, 534.

⁴ *R. v. Crossley*, 7 T. R. 315, one, &c., Lawrence, J., cited, *R. v. Atkinson*, Easter, 24 Geo. 3, K. B., observing, that the objection was not taken there, p. 320. This case was decided after great research by the judges into the precedents.

⁵ *R. v. Hailey*, Ry. & M., N. P. C. 94; 1 C. & P. 258.

⁶ *R. v. White*, Moo. & M. 271. *R. v. Crossley*, was not referred to either in this or the preceding case.

⁷ 7 T. R. 319.

⁸ *R. v. Crossley*, Trem. P. C. 136. *R. v. Jole*, Id. 138. *R. v. Brooks*, Id. 151, 152. See also *R. v. Stone*, Id. 148. *R. v. Hawkins*, Id. 167.

⁹ *R. v. Taylor*, Holt's Ca. 534. In the case of *R. v. Crossley*, it became necessary to prove the defendant to have been an attorney, and,

The affidavit should name all the plaintiffs and the defendants; yet if it say, "A. B. against C. D. and others," it seems that perjury may be well assigned upon it.¹ Proof that the person had acted as a commissioner for taking affidavits is *prima facie* evidence that he is such commissioner, although he may never have seen his commission.² An affidavit of service of notice should have the notice appended to it.³

However, an indictment does not lie for perjury in an affidavit in chancery upon the statute of Eliz., although it does not lie in respect of depositions in chancery.⁴ Nor will it lie in respect of a foreign affidavit,⁵ although it is a very serious misdemeanor to make or use a false affidavit of this kind.⁶

Bastardy.] The prisoner was convicted on an indictment for perjury upon the hearing of an affiliation summons. The woman went to Dolgelly in order to affiliate her child, and left her parents in order to take that step, without any intention of returning, and she went into service. If her place of residence was with her parents, and not Dolgelly, the petty sessional division of Dolgelly had no jurisdiction, and therefore perjury could not have been committed. But the court held the place of residence to have been Dolgelly. Her act in going there was for convenience; it was not fraudulent, nor for the purpose of harassing the defendant.⁷ A summons was taken out in bastardy, but not upon oath, and the summons did not obey the Act. The defendant swore that he had not paid anything for maintenance. The evidence was material, and being contradicted, in an indictment for perjury, it was held, that the defendant had waived any irregularities as to the oath and summons by his appearance.⁸ And it made no difference in another case, that the jury found that the defendant had not within twelve months next after the birth of the child paid for maintenance. He had sworn that he had never paid a farthing. In this case also the oath had been taken before the justice, and the summons followed the Act of parliament.⁹

Convictions have frequently been quashed by reason of the incompetency of the parties who administered the respective oaths, independently of any court.

Legal officers.] A person was indicted for perjury before a surro-

for this purpose, the book from the master's office, wherein the names of the attornies of the court are entered, was held [sufficient without producing the roll. 2 Esp. 526.

¹ *R. v. Christian*, Car. & M. 188. 388.

² *R. v. Newton*, 1 Car. & K. 469. See *R. v. Chapman*, 2 Car. & K. 846.

³ *R. v. Hudson*, 1 Fost. & F. 56.

⁴ *R. v. Burton*, 3 Keb. 345.

⁵ *Musgrave v. Medez*, 19 Ves. jun., 652.

⁶ *O'Mealy v. Newell*, 8 East, 364.

⁷ *R. v. Hughes*, Dears. & B.

188.

⁸ *R. v. Berry*, Bell, 46; 28 L. J. M. C. 86.

⁹ *R. v. Simmons*, Bell, 168; 28 L. J. M. C. 183.

gate in the ecclesiastical court of the consistory of London, and a difficulty as to evidence of the appointment having been disposed of by Lord Ellenborough, it was proposed for the defendant to show that the appointment had not been *duly* made. The surrogate should have been appointed in the presence of the registrar, or his deputy, or a notary public, but the counsel for the crown urged, that it was too late to press the objection after proof that the office had been executed for twenty years by the surrogate. Lord Ellenborough, however, refused to shut out this evidence, and being of opinion, thereupon, that the appointment had taken place contrary to the canon, he directed an acquittal.¹ So, again, a master in chancery, merely as such, has no power to administer an oath, for he is but a clerk of the court to make writs. But when the allegation is made, that the oath in question was taken in the Court of Chancery, by which it appears to have occurred in a judicial proceeding, the case is altered, and the authority sufficiently appears.² So, in an answer to interrogatories, if one be forsworn in a matter not materially charged in the interrogatories, it is not an offence punishable even at common law, because the officer has no power to administer an oath concerning any things except such as are charged in the interrogatories.³ Nor has a master extraordinary in chancery power to administer an oath in the Court of Admiralty. Unless, indeed, in a cause removed thence into chancery. But in such a case, it would be a misdemeanor to swear falsely.⁴

Justices.] Justices of the peace have no *acknowledged* right at common law to administer an oath,⁵ but various Acts of parliament have expressly authorized them to do so, and they have exercised the power in question from very early times.⁶ However, no voluntary oath sworn before them extrajudicially could have subjected the party breaking it to an indictment for perjury. It was, indeed, said once by Jeffreys, C. J., that such a charge might be preferred;⁷ but this dictum is at variance with the received law of modern times. In an indictment of perjury, however, for swearing before a justice that J. S. was present at a conventicle, the chief justice before mentioned, and all the court, refused to quash it for a want of power in the magistrate to administer the oath, leaving the party to plead that matter if he chose. And the lord chief justice said that the conventicles were unlawful by the common law, and that justices might punish unlawful assemblies.⁸

So also, it is said, that if one take a false oath before a magis-

¹ *R. v. Verelst*, 3 Campb. 432.

² See 16 Vin. Ab. 308, A. 6.

³ 1 Sid. 274, per cur.

⁴ *R. v. Stone*, 23 L. J. M. C. 14; Dears. 251.

⁵ 2 Hawk. c. 8, s. 64.

⁶ See Burn's Justice, tit. "Oaths," upon this subject.

⁷ 1 Ventr. 370.

⁸ Anon. 1 Ventr. 369. The justice was, probably, as much authorized to give the oath in this as in many other cases where the power of doing so would never have been questioned. See *Kimersly v. Cooper*, Cro. El. 168.

trate, in order to induce him to compel another to find sureties for the peace, he will be guilty of perjury.¹

But upon a charge of perjury for swearing falsely in a case punishable upon summary conviction, the conviction is not receivable in evidence.² Perjury assigned, upon the copy of a deposition in English, signed by the deponent, may be proved by showing a verbal deposition in the Welsh language, for the written deposition is the substance.³ In bastardy, where the magistrates had dismissed the case upon the merits, it was held that the prisoner might be guilty of perjury upon a second hearing of the same case, without reference to any defence on the ground of a prior decision, for the justices had jurisdiction over the subject matter.⁴ Where the deponent swore he was not in a beerhouse, and perjury was assigned, it was held that it was not necessary to prove the landlord to have been the licensed keeper of the house, for the justices had general jurisdiction, and could control the sale of beer on Sundays.⁵

Hence, if the oath alleged to be false take place before an incompetent authority, the obligation is not binding in law, and perjury is not committed. Therefore, an extrajudicial oath, though false, cannot be thus dealt with.⁶ And Mr. Serjeant Hawkins lays it down, that no oath whatsoever in a mere private matter, however wilful and malicious, is punishable as a perjury in a criminal prosecution, for private injuries are to be redressed by private actions. And Lord Kenyon was heard to say, that "he did not know but that a magistrate subjects himself to a criminal information for taking a voluntary extrajudicial affidavit."⁷

So, it is in a court of record, if the court has lost its jurisdiction by reason of the non-compliance of parties with the enactments of the legislature. As where there had been co-plaintiffs in a suit, and one of them died, but without entering any suggestion on the record under 8 & 9 Will. 3, c. 11, s. 6. The defendant was indicted for perjury upon the trial, but his counsel urged, that the trial had been extrajudicial, because the statute had not been complied with. There was no suggestion upon the record. Lord Ellenborough observed, that the oath had been taken in an unauthorized cause, and held, that the suit had abated at the time of the trial. The defendant was of course acquitted.⁸ But where a writ of inquiry was returnable into the Common Pleas instead of the King's Bench,

¹ 16 Vin. Ab. 309, A. 15. See Id. 314, D. 1.

² *R. v. Goodfellow*, Car. & M. 569.

³ *R. v. Thomas*, 2 Car. & K. 806.

⁴ *R. v. Cooke*, Den. & P. 462.

⁵ *R. v. Kirton*, 6 Cox, C. C. 393.

⁶ 16 Vin. Ab. 307, A. 3.

⁷ *In Bramah v. The — Fire Insurance Company*, 3 Burn's Justice, ed. Chetwynd, p. 532; 4 Com. 137. And see now 5 & 6 Will. 4, c. 62, s. 13, forbidding the use of oaths before magistrates, unless warranted by statute.

⁸ *R. v. Cohen*, 1 Stark. 511.

and perjury was assigned upon evidence during such an inquisition, the court held that an indictment would lie.¹

*In judicial proceedings.*²] There is another requisite, namely, that the offence should have been committed in some *judicial proceeding*. Therefore, a breach of the oath of fealty and allegiance, or of oaths taken by officers and ministers of justice, is not punishable as perjury.³ If an officer, however, commit extortion, the breach of his oath, it is said, may serve for aggravation.⁴ But if there be a violation of the oath in any specific instance, the law will attach upon the transgressor. As, if a mayor make a false return.⁵ Or a sheriff, by information, he never having been sworn.⁶ But not a wager of law falsely made.⁷ And if it be suggested, that an affidavit is necessary upon any particular occasion, that fact must be shown to the satisfaction of the court. Where such a practice was alleged as being necessary in the Insolvent Debtor's Court, the production of a printed paper by a witness, purporting to be a copy of the rules of that court, and requiring an affidavit, was held insufficient evidence of the practice.⁸ So, upon affidavit of an interpleader rule. The indictment failed to state that the rule was obtained according to the 1 Will. 4, c. 4, and, therefore, there was no judicial proceeding.⁹

A solicitor complained to the lord chancellor, *ore tenus*, that he had been arrested on his return home after the hearing of a cause. He was examined before that judge concerning the injury which he had sustained, and perjury was assigned upon his answer. It was objected, that the oath alleged as false had not been made in a judicial proceeding, but the court were quite clear upon the point, and discharged the rule for arresting the judgment.¹⁰

At common law, need not be material to the issue.] With respect to the materiality of the point sworn to, as it regards the issue¹¹ at common law, a man may be convicted, although he be only perjured in circumstance;¹² but upon the statute of Elizabeth the oath must be immediately relevant, with this qualification, that even at common law, the swearing to any impertinent or minute

¹ *Pippet v. Hearn*, 5 B. & Ald. 634; S. C. 1 D. & Ry. 266.

² See *R. v. Millard*, Dears. 166; 22 L. J. M. C. 108, on 7 & 8 Geo. 4, c. 30, ss. 24, 30.

³ 3 Inst. 166.

⁴ *Id.* 11 Rep. 98; Palm. 144.

⁵ Noy. 92; Latch. 232.

⁶ *R. v. Bronker*, Dy. 168. See 3 Keb. 359.

⁷ Gouldsb. 51.

⁸ *R. v. Koops*, 1 Nev. & P. 828. S. C. 6 Ad. & El. 198.

⁹ *R. v. Bishop*, Car. & M. 302.

¹⁰ *R. v. Aylett*, 1 Term. Rep. 63.

¹¹ The sale of a pig, for instance, on the day after "sworn to" alleged may be a material question, although not material to the question to be tried, *i. e.*, whether the pig had or not been sold *bonâ fide* to the prisoner before the date of the execution. *R. v. Altass*, 1 Cox, 17.

¹² See 1 Ld. R. 258, per Holt, C. J.; 2 Show. 20, admitted *arguendo* by the attorney-general, Sir Wm. Jones.

circumstance is not deemed worthy of notice. And this explains the meaning of a passage in Freeman, where it is said, that perjury cannot be in respect of a thing which is altogether foreign, for that if a witness were to swear what clothes he had, or when he saw such a fact done, it would not be perjury at common law.¹

In illustration of the first point, it is laid down, that any false oath is perjury which tends to mislead the court, though it do not in any way affect the principal judgment to be given. As where a person offers himself as bail for another, falsely swearing that his substance is greater than it is.² So, where the witness swore that he had seen thirty or forty of T. S.'s sheep in Mr. Sotherton's close, that he knew them to be such, because they were marked with an (a 5) on the shoulder, and all his sheep were so marked, whereas the sheep were not marked with (a 5). Lea, C. J., and Houghton, J., were of opinion, that the perjury had been well assigned.³ Nevertheless, it does not appear that any judgment was given, and some years afterwards, two persons were charged with having sworn falsely to the same facts as above, when there arose a difference of opinion upon the bench. Hyde, C. J., and Whitlock, J., held, that the perjury had been sufficiently made out, but Doderidge, J., thought, on the contrary, that the swearing was only to the particularity. But Hyde observed, that the indictment was bad, because it had been drawn jointly against two, since the perjury of one was not that of the other; and the attorney-general had a day given him to maintain the indictment.⁴

So perjury may be committed by giving a false answer in chancery, although in a matter not material, or charged in the bill.⁵ As where one exhibited a bill to discover the knowledge of the defendant as to a devise, and whether he did not solicit to prove the will in chancery. He answered that he did not solicit. But upon the trial for perjury, it was proved that he did solicit, *although he did not pay* the fees, and it was moved to stay the judgment, for want of material reference to the point at issue. But the court was clear that this was perjury, for at common law it might be in a thing not material.⁶ So, if the credit of a witness be in question, and one come forward and swear falsely for the purpose of supporting the testimony, this has been said to be perjury.⁷ So, a man may be indicted at common law for a false affidavit taken before a master in chancery, but not upon the statute.⁸ So, in

¹ 1 Freem. 506. *R. v. —*, one of the Lord Mountague's witnesses; 1 *Ld. Raym.* 258; *S. P. Gouldsb.* 191, per Popham. But Holt, C. J., denied the authority of this last case, in *R. v. Greep*, *Carth.* 422; 12 *Mod.* 141; and held that such a swearing would be perjury. See, however, the observations of Mr. Serjeant Hawkins, *post*.

² See 16 *Vin. Ab.* 309, A. 14.

³ 2 *Ro. Rep.* 368.

⁴ *R. v. Jary and King*, *Palm.* 535, and see 16 *Vin. Ab.* 316, E. 3. 1 *Hawk. P. C. c.* 69, s. 8. The case does not seem to have been ultimately decided.

⁵ 1 *Sid.* 274.

⁶ *R. v. Drue*, 1 *Sid.* 274.

⁷ By Holt, C. J., *Carth.* 422.

⁸ *Buxton v. Gouch*, 3 *Salk.* 269.

illustration of this point, it must be further added, that in the nature of the thing an evidence may be very material, and yet not full enough to prove the point in question.¹

It was held by Lord Kenyon, also, that if in answer to a bill filed by A. for the redemption of lands, the equity of which was assigned to him by B., the defendant should swear that he had no notice of the assignment, insisting at the same time on tacking another bond debt due from B. to his mortgage, it would be a material fact upon which perjury might be assigned.² A. having recovered against B., B. sued A. in chancery, stating that a part of the contract had not appeared in the court of law. A. denied this in his answer, and this, if false, amounted to perjury.³ A question, however little connected with the matters at issue, may become material if it affects the credit of the witness, as a question put upon cross-examination.⁴

Examples of idle, impertinent, or trifling matters are, where a party was charged with perjury, for swearing that J. S. drew his dagger, and beat and wounded another. This act was found to have been done with a staff. This was agreed not to be perjury, inasmuch as the beating only was material.⁵ So, where one was asked by the judge whether A. brought such a number of sheep from B. to C. all together, and the answer was, yes; whereas he brought part at one time and part at another. This was held not to be perjury;⁶ and so it was again in the case of the blue coat already cited.⁷ So again, where a witness was asked, whether such a sum of money had been paid for two things then in dispute, to which he answered, "yes," though, in truth, it was paid but for one by agreement.⁸ So, if a witness take an oath that, in coming to town to give evidence, he lay at one inn, whereas, in fact, he lay at another.⁹ A question was made about sealing a deed at D., and whether one J. S. was a witness to it, and defendant swore, that J. S. was 100 miles distant from D. at the time, and, consequently, that he could not witness it. Eyre, J., said, that this was not perjury, because not material to the issue; but Holt, C. J., entertained a different opinion. The judgment, however, was arrested upon another point, with leave to the informer to exhibit a new information, the court being of opinion that the defendant had been guilty of wilful and corrupt perjury. But the case being removed into the House of Lords, by writ of error, the peers, in their turn, reversed the judgment of

¹ By Holt, C. J., 2 *Ld. Raym.* 889. See also upon this subject, *Brown v. Michel*, *Cro. El.* 500.

² *R. v. Pepys*, *Peake*, *Rep.* 138.

³ *R. v. Yates*, *Car. & M.* 137.

⁴ *R. v. Overton*, 2 *Moo.* 263; *Car. & M.* 655.

⁵ *R. v. Styles*, cited, *Hetl.* 97,

by Richardson, C. J., in *Allen v. Westley*.

⁶ *R. v. Laiston*, 2 *Ro. Rep.* 41.

⁷ *Ante.*

⁸ 2 *Ro. Rep.* 42, per Houghton, J., cited.

⁹ By Holt, C. J., *Comb.* 461.

King's Bench without assigning any reason.¹ Parker, C. J., upon a subsequent occasion, made the following observations upon this case of *R. v. Griep*:—"I have heard a case mentioned in King William's time, where the question being put about the sealing of a deed, it was sworn that the party was at such a time in such a place, and, consequently, could not seal the deed; and upon this oath he was convicted of perjury. But now, though the matter of this oath was but a circumstance, considered in relation to the point in question, upon the trial in which the oath was given, yet it was *all his oath, his entire evidence*. But if perjury may be committed in matter of circumstance, it must be a material circumstance, a circumstance of that weight, that without it he could not hope to find credit with the jury."²

The same learned judge, when lord chancellor, observed also, that he did not think it would be perjury at law, if the depositions of a witness taken *de bene esse* were quite contradictory to his depositions in chief, there being *no issue joined*, as there must be before the taking of the depositions in chief.³ It has also been held, that the reversal of a judgment against B. for perjury upon a writ of error, is no ground of defence for A. upon a trial for perjury alleged to have been committed by him upon B.'s trial, as showing that A.'s evidence could not have been material, and it was also the opinion of the judge, that the allegation of B.'s conviction was not negatived by the subsequent successful appeal.⁴

Error was brought upon a judgment against the defendants for perjury. The indictment stated, that it had become a material question, whether on the occasion of a certain alleged arrest, one J. K. had been touched by J. L. The defendant was charged with having sworn that J. L. put his arms round him, and embraced him: *innuendo*, that on the occasion to which the evidence applied, J. L. had touched the person of J. K. The court reversed the judgment, being of opinion that the evidence was not in any way connected with the material subject of inquiry. And, moreover, there was no averment of materiality in that part of the indictment which set out the evidence.⁵

Perjury by statute.] The chief Acts upon this subject are 32 Hen. 8, c. 9, and 5 Eliz. c. 9. By the 3rd section of the former Act it is provided, that no person whatever do suborn any witness, by letters, rewards, promises, or any other sinister labour or means, to the procurement or occasion of any manner of perjury by false verdict or otherwise in the chancery, the star chamber, Whitehall, or elsewhere within the king's dominions, or the marches of the same, upon pain of forfeiting 10*l.*, one moiety to be the king's, the other his who may sue for the same by action of debt, bill, plaint, or information, in any of the king's

¹ *R. v. Griep*, *Ld. Raym.* 256.

² 10 *Mod.* 195.

³ 1 *P. Wms.* 569, *Trin.* 1719.

⁴ *R. v. Meek*, 9 *C. & P.* 513.

⁵ *R. v. Nicholl*, 1 *B. & Adol.*

21.

courts, in which action no essoin, protection, wager of law, nor injunction shall be allowed.

This interference on the part of the legislature was followed up by 5 El. c. 9, s. 3,¹—whosoever shall unlawfully and corruptly procure any witness or witnesses by letters, rewards, promises, &c., to commit perjury, by any writ, &c., in any wise touching or concerning any lands, tenements, or hereditaments, or any goods, &c.,² or in any of the queen's majesty's courts of record, or in any leet, view of frank-pledge or law-day, ancient demesne court, hundred court, court baron, or in the court or courts of the stannary in Devonshire and Cornwall; or shall likewise unlawfully and corruptly procure or suborn any witness or witnesses sworn to testify *in perpetuam rei memoriam*; every such offender shall forfeit 40*l*.³

The 5th section prescribes the incompetency arising from the infamy of the crime.

Next follows the punishment of such as fall into the temptation of subornation. By sect. 6, the party thus offending is to forfeit 20*l*. and to be imprisoned for six months, without bail or mainprise.⁴ The 8th section gives a moiety of these respective forfeitures to the crown, and the other half to the party grieved, and who will sue for the same in the manner pointed out by the statute of Hen. 8. The 9th section points out the judges who should have authority to hear and determine these matters.⁵ By sect. 10, proclamation of the statute was directed to be made at the assizes twice in the year, to prevent ignorance of the same. Sect. 11 declares, that ecclesiastical and spiritual courts shall not be in any wise affected by the Act, but that offenders may be punished therein as before.⁶ The 12th section related to the serving process upon witnesses, giving a penalty of 10*l*. to be recovered against witnesses neglecting the process, and also such further recompense as the party grieved might have sustained. The action to be brought by the injured party, and the further payment to be at the discretion of the judge of the court.⁷

This Act does not alter the nature of the offence of perjury, but only enlarges the punishment. It respects only such false oaths as are procured or taken in civil suits. This restriction was always conceded by the learned judges.

Again, it is observable, that the statute speaks only of *witnesses*. An action was brought upon the statute against one for commit-

¹ Sect. 1 recites the statute of Hen. 8, and sect. 2 declares that the crime of perjury has augmented, by reason of the smallness of the penalty.

² The courts mentioned above in 32 Hen. 8.

³ See, as to the increase of punishment, 2 Geo. 2, c. 25, *post*.

⁴ See sect. 6, and 2 Geo. 2, c. 25,

for a further punishment. The pillory was added.

⁵ See sect. 4.

⁶ See 3 Inst. 164.

⁷ *R. v. Flower*; 5 Rep. 99. *R. v. Monday*, there cited, as in K. B. Mich. 36 & 37 Eliz. And again, Trin. 39 Eliz.; 3 Inst. 164.

ting wilful perjury in his testimony. The defendant in his defence before the star chamber alleged, that he had been examined as a party and not as a witness. And by Weston, J., if he had been sworn upon his answer, it would not be within the statute, but if examined *on the part of the Queen* upon interrogatories it is otherwise.¹ So, where a man was indicted for perjury in his answer in the star chamber upon his examination to interrogatories there, he was discharged, because there was no examination as a witness, nor *in perpetuam rei memoriam*.² So, upon another occasion, it was said by counsel, *arguendo*, that the case was not within 5 Eliz., for such an offence ought to have been before a jury in giving evidence, or upon some articles.³ The court, however, were against him, probably because they thought that the facts did not bear out the argument of the counsel, the defendant having been convicted of taking a false oath at a court leet.⁴

Then again, as at common law, the oath must have been taken in some judicial proceeding. Therefore, where a man was examined upon certain articles in the star chamber, and being convicted of perjury, the judgment was, that he had falsely and wilfully deposed, it was holden bad for want of stating the matter in which the false oath had been taken, as well as the action, and the defendant was discharged.⁵ So also, an indictment was holden bad which charged a perjury before commissioners out of chancery, because it was not alleged that the commission was under the great seal, or that the officers had power to administer an oath under their commission.⁶

There must appear in proceedings upon the statute to have been a suit depending, for otherwise no party could be prejudiced.⁷

Lastly, (and herein the statute differs from the common law,) the matter sworn must be in some court of record, or court especially mentioned in the Act, and must be material to the issue. Thus, by Popham, C. J., if a man do not depose upon some matter depending in suit in some court of record, he cannot be touched for a perjury upon 5 Eliz. Also, if he be perjured in circumstances, and not in the point in question, it is not material nor punishable by virtue of that statute.⁸

So, where a man was indicted for perjury, he was discharged, because there was no statement how the issue was, nor how the deposition trenched to the point of the issue.⁹

¹ *R. v. Sir Robert Miller*, Noy. 128, as to the old wager of law, now abolished. 1 Hawk. c. 69, 20.

² *R. v. Rither*, Cro. El. 148.

³ Godb. 71.

⁴ Godb. 71. See *R. v. Matthews*, 3 Leon. 201, to the same effect; Dy. 288 (a), S. P. By Wray and other justices.

⁵ *R. v. Stedman*, Cro. El. 137, S. P. *R. v. Thomas*, Id.

⁶ *R. v. Mandy*, 2 Ro. Rep. 427.

⁷ See 2 Russ. C. & M. 654.

⁸ Gouldsb. 191; 11 Rep. 13.

R. v. Mandy, 2 Ro. Rep. 427. S. P. *Custodes v. Howel Gwin*, Sty. 336; 2 Show. 20. By the att.-gen. *arg.* 3 Inst. 166.

⁹ *R. v. Lane*, Cro. El. 148.

So again, in an indictment upon the statute it was agreed, that the charge should strictly pursue the requisites of the Act. For, by Richardson, C. J., and G. Croke, J., there can be no indictment upon this statute, but where it is shown, that the deposition is upon the matter in question, and conducing to the issue, and that the party has been prejudiced by the false oath. The court, however, would not quash the indictment, but directed that the defendant should plead not guilty, upon which it would appear by the evidence, whether the matter he had sworn to were pertinent to the issue or not.¹ The same point was mentioned as law by Lord Mansfield in *The King v. Aylett*.²

Witnesses for prisoners.] By 1 Ann. st. 2, c. 9, s. 3, it was enacted, that all persons who should be produced as witnesses for prisoners upon any trial for treason or felony, should be sworn in like manner as the witnesses for the crown, and if convicted of wilful perjury, that they should suffer all the penalties prescribed by the law against perjury.

Freeholders' oath.] By 18 Geo. 2, c. 18, s. 1, if any person, taking the freeholders' oath and affirmation, shall thereby commit wilful perjury, and be convicted, or if any person should suborn any freeholder to take such a false oath, and be convicted, each offender shall respectively be subject to the punishments prescribed against perjury by 5 El. c. 9, and 2 Geo. 2, c. 25.

The same law is provided by 11 Geo. 1, c. 18, s. 3, with reference to elections in London.

Courts martial.] The stat. 22 Geo. 2, c. 33, s. 17, prescribes the punishments of 5 Eliz., and 2 Geo. 2, against all persons who are found guilty of perjury, or subornation of perjury, at courts martial.

Municipal corporations.] By 5 & 6 Will. 4, c. 76, s. 21, false swearing under that Act, "for the Regulation of Municipal Corporations in England and Wales," and false affirmations, are declared to be perjuries, and punishable accordingly.³

Bankrupts and insolvents.] By 12 & 13 Vict. c. 106, s. 254, the false oath of a bankrupt under examination, was made punishable with the penalties of perjury, and by 7 Geo. 4, c. 57, s. 71, the like punishment is awarded against persons swearing falsely under the provisions of that Act. But it was not a perjury to swear to the

¹ *R. v. Sharp*, Cro. Car. 352.

² 1 Term Rep. 69.

³ As to the Gen. Inclosure Act, 41 Geo. 3, c. 109, s. 43.

truth of a schedule, in which certain items were omitted, as debts due to the insolvent.¹ For an omission of money received and expended by the insolvent is not within the Act.²

So, that an affidavit made under 1 & 2 Vict. c. 110, s. 8, and sworn before a registrar of bankrupts under 5 & 6 Vict. c. 122, (now repealed,) was held to be sworn before a competent authority, and was a material matter upon which perjury might be assigned, although there was no power under 1 & 2 Vict. c. 110, s. 8, of making the person a bankrupt.³ And an affidavit of debt for a *capias* under 1 & 2 Vict. c. 110, s. 3, might be sworn before the writ of summons issued. So that an indictment for perjury upon such an affidavit needed not to allege that an action was pending when the affidavit was made.⁴ By 12 & 13 Vict. c. 106, s. 254, if any bankrupt's wife shall give, in any way, false evidence, she shall be guilty of perjury.⁵

Excise and customs.] Several oaths having been imposed by statutes concerning the customs and excise, it is perjury for a party to forswear himself in these respects.

The reader is referred to several Acts of parliament in the note,⁶ but he will be careful to remember that the Oaths Abolition Act (which we shall set out presently) has interfered with several of these oaths by substituting a declaration in lieu of them. It is better to set out the authority to administer the oath by statute in the indictment, though the court will not quash an indictment which fails to show the authority. The defendant may demur, or move in arrest of judgment, or apply to the attorney-general.⁷

Naval and military departments.] There are oaths likewise in the various departments of the naval and military services, the breach of which is punishable.⁸

¹ *R. v. Mudie*, 1 M. & Rob. 128. S. C. nom. *R. v. Moody*, 5 C. & P. 23.

² *R. v. Marner*, Car. & M. 628.

³ *R. v. Dunn*, 16 L. J. Q. B. 382. *Dunn v. Reg.* 12 Q. B. 1026.

⁴ *King v. Reg.* 18 L. J. Q. B. 253. See *R. v. Robins*, 6 T. R. 626, cited there.

⁵ See also, sect. 255. See 2 Cox, C. C. 267. *R. v. Westley*, Bell, 193.

⁶ See amongst others, 52 Geo. 3, c. 13, s. 30; 7 & 8 Geo. 4, c. 53, s. 31; c. 85, s. 38; 3 & 4 Will. 4, c. 51, s. 29; 3 & 4 Vict. c. 87, s. 71; and compare 5 & 6 Will. 4, c. 62, ss. 2, 5, with these Acts.

⁷ *R. v. Burnby*, 5 Q. B. 548; Dav. & M. 362; 13 L. J. M. C. 29.

⁸ See 11 Geo. 4 & 1 Will. 4, c. 20, ss. 89, 99; 2 Will. 4, c. 40, s. 32, naval civil department. 2 Will. 4, c. 40, s. 45, army prize money; perjury or subornation of perjury. In this latter case, by sect. 46, if the offence be committed out of the realm, it may, nevertheless, be tried in any county in England, as if it had been committed in that county. 2 Will. 4, c. 106, s. 4; half-pay receipt (perjury). See, however, 5 & 6 Will. 4, c. 62, s. 2, which substitutes a declaration in several cases, and also see sect. 21.

West Indian colonies.] So under the bill for giving relief to certain colonies in the West Indies.¹

Privy council.] So with reference to oaths or affirmations before the judicial committee of the privy council.²

Slavery.] And again, under the Act for the Abolition of Slavery throughout the British colonies.³ The Spanish Slave Treaty Act in the case of persons wilfully and corruptly giving false evidence.⁴

Poor laws.] So under the poor laws' statute, in the case likewise, of giving false evidence wilfully and corruptly.⁵ But the commissioners are authorized to administer oaths as well as declarations, if they see fit.⁶

Charities.] Again, to give false evidence before the charity commissioners, either upon oath or affirmation, is an act of perjury.⁷

Sale of bread.] So to take any false oath, or make a false affirmation under the sale of bread bill, is punishable as a perjury, either by indictment or information, according to the due course of law.⁸

Tithe commutation.] So under the Tithe Commutation Act, whosoever shall wilfully give false evidence, shall be deemed guilty of perjury; and if any person shall make or subscribe a false affidavit or declaration for the purposes of the Act, he shall suffer the penalties of perjury.⁹

Marriage Act.] So under the Marriage Act, knowingly and wilfully to make any false *declaration*, or sign any false notice or certificate, required by the Act, for the purpose of procuring any marriage. And any person who shall forbid the issue of any superintendent registrar's certificate by falsely representing himself to be a person whose consent to such marriage is required by law, knowing such representation to be false, shall suffer the penalties of perjury.¹⁰

¹ 2 & 3 Will. 4, c. 125, s. 16.

² 3 & 4 Will. 4, c. 41, s. 9.

³ 3 & 4 Will. 4, c. 73, s. 42; and to make or subscribe any false declaration under 6 Will. 4, c. 5, s. 8, see Slaves Compensation Acts, is a misdemeanor.

⁴ 6 Will. 4, c. 6, s. 8, not saying whether by oath or affirmation, or otherwise.

⁵ 4 & 5 Will. 4, c. 76, s. 13.

⁶ Sect. 2. See also sect. 109.

⁷ 5 & 6 Will. 4, c. 71, s. 10.

⁸ 6 & 7 Will. 4, c. 37, s. 22.

⁹ 6 & 7 Will. 4, c. 71, s. 93.

These expressions, "guilty of perjury," and "suffer the penalties of perjury," must be considered as synonymous.

¹⁰ 6 & 7 Will. 4, c. 85, s. 38.

Births—Registration.] Every person who shall wilfully make or cause to be made, for the purpose of being inserted in any register of birth, death, or marriage, any false *statement*, touching any of the particulars required by the Act to be known and registered, shall be subject to the same pains and penalties as if he was guilty of perjury.¹

The charge against a defendant was, that he had made a false statement after marriage, to the officiating clergyman, in order to have such statement entered in the marriage register book. It appeared, however, that the statement in question was made to the clerk before the marriage; but that the defendant, when asked, averred the truth of it to the clergyman. It also appeared that the marriage register book was not the book provided by the registrar-general. These points were made for the defendant, and were argued before the judges; but they held the count sufficient, and that the identical book directed by the registrar-general was not necessary in the case;² and the purpose need not be effected.³ But the act must, of course, be intentional.⁴

Election petitions.] By 11 & 12 Vict. c. 98, s. 85, and 15 & 16 Vict. c. 57, s. 13, every person who shall wilfully give any false evidence before any committee or examiner of recognizances, or who shall wilfully swear falsely in any affidavit, shall be liable, on conviction, to the penalties of perjury.⁵

¹ 6 & 7 Will. 4, c. 86, s. 41.

² *R. v. Brown*, Den. 291; 2 Car. & K. 504.

³ *R. v. Mason*, 2 Car. & K. 622.

⁴ *R. v. Lord Dunboyne*, 3 Car. & K. 1. Whether the prosecution must take place within three years, qu.?

⁵ See as to various perjuries,—The Woolwich Lands Act, 3 & 4 Will. 4, c. 65, s. 16—Houses of Parliament, 1 & 2 Vict. c. 7, s. 35—Dean Forest Mines, 1 & 2 Vict. c. 43, s. 73—Imprisonment for Debt, 1 & 2 Vict. c. 110, s. 100—Custody of Infants, 2 & 3 Vict. c. 54, s. 2—Police Courts Acts, 2 & 3 Vict. c. 71, s. 23—Metropolis Improvement, 2 & 3 Vict. c. 87, s. 71—Marriage Act Amendment, 3 & 4 Vict. c. 72, s. 4—False Returns to Returning Officers, 3 & 4 Vict. c. 97, s. 4—Copyhold Enfranchisement, 4 & 5 Vict. c. 35, s. 94—Election Petitions Trial, 4 & 5 Vict. c. 58, s. 76—Pentonville Prison, 5 & 6 Vict. c. 29, s. 27—Argentine Con-

federation, 5 & 6 Vict. c. 40, s. 8—Slave Trade Treaties, 5 & 6 Vict. c. 42, s. 7—Millbank, 6 & 7 Vict. c. 25, s. 26—Admiralty Lands, 6 & 7 Vict. c. 58, s. 14—County Coroners, 7 & 8 Vict. c. 92, s. 14—Insolvent Debtors, 7 & 8 Vict. c. 96, s. 40—Joint Stock Companies, 7 & 8 Vict. c. 111, s. 30 (misdemeanor); c. 110, ss. 26, 31 (misdemeanor)—Lands Clauses Consolidation, 8 Vict. c. 18, s. 149—Merchant Seamen 8 Vict. c. 112, s. 22 (misdemeanor)—Joint Stock Banks Regulation, 8 Vict. c. 113, s. 18 (misdemeanor)—Railways Clauses Consolidation, 8 Vict. c. 20, s. 160—Customs Management, 8 & 9 Vict. c. 85, s. 2—Friendly Societies, 9 & 10 Vict. c. 27, ss. 9, 16—Coal-whippers, 9 & 10 Vict. c. 36, s. 37—Battersea Park, 9 & 10 Vict. c. 38, s. 56—Chelsea Bridge, 9 & 10 Vict. c. 39, ss. 41, 103—Small Debts, 9 & 10 Vict. c. 95, s. 84—Chancery Oaths and Declarations, 11 Vict. c. 10, s. 3—Joint Stock Companies Winding-up Act, 11 &

Affirmation instead of oath.] Certain dissenters from the Church of England have been, from time to time, relieved from the obligation of taking an oath to which they have entertained religious scruples, but the wilful violation of their affirmation, which was substituted for the oath, has been so far declared to be an offence of the same nature as perjury, as to subject the defendant to the same penalties and forfeitures which are enacted against that crime.¹

By a late statute this relief has been afforded to Quakers and Moravians on *criminal* as well as civil cases;² the Quaker having been expressly excluded by statute from giving his testimony upon criminal trials. But under the same section, a false affirmation is punishable as perjury. However, it has been found, that certain persons who had seceded from the sects of Quakers and Moravians, were yet still embarrassed by scruples respecting oaths, it was provided that these separatists might make their solemn affirmation and declaration as fully as if they had continued to belong to those

12 Vict. c. 45, s. 113—Marriages in Foreign Countries, 12 & 13 Vict. c. 68, s. 16—Bankruptcy, 12 & 13 Vict. c. 106, s. 254—Petty Bag, 12 & 13 Vict. c. 109, s. 45—Pirate's Head Money, 13 & 14 Vict. c. 26, s. 6—Coalwhippers, 14 & 15 Vict. c. 78, s. 37—High Peak, 14 & 15 Vict. c. 94, s. 19—Corrupt Practices, Elections, 15 & 16 Vict. c. 57, s. 13—Master in Chancery Abolition, 15 & 16 Vict. c. 80, s. 31—Jurisdiction of Equity, 15 & 16 Vict. c. 86, s. 23—Lunacy Regulations, 15 & 16 Vict. c. 70, s. 57—Arabian Slave Trade, 16 Vict. c. 16, s. 3—New Granada Ditto, 16 Vict. c. 17, s. 4—Whichwood Forest, 16 & 17 Vict. c. 36, s. 33—Whittlebury Forest, 16 & 17 Vict. c. 42, s. 19—Savings Banks Annuities, 16 & 17 Vict. c. 45, s. 32—Customs, 16 & 17 Vict. c. 107, ss. 38, 311—Manning the Navy, 17 & 18 Vict. c. 18, s. 54—Charitable Trusts, 17 & 18 Vict. c. 137, s. 13—Manchester and Salford, 17 & 18 Vict. c. 20, s. 27—Admiralty Courts, 17 & 18 Vict. c. 78, s. 9—Encumbered Estates, West Indies, 17 & 18 Vict. c. 117, s. 64—Common Law Procedure, 17 & 18 Vict. c. 125, ss. 21, 89—Mutiny, 18 & 19 Vict. c. 11, s. 103—Marine Mutiny, *passim*, 18 & 19

Vict. c. 12, s. 90—Foreign Oaths and Notarial Acts, 18 & 19 Vict. c. 42, s. 4—Woolmer Forest, 18 & 19 Vict. c. 46, s. 20—Grand Juries, 19 & 20 Vict. c. 54, s. 1—Foreign Evidence, 19 & 20 Vict. c. 113, s. 3—Marriage Act, 19 & 20 Vict. c. 119, ss. 2, 18—Divorce, 20 & 21 Vict. c. 85, s. 50—Encumbered Estates (Ireland), 21 & 22 Vict. c. 72, s. 90—Probate Court, 21 & 22 Vict. c. 95, s. 34—Divorce, 21 & 22 Vict. c. 108, s. 23—Public Offices, 22 Vict. c. 19, s. 51—Evidence Abroad, 22 Vict. c. 20, s. 2—Evidence (Revenue), 22 & 23 Vict. c. 21, s. 16—Probate Court, 22 & 23 Vict. c. 31, s. 30—Census (Ireland), 23 & 24 Vict. c. 42, s. 11—Ionian Islands Marriages, 23 & 24 Vict. c. 86, s. 9—Surveyor: False Valuation, 23 & 24 Vict. c. 112, s. 15—Government of the Navy, 23 & 24 Vict. c. 123, s. 57—Mutiny Act, 24 Vict. c. 7, s. 96—Bankruptcy and Insolvency (Corrupt Oath or Affirmation before a Registrar), 24 Vict. c. 134, s. 54—Corrupt and False Declarations, 24 Vict. c. 134, s. 145.

¹ 7 & 8 Will. 3, c. 34, s. 3; 8 Geo. 1, c. 6, s. 2; 22 Geo. 2, c. 46, s. 36. See also 12 Geo. 2, c. 13, s. 8.

² 9 Geo. 4, c. 32, s. 1.

denominations of Christians, and liable to the penalty for false swearing.

Declaration instead of oath or affirmation.] An Act was passed in the year 1835, which very considerably lessened the number of oaths in general.¹ A subsequent statute of the same year² repealed the former (it being found necessary to make some amendments), and consolidated the old and new provisions into one law.

By sect. 2 of this last-mentioned Act, in any case where, by any Act or Acts, made or to be made relating to the revenues of customs or excise, the post office, the office of stamps and taxes, the office of woods and forests, land revenues, works, and buildings, the war office, the army pay office, the office of the treasurer of the navy, the accountant-general of the navy or the ordnance, His Majesty's treasury, Chelsea Hospital, Greenwich Hospital, the board of trade, or any of the offices of His Majesty's principal secretary of state, the India board, the office for auditing the public accounts, the national debt office, or any office under the control, direction, or superintendence of the lords commissioners of His Majesty's treasury, or by any official regulation in any department, any oath, solemn affirmation, or affidavit, might, but for the passing of this Act, be required to be taken or made by any person on the doing of any act, matter, or thing, or for the purpose of verifying any book, entry, or return, or for any other purpose whatsoever, it shall be lawful for the lords commissioners of His Majesty's treasury, or any three of them, if they shall so think fit, by writing under their hands and seals, to substitute a declaration to the same effect as the oath, solemn affirmation, or affidavit, which might, but for the passing of this Act, be required to be taken or made; and the person who might under the Act or Acts imposing the same, be required to take or make such oath, solemn affirmation, or affidavit, shall, in presence of the commissioners, collector, other officer, or person empowered by such Act or Acts to administer such oath, solemn affirmation, or affidavit, make and subscribe such declaration, and every such commissioner, collector, or other officer or person, is hereby empowered and required to administer the same accordingly.

By sect. 3, this declaration is to be published in the Gazette, and after the lapse of twenty-one days from the publication, the provisions of the Act are to apply.

And by sect. 4, no oath nor affirmation can after such twenty-one days be administered in respect of the subject-matters in question.

By sect. 8, the Universities of Oxford and Cambridge, and all other bodies corporate and politic, and all bodies now authorized to administer any oath, &c., may make statutes, byelaws, or orders, authorizing the substitution of a declaration for an oath,

¹ 5 Will. 4, c. 8.

² 5 & 6 Will. 4, c. 62.

affirmation, or affidavit, provided that such statute be passed according to the rules of the particular body.

Sect. 9 abolishes oaths of the churchwarden and sidesman, both upon entering and quitting office, and substitutes a declaration upon the commencement of the duties of such office.

Sect. 10 substitutes a declaration for oaths, affirmations, or affidavits taken or used under any highway or turnpike Acts.

Sect. 11 has the same provisions where oaths, &c. were previously required upon the taking out of a patent.

Sect. 12 has reference to the Pawnbrokers' Acts, and likewise substitutes a declaration.

In this case it is not sufficient to prove the handwriting of the justice before whom the declaration is made; it must be shown that he was acting as a magistrate within the district of which he was such justice.¹ In another case, however, it was said that neither the magistrate nor any one present need be called if the proof of guilty knowledge were made out beyond a question. It was also held that two witnesses, as in perjury, were necessary to prove the offence.²

By sect. 14, in lieu of affidavits on oath, to prove the death of any proprietor of any stock or funds transferable at the bank of England, or to prove the identity of the person of any such proprietor, or to remove any other impediment to a transfer, or relating to the loss, mutilation, or defacement of any bank note, bank post bill, a declaration is substituted.

Sect. 15 has the like provision with regard to oaths hereupon required under 6 Geo. 2, c. 7, "An Act for the more easy Recovery of Debts in His Majesty's Colonies and Plantations in America," and also under 54 Geo. 3, c. 15, "An Act for the more Easy Recovery of Debts in His Majesty's Colonies of New South Wales."

By sect. 16, it shall and may be lawful to and for any attesting witness to the execution of any will or codicil, deed or instrument in writing, and to and for any other competent person, to verify and prove the signing, sealing, publication, or delivery of any such will, codicil, deed or instrument in writing, by such declaration in writing made as aforesaid, and every such justice, notary, or other officer, shall be and is hereby authorized and empowered to administer or receive such declaration.

By sect. 17, in all suits now pending, or hereafter to be brought in any court of law or equity, by or on behalf of His Majesty, his heirs and successors, in any of his said majesty's territories, plantations, colonies, possessions, or dependencies, for or relating to any debt or account; His Majesty, his heirs and successors, shall and may prove his and their debts and accounts, and examine his or their witness or witnesses by declaration, in like manner as any subject or subjects is or are empowered or may do by this present Act.

By sect. 18, whereas it may be necessary and proper in many

¹ *R. v. Morgan*, 1 Cox, 109.

² *R. v. Browning*, 3 Cox, 437.

cases not herein specified, to require confirmation of written instruments or allegations, or proof of debts, or of the execution of deeds or other matters; it is further enacted, that it shall and may be lawful for any justice of the peace, notary public, or other officer, now by law authorized to administer an oath, to take and receive the declaration of any person voluntarily making the same before him in the form in the schedule to this Act annexed; and if any declaration so made shall be false or untrue in any material particular, the person wilfully making such false declaration shall be deemed guilty of a misdemeanor.

Sect. 20 ordains that all declarations, unless otherwise directed by the powers given under the Act, should be in the form prescribed by the annexed schedule. By 1 & 2 Vict. c. 105, all persons, whether jurymen, witnesses, or deponents, are to be bound by the oath each considers binding upon him.

The proceeding against a justice, under sect. 13, is by indictment. As where the defendant thought fit to swear witnesses before himself, with reference to the ecclesiastical conduct of two of the clergy of the Bishop of Exeter.¹ But the indictment was held bad in arrest of judgment, because it failed to set out the deposition, so that the court could not judge whether it was within the Act.² It merely stated that "a certain oath or affidavit" was administered,³ and that the defendant had no cognizance nor jurisdiction thereof, and it negatived the proviso in the section. But it seemed to Coleridge and Williams, Justices, that the particulars of the oath need not be set out.⁴

There are some saving clauses: sect. 6 saves the oath of allegiance in the case of persons appointed to any office. Sect. 7 preserves all oaths, solemn affirmations, and affidavits in any judicial proceeding in any court of justice, or upon any proceeding by way of summary conviction before a magistrate. And sect. 19 declares that the same fees should be paid upon the taking of declarations, as in the case of oaths, affirmations, or affidavits.

By sect. 5, if any persons shall make and subscribe any such declaration as hereinbefore mentioned in lieu of an oath, solemn affirmation, or affidavit, by any Act or Acts relating to the revenues of customs or excise, stamps and taxes, or post office, required to be made on the doing of any act, matter, or thing, or for verifying any book, account, entry, or return, or for any purpose whatsoever, and shall wilfully make therein any false statement as to any material particular, the person making the same shall be deemed guilty of a misdemeanor.⁵

And by sect. 21, *in any case* where a declaration is substituted for an oath under the authority of this Act, or by virtue of

¹ *R. v. Nott*, Car. & M. 288.
Yet whether an indictment lies, qy?
⁴ Q. B. 768.

² S. C.

³ S. C.

⁴ 7 Jur. 621; Dav. & M. 1.

⁵ And so punishable accordingly, by fine and imprisonment, at the discretion of the court.

any power or authority hereby given, or is directed and authorized to be made and subscribed under the authority of this Act, or by virtue of any power hereby given, any person who shall wilfully and corruptly make and subscribe any such declaration, knowing the same to be untrue in any material particular, shall be deemed guilty of a misdemeanor.¹

Of proceedings in perjury.] At common law, the proceeding is by indictment and information, under the statute 5 Eliz., by indictment, information,² and action.

First, the most common and most advisable course is to prefer an indictment at common law, either at the assizes or the Court of King's Bench, at Westminster. Because, notwithstanding that the statute of 5 Eliz. was introduced for the better prevention of the crime, it is much more difficult to procure a conviction upon it than at common law, and as to the punishment which formed so chief a merit of that statute, the Act 2 Geo. 2, c. 25, has amply supplied its place. As to the jurisdiction, by stat. 5 El. c. 9, s. 9, as well the judges of the said courts³ where such perjury shall be committed, as also the justices of assize and gaol delivery, and the justices of peace at their quarter sessions,⁴ shall have power to inquire of all offences contrary to this Act, by inquisition, presentment, bill, or information, or otherwise lawfully to hear and determine the same. And by sect. 13, the statute shall not restrain the authority of any judge having absolute power to punish perjury before the making thereof, so that he set not on the offender less punishment than is contained in this Act. The following case happened upon this section:—A bill of perjury was sued in chancery for a perjury committed there against the form of the statute, and a doubt arose, whether if the defendant would plead not guilty, he should be sworn to his plea, and also answer interrogatories as was usual in the star chamber. It was resolved in the negative by Catlyn, Saunders, Dyer, and Whyddon, unless it had previously and absolute authority, and had been used to examine perjuries in that court before that statute.⁵ The words "might

¹ And punishable by fine and imprisonment at the discretion of the court. See *R. v. Boynes*, 1 Car. & K. 65.

² It was ruled upon one occasion, that the attorney-general might have an information upon perjury supposed to be in advantage of the crown, and that any other person might assign such perjury if he were grieved by it, but that the attorney might though the queen were benefited by it. *R. v. Agar*, Mo. 627. The course of information by a memorandum, *quod re-*

cordatur, &c., was since 5 Eliz. and begun by Twisden.—1 Keb. 213.

³ Any of the Queen's courts of record, any leet, antient demesne court, hundred court, court baron, or courts of the stannary in Devon or Cornwall.

⁴ But this power is taken away by 5 & 6 Vict. c. 38, and they could not try a perjury at common law. *R. v. Bainton*, Str. 1088. *R. v. Westiness*, Id. *R. v. Beaumont*, Say. Rep. 278. Although it was once thought otherwise. *R. v. Gunn*, 11 Mod. 66.

⁵ Dy. 288; 3 Inst. 167.

have done and used to do," were expounded strictly; for, being copulative, an anterior usage could not give authority to a court, unless a *right* existed as well before the statute, and it was so held very shortly after the passing of the Act.¹

By sect. 11 of the statute above referred to, it is also provided that the Act shall not extend to any ecclesiastical court, but that the offenders may be punished by such laws as heretofore in the ecclesiastical courts.

However, notwithstanding this apparent saving, the spiritual courts have no jurisdiction in cases of perjury by statute. "For perjury, concerning any temporal act," says Lord Coke, "the ecclesiastical court has no jurisdiction, and if it be concerning a spiritual matter, the party grieved may sue for the same in the star chamber."²

Information.] The courts will not always grant an *information*. As where a wife came forward and swore that she had no manner of cause for swearing the peace against her husband, the court refused an *information* for perjury upon her oath.³ So where a witness was asked whether he had received 800*l.* for passing his accounts. Per Holt, C. J.—This was not a fair question.—It could not have been expected that the witness would have owned himself guilty of bribery; you may indict him, but we will not grant an *information*.⁴ And the court will not permit a right, as of voting, to be tried by an *information* for perjury.⁵ A man was indicted for perjury in an affidavit and pleaded guilty. He was then charged with the same offence by one L. upon an *information*, and the court doubted at first whether they should proceed upon the latter charge. But as his affidavit had charged L. and others with having suborned him to commit perjury, it was thought that he might be tried upon that as another distinct perjury, and he was convicted.⁶

It was doubted whether a witness could be committed for perjury in *facie curiæ*,⁷ but by 14 & 15 Vict. c. 100, s. 19, the judges are invested with extensive powers, although they now forbear from exercising them.⁸

¹ *R. v. Onslowe*, Dy. 243.

² 3 Inst. 164.

³ *R. v. Porter and others*, 1 Barnard. 52.

⁴ *R. v. Dummer*, 1 Salk. 374.

⁵ *R. v. Weston*, 1 Barnard. 56.

⁶ *R. v. Maynard*, 1 Vent. 182.

⁷ "It was said, a perjury in *facie curiæ* is punishable by the judge, and such is it if jurors go against their evidence; perhaps a witness may be punished for perjury in *facie curiæ* (which I will not maintain to be law). But a jury can never be so punished, because the evidence in court is not binding evidence to a jury, as hath been

showed."—By Vaughan, C. J., in *R. v. Bushell*, Vaugh. 152. And in *R. v. Thorogood*, the defendant having made an affidavit in the Court of Common Pleas, and then subsequently appearing and confessing its falsehood, the court recorded the confession, and ordered him to be set in the pillory. 8 Mod. 179.

⁸ It is considered that the power of a summary committal by the judge operates in *terrorem*, and discourages the witnesses, and thus becomes a hindrance to justice, especially as a magistrate can be resorted to.

By 14 & 15 Vict. c. 100, s. 19, any judge of the superior courts of law or equity, or of assize, nisi prius, oyer and terminer or gaol delivery, or justices, recorder, deputy recorder, chairman or other judge holding any general or quarter sessions of the peace, or any commissioner of bankruptcy or insolvency, or judge or deputy of any county court, or court of record, or justices in special or petty sessions, or sheriff or his deputy in writs of inquiry or trial from the superior courts,—if he shall think that perjury has been committed in evidence, affidavit, depositions, examination, answer, &c., to direct a prosecution, and commit the person; but bail shall be allowed, with one surety, or more than one,—and also to require persons to be bound over to prosecute or give evidence. The judge will give a certificate to the prosecutor without fee, which shall be the voucher of the prosecutor, and likewise to ensure costs to him upon its production, unless the court at the trial shall refuse them. But no such direction nor certificate shall be given in evidence upon any trial against any person so prosecuted. So is the statute 22 & 23 Vict. c. 17, against vexatious indictments.

Still it must appear that the oath was administered in the course of a judicial proceeding, although the commission and authority need not be alleged.¹ At a meeting for hearing appeals against surcharges for taxes, the defendant was sworn as a witness, and made, it was alleged, a false deposition. It was held, in error, that this was not an oath in a judicial proceeding, and that the statute 23 Geo. 2, c. 11, s. 1, did not help.² It was alleged, that “in the Whitechapel court of Middlesex, holden at, &c., in the county of Middlesex, before J. M., then and there being the judge of the said court, a certain action of contract then pending in the said court between A. L., plaintiff, and R. H., defendant, came on to be tried,” &c., upon which trial A. L. was then and there duly sworn “before the said J. M., being then and there judge of the said court, and then and there having competent and sufficient authority to administer the said oath to the said A. L. in that behalf.” It was held,—1st, that it sufficiently appeared in the indictment, that the court in which the action was tried was held in pursuance of 9 & 10 Vict. c. 95, that from the averment of competent authority in the judge to administer the oath, it sufficiently appeared that the judicial proceeding, in the course of which the oath was administered, was one over which the judge had jurisdiction.³ Perjury is one of the offences in the Act against vexatious indictments, which restrains prosecutors not bound by recognizances.⁴

Chancery.] In the Court of Chancery the course seems to have

¹ *Overton v. Reg.* 4 Q. B. 83;
and see 2 Moo. C. C. 266, n.

² S. C.

³ *Lavey v. Reg.* Den. & P. 504;
21 L. J. M. C. 10; 17 Q. B. 496.

⁴ 22 & 23 Vict. c. 17.

been always, that the chancellor might punish according to his discretion. And thus it was said, that either upon perjury by affidavit, or in an answer, the learned equity judge might direct the offender to be punished.¹ Thus, also, Egerton, C. J., adjudged a person who was palpably perjured, to pay a fine of 20*l.*, to be imprisoned, and to pay 10*l.* costs.² And his lordship cited some cases in support of his right to do this. As where a perjured witness in chancery was adjudged to the pillory and to pay costs.³ So, again, where a witness was ordered to stand in the pillory under such circumstances.⁴ His lordship cited another case, in which a juror swore that he had not 40*s.* in freehold, whereas it appeared that the value of his property of that description was of 4*l.* annually, and justices committed him to the Fleet.⁵ The lord keeper added, that every court might punish perjury appearing before themselves.⁶

The courts, however, are very tender of interposing any difficulties between the finding of a grand jury and the trial for perjury. Thus they will not, in general, quash an indictment, although defective, but will compel the defendant to plead, or, at all events, to demur.⁷

Application was made to the Court of Chancery for leave to amend an answer in a case where it did not appear that the party had any interest in the issue, and, therefore, could not be supposed to have sworn falsely with intention. But the court refused the motion, it being intimated that a prosecution for perjury had been threatened. It was the province of the grand jury to judge of the intention.⁸

Certiorari.] In general, the court will not grant a *certiorari* at the instance of the defendant to remove an indictment for perjury, nor will they quash it upon motion, but will put the party to plead.⁹ But under some extraordinary circumstances, this indulgence has been permitted. As where the defendant made an affidavit that he had twice paid costs for not going on to trial, the judges having gone away. This was allowed to be a special reason.¹⁰ So, also, where the defendant made an affidavit, that the prosecutor's attorney was under-sheriff of Middlesex, and that he attended the grand jury on finding the bill.¹¹

The effect of a *certiorari* is not to discharge the defendant out

¹ *R. v. The Earl of Oxford*, 1 Chanc. Rep. 1, Mich. 13 Jac.

² *Bullen v. Bullen and Clerke*, Mo. 656.

³ *Baskervill v. Gulliam*, Id. 657, cited there.

⁴ *Pomeroy v. Ford*, Id.

⁵ *Sir Geo. Calveley v. Rishley*, Id.

⁶ *Sir Geo. Calveley v. Rishley*, Mo. 657.

⁷ 2 Hawk. P. C. c. 25, s. 146.

⁸ 1 Bro. Parl. Ca. 419.

⁹ 1 Sid. 54. *R. v. Pusey*, 2 Str. 717; 2 Hawk. c. 9, s. 28.

¹⁰ *R. v. Morgan*, 2 Str. 1049.

¹¹ *R. v. Webb*, Id. 1068.

of custody, although it will vacate a recognizance of bail. As where the prosecutor removed an indictment for perjury into the King's Bench by *certiorari*. Buller, J., said, upon an application to deliver the prisoner out of custody on the ground of their being no record before the court, that he must find sureties. Had he been admitted to bail, indeed, the removal of the indictment would have discharged his recognizance.¹

Action.] We now proceed, although the remedy is most rare, to show when an action may be brought under the statute by the party grieved, and what action it is which is prescribed. And the plain meaning of the statute obviously was, that if any one be aggrieved by the false oath of another, he might recover damages for the mischief thereby occasioned. But it seems that some doubt once prevailed as to the power of suing for injuries caused by false affidavits. Thus, Coke, C. J., said that an action would not lie upon the statute for a false affidavit; the party offending might certainly be indicted at common law.² However, Mr. Serjeant Hawkins questions this opinion, observing, that it must, at all events, be confined to such affidavits as are in no way material to the issue before the court. For if the parties be grieved in any way by reason of the perjury, as if a trial were put off, or a judgment or execution set aside in consequence of a false affidavit, the offence, says the learned serjeant, appears not only to be within the meaning, but within the very letter also of the statute.³

In fact, this action has been superseded by the action on the case. Such an action was brought for not producing a paper under a *subpœna duces tecum*, on a former trial; the defendant had appeared as a witness but would not produce a warrant, which was the subject of the present action, but, on the contrary, swore positively that he neither had it in his possession, nor knew anything of it. The plaintiff was, consequently, nonsuited, and compelled to pay the costs of the action. The attorney-general objected, for the defendant, that the only remedy was an indictment against him for perjury, and that the proper mode of trying his veracity could not be the present. As well might an action be brought against a witness for withholding certain oral testimony, which, it might be imagined, he could have disclosed. But Lord Ellenborough answered, that if a man commit a misdemeanor, the party injured by such an offence is not in every case to be driven to proceed against him criminally, but may maintain a civil action for damages. There were various actions well known in the law (as for maliciously holding to bail, &c.) wherein perjury was imputed to the defendant, for which he was liable to be indicted. A verdict was ultimately found for the plaintiff.⁴

¹ *R. v. Richardson*, 2 Leach, 560.

² 1 Ro. Rep. 79; see 5 Mod. 348; S. P. as to an indictment.

³ 1 Hawk. c. 69, *quod vide*. See *R. v. Matthews*, 3 Leon. 201.

⁴ *Amey v. Long*, 1 Camp. 14, 16; 9 East, 473.

The word "original" in 18 Eliz. does not mean *original writ*, but *original action*, as contradistinguished from proceedings in inferior courts, and the star chamber, where the proceedings were had in a summary way, by libel or complaint.¹

Thirdly, we proceed to mention a few instances in which it has been endeavoured to proceed in a collateral manner, not indeed as a punishment of the parties said to be perjured, but obviously so as to effect them with the crime. It was moved to set aside the allowance of bail upon the ground of an entirely false description of property, but the court refused the rule. The court said, they could and would punish the defendant, or his attorney, if it were possible to connect them with the transaction, but independently of that fact, the plaintiff had no other remedy than an indictment for perjury.² On a subsequent application to set aside the *allocatur* of bail by reason of perjury, Park, J., said, that the rule, if granted, would operate on the defendant whose conduct had not been called in question, and that he would be affected without even hearing an answer from the bail. The learned judge added, that he did not clearly see on what ground a case in the King's Bench, which was cited (and to which we shall presently advert) proceeded. The only remedy for the plaintiff was by indictment.³

The practice, however, of the Court of King's Bench seems to be different in this respect, although even there the application met at first with no encouragement from the judges. It was moved to set aside the justification of bail on an affidavit charging perjury, when Best, J., said, he never knew an instance of such an application. Ultimately, however, upon a statement by the master, that one of the bail had been rejected in another cause, the rule was granted *nisi*, and, subsequently, made absolute.⁴ The same course was pursued in the same court upon another occasion.⁵

However, the courts have unanimously refused to stay execution, on the ground of a bill of indictment having been found against the plaintiff's principal witnesses. For, by Lord Ellenborough, this would be a receipt to every person, after verdict and judgment against him, how to delay the fruit of such judgment by indicting some of the plaintiff's witnesses for perjury.⁶

Strong affidavits, imputing perjury, will afford good grounds for

¹ 3 Term Rep. 365, note (a).

² *A'Becket v. —*, 5 Taunt. 776.

³ *Stockham v. French*, 1 Bingham. 365; *S. P. Shee v. Abbott*, 2 B. & B. 619. See, however, *Barling v. Waters*, 6 Bingham. 423.

⁴ *Gould v. Berry*, 1 Chit. Rep. 143.

⁵ *Brown v. Gillies*, Id. 372. It should seem, however, that upon the same principle which requires

the oaths of two persons to convict a man of perjury, there ought to be at least *two affidavits* on these occasions. It may be added, that the bail may be punished if they prevaricate, or commit perjury *in facie curiæ*. See *ante*; Anon. 1 Str. 384, where both the bail and the attorney were set in the pillory.

⁶ *Warwick v. Bruce*, 4 M. & S. 140; *Attorney-General v. Wood-*

a new trial, but cannot prevail in any other way.¹ But merely finding an indictment will not be sufficient before conviction.²

Pleadings.] The difficulty of setting out the crime of perjury on the record was formerly considerable.³ Thus, an information under the statute first set forth the statute itself, then the pleadings in an ejectment, the issue, the proceedings upon the trial, the evidence both before the perjury as well as that on which the perjury was assigned, and, lastly, the assignments themselves.⁴

A statute was passed in the reign of George the Second for the purpose of remedying the inconvenience.⁵ And by sect. 1 it was declared, that prosecutions for perjury were so difficult that the crime had frequently been committed with impunity, for which reason it was enacted, that in every information or indictment to be prosecuted against any person for wilful and corrupt perjury, it should be sufficient to put forth the substance of the offence charged upon the defendant, and by what court, or, before whom the oath was taken, (averring such court, or person or persons, to have a competent authority to administer the same,) together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries might be assigned; without setting forth the bill, answer, information, indictment, declaration, or any part of any record or other proceeding, either in law or equity, other than as aforesaid; and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed, any law, &c., notwithstanding. And by sect. 2, on every information or indictment for subornation of perjury or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth the bill, answer, &c., as in sect. 1.

In proceeding on this statute, it was formerly necessary to set the Act itself forth almost literally. Where the statute was recited as speaking of any court of record, the defendant was discharged, because all the courts enumerated in the statute should have been specified.⁶

But now by 14 & 15 Vict. c. 100, s. 20, in any indictment for perjury the substance of the offence need alone be set forth, and

head, 2 Price, 3. *Thurtell v. Beaumont*, 1 Bingham. 339. See also, *Bartlett v. Pickersgill*, 4 East, 577, n.

¹ *Lister v. Mundell*, 1 B. & P. 427. *Fabrilus v. Cock*, 3 Burr. 1771. And there are many other cases to the like effect.

² *Seeley v. Mayhew*, 4 Bingham. 561.

³ See Stark. Cr. Pl. vol. i. 112.

⁴ Id. Citing Co. Ent. Inform. 367; Co. Ent. 165, 166; see 1 Hawk. c. 69, s. 23. *R. v. Drew*, 1 Keb. 935.

⁵ 23 Geo. 2, c. 11.

⁶ *R. v. Thomas*, Cro. El. 137.

by what court, and before whom the oath was taken, without setting forth the bill, &c., or commission or authority of the court. However, where by statute, questions are required to be put, as under the Merchant Seamen's Act, the question put to an applicant for a registry ticket must be averred and proved in the words of the statute.¹

Yet, Lord Kenyon felt himself compelled to say upon one occasion, that the court had reason to lament, in almost all the trials for perjury, that the prosecutor would not avail himself of the Act in question, passed to obviate difficulties in drawing indictments for the offence.²

On one occasion, where an indictment, stating all the continuances on the former prosecution, &c., had been removed into the King's Bench by *certiorari*, it was referred to the master to see what part of the record was unnecessary, and ordered, that the clerk of the peace should pay the expense incurred by the unnecessary part.³ And his lordship desired that the bar would, for the sake of publicity, take a note of this.⁴

By 9 Geo. 4, c. 15, certain variances between written and printed evidence and the record may be amended, if the court should see fit.⁵

Where perjury was assigned on an affidavit made to set aside a judgment signed since the rules of Hilary Term, 4 Will. 4, and the allegation was, that the judgment had been entered up "in or as of Trinity Term," 5 Will. 4, the judge refused to amend.⁶

Joinder of parties.] It is worthy of attention, that two persons cannot be joined together in the same indictment for perjury. And thus, after several objections the court fastened upon this, saying, that the perjury of the one could not be that of the other.⁷ It was indeed said, in *R. v. Chedwick*, that an indictment against husband and wife was good, although preferred against both;⁸ but this case stands alone amongst contradictory decisions. As, where six had been included in an indictment for perjury, and four were convicted, the court arrested the judgment, saying, that there might be great inconvenience if the practice were allowed. One might be desirous to have a *certiorari*, the others not; the jury on

¹ *R. v. Knox*, 2 Cox, 165.

² 5 T. R. 317. See 14 & 15 Vict. c. 100, *post*.

³ *R. v. May*, 1 Dougl. 194; S. C. Leach, 192.

⁴ Dougl. 194, n. (26).

⁵ *R. v. Goffe*, 1 Lev. 189. Anon. said to be *R. v. Bromley*, 1 Ventr. 13; 16 Vin. Ab. 325, J. 21.

⁶ *R. v. Cooke*, 7 C. & P. 559.

In this case of *R. v. Cooke*, it was likewise held, that the allegation of the defendant having made his warrant of attorney directed to certain persons, "then and still being attorneys," &c., was proved by putting in the warrant of attorney.

⁷ *R. v. Jary and King*, Palm. 535; 2 Burr. 985. *R. v. Harvey and others*, acc. 1 Sess. Ca. 424.

⁸ 1 Keb. 685.

the trial of all might apply evidence to all, which, in fact, might be against one only. Perjury is a separate act in all.¹

Two oaths.] Where the defendant has sworn on a second examination matter directly opposite to his first evidence, the contradictory testimony should be specifically pointed out in an indictment of this sort.

A defendant was convicted of having sworn in the House of Lords diametrically opposite to his previous oath before a committee of the House of Commons, but the indictment omitted to specify in what particulars the perjury consisted, or in which evidence, and the court arrested the judgment. It was admitted, that precedents were to be found of such indictments,² but there being no judicial decision in their favour, Abbott, C. J., would not allow them to prevail as authority. A defendant might be twice put in peril of the punishment of perjury, and perhaps twice convicted and punished on the same subject matter, if such an indictment as this could be sustained; for he could not plead the acquittal or conviction as a bar to an indictment charging perjury in the usual way on either of the depositions.³

Venue.] It has been said, that in indictments the venue in this case is local, but that it is otherwise in informations. Thus, where the perjury was alleged to have happened in Middlesex, but it turned out to have occurred in the Inner Temple, the court mentioned the distinction above laid down. The reporter adds, that the court offered to have the matter found specially; but there being no counsel for the defendant in the information, and the question being raised only *per amicum curiæ*, the matter went off.⁴

It has been said that perjury committed at the Old Bailey, although before a Middlesex jury, must be tried by a London jury.⁵ So perjury committed at a trial at bar in Westminster-hall from Yorkshire must be tried by a Middlesex jury, although the cause be tried by a Yorkshire jury.⁶ But the judges held, that perjury committed in Gloucester, which is a county of itself, before a jury of the county at large, might be tried by a jury of the county.⁷ And so again, perjury committed at the Worcester quarter sessions, which are held in the county of the city of Worcester, was held rightly tried in the city.⁸

Time and place.] "There must," said Lord Mansfield, in *R. v. Aylett*, 1 T. R. 69, "be an allegation of time and place, which are sometimes material and necessary, and sometimes not." Where

¹ *R. v. Philips and others*, 2 Str. 921. See also *R. v. Longbottom*, 1 Barnard, 314. *R. v. Macajah*, 2 Barnard, 24.

² 5 B. & Ald. 937, note (a).

³ *R. v. Harris*, 5 B. & Ald. 926.

⁴ *R. v. Maynard*, 1 Ventr. 182.

⁵ *R. v. Eliz. Canning*, 2 Dougl. 794, cited. See 2 Dougl. 797.

⁶ Id.

⁷ *R. v. Gough*, 2 Dougl. 791.

⁸ *R. v. Jones*, 6 C. & P. 137.

it was stated that A. was arrested by L. after hearing a cause in chancery, to wit, on the 4th of August, Lord Mansfield held the indictment good; because, supposing the time material, it must have been proved at the hearing, and if not, it might be rejected, being laid under a *videlicet*.¹ If time be material, it may be proved though laid under a *videlicet*, and if immaterial, its being laid under a *videlicet* will not render it material.² If the indictment be founded upon perjury committed at the assizes or sittings, the offence may be laid on the first day of the assizes or sittings, or upon the day when the trial really took place.³ An indictment for perjury stated, that heretofore, to wit, on Monday, the 3rd day of December, in the 28th year, &c., a certain cause came on to be tried. By the *nisi prius* record it appeared, that the jury were respited until, &c., unless the justices, &c., should first come on Thursday, the 29th day of November, &c. It was objected, that here was a variance, for the cause must be taken to have been tried on the day mentioned in the *nisi prius* record. But Lord Kenyon overruled the objection, for the day being stated under a *videlicet* need not be proved exactly as laid.⁴ The allegation of place is no longer necessary.

By 14 & 15 Vict. c. 100, s. 20, the statement as to the court itself is sufficient.⁵

Oath of jury.] The allegation of the oath of the jury before whom the proceedings were heard is indispensable in cases of trial by jury. For want of this statement an indictment has been quashed.⁶

Thus, where an indictment alleged, amongst other things, that F. C. A. and others exhibited their bill in the exchequer against the defendant, it appeared upon the production of the bill itself, that J. C. A., &c., exhibited this bill, and it was submitted, that here was a variance. But Lord Ellenborough, said, that the question then before them, namely, whether F. C. A. did in reality exhibit his bill might be proved by other evidence than the production of the bill, although that certainly was the usual mode of proceeding. Had the indictment professed to set out the tenor of the bill, there would have been clearly a variance. The indictment further stated, that afterwards, to wit, on, &c., comes the said defendant in his own proper person, and exhibits and produces his answer to the aforesaid bill of complaint. This answer, upon producing it, appeared to be entitled, "The answer of R. R. to the bill of complaint of J. C. A.," &c. Upon this, the defendant's

¹ *R. v. Aylett*, 1 T. R. 63.

² *Johnson v. Pickett*, E. 25 Geo. 3, B. R. cited, 1 T. R. 68, in the above case.

³ Stark. C. Pl. 122. Per Abbott, C. J., 1819.

⁴ *R. v. Payne*, 9 East, 158, cited there.

⁵ *R. v. Burton*, Sty. 153. See

R. v. Deman, 2 Ld. R. 1221. *R. v. Eden*, 1 Esp. 98. *R. v. Lincoln*, Russ. & Ry. 421. *R. v. Dowlin*, 5 T. R. 311.

⁶ *R. v. Hinton and Brown*, 3 Mod. 122.

counsel again contended for an acquittal, because here was no proof of the allegation of an answer by the defendant to a bill of complaint by *F. C. A.* But Lord Ellenborough held, that there was nothing in this objection after the former decision. The defendant being found guilty, his counsel moved for a new trial. 1st, because the evidence had been improperly admitted, there being no *averment* that *F. C. A.* had exhibited his bill by the name of *J. C. A.* 2ndly, because, after all, there was a variance, inasmuch as the words "as appears by the record," had been introduced into the indictment, whereas, in fact, extrinsic evidence had been given to show that *F. C. A.* exhibited his bill, the *record* proving the direct contrary. But the court were against the motion, holding, that the evidence was admissible, and that the words, *as appears by the record*, referred to the last antecedent, and could not be incorporated with the prefatory allegation that *F. C. A.* exhibited his bill.¹ However, the court granted a rule to show cause on the ground that the answer, being improperly entitled, was a nullity, but this ultimately failed, the judges, on consideration, being of opinion that the answer could not be so treated.²

Again, an indictment alleged, that a bill of discovery was filed on the 1st day of December, 1807, but, on the production of the bill, it appeared to have been entitled generally of the preceding Michaelmas Term. The point was taken immediately as a variance, but Lord Ellenborough said, that as the day was not alleged as part of the record, it was sufficient to prove the bill filed on any other day.³

It was alleged, that a suit was depending, and that a commission was issued for the examination of witnesses, and that certain interrogatories were exhibited, and that it was averred, that upon the examination of the said defendant upon the said interrogatories, it became very material to ascertain the truth of the matters alleged to have been sworn to and stated by the said defendant upon his oath in answer to the said ninth interrogatory. The ninth interrogatory was set out. Whether this was a sufficient averment of materiality was not decided.⁴ An indictment stated, that an application had been made by the plaintiff to Lord Denman, C. J., and the other judges of the court, &c. Parke, B., said, that the application could only be made to the court, and ought to have been so stated. There is no jurisdiction.⁵

So, where an indictment stated a trial to have taken place before Sir J. Littledale, &c., but on producing the record, it was silent as to the name of the judge, and the *postea* stated the trial to have been before Sir C. Abbott, &c.; it was objected, that here was a variance. Sir J. Littledale, in fact, did try the cause. It was answered, that there was no reference to the record, and,

¹ *R. v. Roper*, 1 Stark. 518.

² 6 M. & S. 327.

³ *R. v. Hucks*, 1 Stark. 521.

⁴ *R. v. Hewens*, 9 C. & P. 786.

⁵ *R. v. White*, 2 Cox, C. C. 232.

therefore, that the name of the judge might be proved *dehors*. Lord Tenterden refused to stop the case upon this objection, but gave leave to move the point. The defendant, however, had a verdict.¹ And a difference between the *nisi prius* record and the indictment, as to the day of the trial, was also held immaterial.

So, where perjury was assigned in answer to a bill alleged to have been filed in a particular term, but the copy produced was of a bill amended in a subsequent term by order of the court, it was held to be no variance, the amended bill being part of the original bill.²

So, where the record of a trial had the words "of Westminster," instead of "at Westminster," it was held to be no variance, for the cause was, in fact, so tried, and no county was mentioned in the record.³ So, "within the jurisdiction of this court" was held sufficient, although another court had been referred to in the preceding paragraph, the venue being "Central Criminal Court."⁴

An indictment stated that an action was depending wherein H. K. was the plaintiff, and B. F. the defendant. The judgment when produced began thus—"B. F. sued by the name of L. F., was attached to answer H. K.," &c. Lord Ellenborough held that this was no variance, because, although the indictment did not, as in the judgment, give F. his full description, it gave him his true one.⁵

So, the description of a suit as pending between P. & M. instead of P. and M. the elder, was held not to be a variance.⁶ So W. the younger was named as the plaintiff in a county court in an indictment. The plaint showed the name of W. W. This was no variance. The indictment alleged that certain words were written by J. S. at the house of M. P., in the parish, &c., whereas, &c. The proof was, that the defendant swore that the words were written at the house of M. P., but that he did not describe the situation of the house, nor mention the parish. This was no variance.⁷

So, where the indictment, in setting out a petition, stated, that at several meetings before the *commission* (of bankrupt) the petitioner declared certain things, but upon the production of the petition it appeared that he had done so before the *commissioners*, it was considered to be no variance, for the word "commission" may be read as signifying either a trust, or persons invested with a trust.⁸ And by Abbott, C. J., "If the word *commission*, as there used, was intended to denote the commission itself, it would follow that the several meetings took place before any commission issued; but that is impossible, because in that case the

¹ *R. v. Coppard*, M. & M. 118; 3 C. & P. 59.

² *R. v. Waller*, 3 Stark. Ev. 856.

³ *R. v. Israel*, 3 Dow. & Ry. 234.

⁴ *R. v. Satchell*, 2 C. x, 137.

⁵ *R. v. Windus*, 1 Campb. 405, n.

⁶ *R. v. Bailey*, 7 C. & P. 264.

⁷ *R. v. Withers*, 4 Cox, 17.

⁸ *R. v. Dudman*, 4 B. & C. 850;

petitioner could not have made his declaration in the hearing of the said assignee."¹

So, where the indictment charged the defendant with having sworn to certain facts, but the deposition being produced, turned out to be joint, his wife having sworn first to the matters in question, it was held, that there was no variance, because it was sufficient for the indictment to state the substance of the defendant's oath.²

The indictment stated that the defendant had sworn she had been in A.'s company from two till half-past four. The evidence was, that she said she had been in his company from eleven till half-past four. Park, J., doubted at first whether the allegation was supported, but upon conferring with Bolland, B., he thought it was.³ At the hearing of an information, it was sworn, that A. was on certain land on a particular Sunday morning. The defendant swore that A. lodged with him, and was not absent on any Sunday morning during the whole time he was his lodger, and that time included this Sunday morning. Pollock, C. B., ruled, that the defendant's attention should have been called to the *particular Sunday morning*, and that the general allegation was not sufficient.⁴

An assignment was, that the defendant had sworn he had paid all his debts but two. And a second, that certain creditors, naming them, had all been paid in full, besides the excepted two. With respect to this, it might be said, that the first assignment was too general, but if so, that the defendant should have demurred to it. Still it would not be fair, as names had been mentioned, for the prosecutor to go into evidence of the nonpayment of any other creditors than those named. Several creditors were called, who proved, each, the nonpayment of his own debt. It was held, that this, when done, would not warrant a conviction, and that as to the nonpayment of each debt, it was necessary to have the evidence of two witnesses, or of one witness, together with such corroborative testimony as would be equal to the testimony of a second witness.⁵

But where the indictment undertook to recite the record of a trial upon a feigned issue, a variance was committed in substance by alleging the affirmation to have been made by three, whereas it appeared on the record to have been made by four. But Holt, C. J., directed that the defendant should be indicted *de novo*.⁶

So, where the indictment stated that the defendant gave information that A., being a brewer, &c., did neglect, &c., but the information did not contain the words "being a brewer," the variance was held fatal.⁷

¹ 4 B. & C. 854.

² *R. v. Grindall*, 2 C. & P. 563.

³ *Anon.*, 1 Lew. C. C. 271.

⁴ *R. v. Stolady*, 1 Fost. & F. 518.

⁵ *R. v. Parker*, Car. & M. 639.

⁶ *The Queen v. Carter*, Holt.

Ca. 347. *R. v. Gardner*, 9 East, 441, cited by Abbott, *arg.* and see

4 Burr. 2269.

⁷ *R. v. Leesh*, 2 Man. & Ry.

119.

So, where an issue was set out in an indictment as having been touching the forfeiture of certain goods, whereas, in fact, it only related to the possession and knowledge that such goods were run goods, it was held to be a fatal variance.¹

If the perjury have arisen in a reply to the evidence of a defendant who was acquitted at the trial, that acquittal need not be stated in the indictment, but secondary evidence of it may be given.²

An indictment reciting an information, stated that a certain issue came on to be tried. The evidence was, that the information contained two counts, and that the defendant had pleaded the general issue to each separately. Lord Kenyon held, that there was no variance. Had the indictment, indeed, said that the perjury was committed on the trial of two issues when there was but one, it would have been fatal.³

County.] It is necessary to allege some county where the false oath was taken. For want of this statement an indictment has been held insufficient.⁴ Error was brought to reverse an outlawry upon the 5 Eliz. for perjury. The defendant had been indicted by the name of N. L. in the parish of Aldgate, but the record did not show in what county Aldgate was. And it was allowed.⁵ Although it was urged, that as the word "Middlesex" was in the margin, the parish should refer thereto.⁶

County aforesaid.] Care must be taken not to refer to the wrong county. In indictments the word "aforesaid" is held to refer to the last antecedent, unless the sense hinders; in actions, to the county in the margin where the action is said to be laid.⁷

An information in Middlesex for subornation of perjury, stated that A., late of —, in the county of Surrey, impleaded B. for that, whereas, he was indebted to him in the parish of St. Clement Danes, *in the county aforesaid*, and that the cause was *duly* tried at the sittings in Middlesex. The defendant having been convicted, it was moved to arrest the judgment, because, according to the record, the cause had not been tried before a competent authority. And the objection was held good, inasmuch as the county aforesaid related to Surrey, whereas the parish of St. Clement Danes was in Middlesex, and the judgment was arrested.⁸

So, where an indictment for perjury found at the sessions in Norfolk, stated, that a fine was levied in the Court of Common Pleas at Westminster, in the county of Middlesex, and that the defendant perjured himself at Theed, in the county aforesaid, it was the

¹ *R. v. Hawkins*, Peake, N. P. C. 8.

² *R. v. Browne*, M. & M. 315; 3 C. & P. 572.

³ *R. v. Jones*, Peake, 37.

⁴ *R. v. Thomas*, Cro. Eliz. 137.

⁵ *R. v. Leach*, Cro. Jac. 167.

⁶ Cro. Jac. 167.

⁷ 2 Ld. R. 888; 3 Wils. 330.

⁸ *The Queen v. Rhodes and Cole*, Ld. Raym. 886.

opinion of the court, (although, in fact, they adjourned the case,) that it could not be supported.¹

The averment that the defendant was sworn is material. An indictment was discharged for want of a distinct and full statement that the party had been *sworn*.²

The authority.] Before the passing of 23 Geo. 2, c. 11, sufficient must have appeared on the record to have shown that the judge had authority, although an express averment was not required. As where it was alleged that the defendant had made a false oath before Master Page, one of the masters of the chancery, it was objected, that there was no mention of judicial proceedings, nor even that any such had been filed of record, and then as the master, *merely as such*, could not take an oath, that the charge was not sustained. And the court assented to the objection.³

So, again, upon an indictment for perjury, assigned in an affidavit made before Sir Robert Rich, it was objected, amongst other things, that it was not laid that Sir Robert Rich was a master in chancery, and the court allowed the difficulty, and quashed the indictment.⁴

So, under the Beer Act, 1 Will. 4, c. 64, s. 15, it was held necessary to aver that the justices were acting in and for the division or place where the house was situated, but not that the said justices were acting in petty sessions, inasmuch as every meeting of two justices for business is a petty sessions.⁵ And it seems that in such a case a written information would not be necessary.

Again, where a perjury was charged against the defendant for swearing that one A.B. had sworn several oaths before a justice, judgment was arrested for want of an allegation that the oath was sworn in the county for which the justice acted. The jurisdiction of the magistrate to administer the oath did not appear upon the record.⁶ But these objections seem to be cured by 14 & 15 Vict. c. 100, s. 20.

In a county court case, the indictment stated that the petition was presented under and in pursuance of the several Acts of parliament. Perjury was assigned upon a statement made on oath duly administered on a proceeding upon such petition. "We must take it," said Lord Campbell, "that it was proved at the trial that the prisoner had resided within the district for six calendar months before the filing of his petition." The crown had judgment.⁷

Material to the issue.] It is usual and prudent to allege, where

¹ *The Queen v. Gunn*, 11 Mod. 66.

² *R. v. Dinslow*, Cro. Eliz. 105; 2 Hawk. c. 25, s. 111.

³ *R. v. Ruddy and Howel Gwinn*, 16 Vin. Ab. 308, A. 6.

⁴ *R. v. Bell*, 3 Bulst. 322.

⁵ *R. v. Rawlins*, 8 C. & P. 439.

⁶ *R. v. Wood*, 2 Russ. C. M. 632.

⁷ *Walker v. Regina* (in error), 27 L. J. M. C. 43.

there is any colour at all for such a statement, that certain questions became, and were material, &c. Although (as we have seen) a conviction may be had at common law upon a collateral perjury, in which case it is better to say, that "certain matters then and there arose between the parties," &c.

But, if the proceeding be on the statute 5 Eliz., an allegation as to the materiality of the question becomes indispensable. As, where in a suit in chancery concerning a manor, the defendant swore that the deed of feoffment of the manor was delivered as an escrow. It was said, that the pleading was insufficient, without showing that this oath had reference to the manor in question. It was endeavoured to be answered to this, that the words "*manerium prædictum innuendo*" would cure the omission. But by the court: A man shall not be punished as a perjurer by an innuendo.¹

So, moreover, even at common law, if the materiality of the question be of the substance of the offence, such parts of the original proceedings must be set forth as will demonstrate that fact. Upon an indictment for perjury, it was attempted to be answered to an objection for want of an allegation of this sort, that the defendant could not have been found guilty unless the materiality had been established in evidence. But the judges declared that they could not take that by intendment or inference—it ought to have been expressly alleged.²

A statement that it became and was material to ascertain "the truth of the matter hereinafter alleged to have been sworn to and stated by the said J. G. upon his oath," is not a good averment of materiality.³ It was averred to be a material question, whether the price of a greyhound was given to the defendant before the 12th of September. The defendant swore that he bought the dog on the 6th of September, and had a receipt before the 12th. The question was, whether the sale of the animal was the only material issue, or whether the receipt and the date, the 12th of September, were also material. The judges held, that both the receipt and the date were material.⁴ Again, the defendant swore that he did not see H. L. at all on the 12th of August. It was averred, that it was material for the justice before whom the defendant appeared as a witness, to know whether this was the fact, *i. e.*, whether the defendant did see H. L., but the indictment failed to add, that it was material *in that matter* before the justice, &c. Hence it might have been in some other matter at that time, and therefore the allegation was holden insufficient.⁵ Again, before the

¹ *The Queen v. Bowles*, Cro. Eliz. 428. S. C. cited, 1 Lord Raym. 260. *R. v. Sharp*, Cro. Car. 352. See also, *R. v. Lane*, Cro. Eliz. 148. *R. v. Wallengen*, 1 Sid. 106.

² *R. v. M'Keron*, 5 T. R. 316. Cor. Buller, J., cited there. S. P.

R. v. Bignold, 2 Russ. C. M. 639.

³ *R. v. Goodfellow*, Car. & M. 569.

⁴ *R. v. Overton*, Car. & M. 655.

⁵ *R. v. Bartholomew*, 1 Car. & K. 366.

coroner,—“It then and there became, upon the taking of the said inquisition, a material question whether A. B. had done the duty of W. P.” This was sufficient.¹ Where the defendant was charged with perjury for swearing that he had not retained the prosecutor nor his attorney, the fact of the retainer was held material in the case, and therefore properly so alleged.² And, in the same case, it was the opinion of the court, that although the 6 & 7 Vict. c. 73, requires a prior application from the client before the taxation can be proceeded with, yet that this fact need not appear upon the record. Sufficient had been alleged to show jurisdiction in the judge to grant the summons without that addition.³ If the word “month” in the indictment meant “lunar month,” the dates, though laid under a *videlicet*, might be taken to be the real dates, and thus it appeared that a calendar month, the time required by sect. 37 of the 6 & 7 Vict. c. 73, had expired, before the application to refer the bill for taxation.⁴

Still, it seems unnecessary to aver the expiration of the calendar month, because if the summons had issued from a judge of one of the superior courts, it must be contended that he had power to issue a summons in the absence of proof to the contrary.⁵ In an action in the county court, the prisoner swore she had never been tried at the Old Bailey, and had never been in custody at the Thames Police station. This was held material.⁶ The question as to the materiality should be left to the jury.⁷ In a case of divorce, whether the defendant had gone by the name of A. or B. was deemed immaterial.⁸ E. S. had filed a bill against the defendant J. C. and others, and he prayed that the defendant might answer the premises, that the purchase of certain property belonging to the other defendants might be declared fraudulent and void. The indictment stated, that it then and there became a material question, whether J. C. did advise the other defendants that this property should be sold, and that the said J. C. falsely and corruptly swore, and in and by the said answer denied that he had so advised. This count was held bad, upon a motion in arrest of judgment. “Then and there” could not supply the words “in the said suit,” or words to that effect.⁹ So, where the charge was, that a woman had sworn a child to A., but had denied that A. had ever touched her clothes, her oath, that her master said, he would raise her wages and allow her to lie in at his house, if she would swear the child to some other than his nephew, was held not material.¹⁰

And now, by 14 & 15 Vict. c. 100, s. 20, in every indictment for perjury, or subscribing by oath, &c., the substance alone of

¹ *R. v. Kimpton*, 2 Cox, 296.

² *Ryalls v. Reg.* 17 L. J. M. C. 92. Affirmed in error, 18 L. J. M. C. 69. After verdict, the dates might be regarded as surplusage in order to support the indictment. 11 Q. B. 781.

³ S. C.

⁴ S. C.

⁵ S. C.

⁶ *R. v. Lavey*, 3 Car. & K. 26.

⁷ S. C.

⁸ *R. v. Worley*, 3 Cox, 535.

⁹ *R. v. Cutts*, 4 Cox, 435.

¹⁰ *R. v. Owen*, 6 Cox, 105. *R. v. Goddard*, 2 Fost. & F. 361.

offence needs to be set forth, and by what court the oath was taken, without stating either commission or authority.

A statement that J. K. was in due form of law tried upon a certain indictment then and there depending against him for murder, and that, at and upon the said trial it then and there became and was made a material question, whether, &c., was deemed sufficient, with the aid of the 23 Geo. 2, to show that the perjury was committed on the trial of J. K., for murder, and that the question on which the perjury was assigned was material on that trial.¹ The means by which a murder has been committed need not be set out in an indictment for perjury.²

Further, the judge will discharge the jury if the averment of materiality be omitted.³ Should the materiality, however, appear on the record without an averment to that effect, it seems to be sufficient, according to an intimation which once fell from Abbott, C. J., in a case where the defendant was convicted.⁴ Under the words "such issue" a charge is sustained, although there are several issues, the perjury assigned being material.⁵

It is observable, however, that the judges themselves interfere upon these occasions, and that counsel ought not to insist upon the invalidity of an indictment in so summary a manner, unless, indeed, it may be to suggest a point upon which there can be no doubt.⁶ In the case just referred to, Lord Tenterden thought the indictment good, notwithstanding the interference of counsel before the trial, and there was a verdict for the crown. It was stated, that issue was joined in a cause of *Jacob v. Abraham*, and the cause set down for trial, and appointed for a particular day; and that the defendant in that cause, before that day, made an affidavit before Lord Tenterden, C. J., in which he stated that he had a good defence to the action, which he would be able to prove at the trial, and that some of the bills on which it was brought were void for usury, and perjury was then assigned on these allegations. Lord Tenterden thought that the occasion on which the affidavit was intended to be used might be sufficiently collected from the indictment.⁷

The matter—whether, &c.] The main facts of the indictment now begin. First, the question between the parties. This must be accurately stated. To omit it altogether after stating that a question had arisen would make the indictment *felo de se*. As where upon a charge of a false oath in the star chamber, there was a neglect to show in what matter the defendant had sworn falsely. He was discharged.⁸

¹ *R. v. Dowlin*, 5 T. R. 311, 318.

² *R. v. Lincoln*, Russ. & Ry. Rob. 7. 421.

³ *R. v. Tremearne*, Ry. & M., N. P. C. 147. *R. v. Dunn*, 1 D. & Ry. 10.

⁴ *R. v. Souter*, 2 Stark. 423. So was *R. v. Harvey*, 8 Cox, 99.

⁵ *R. v. Smith*, 1 Fost. & F. 98.

⁶ *R. v. Abraham*, 1 Moo. &

⁷ *Id.*

⁸ *R. v. Stedman*, Cro. Eliz. 137. S. P. *R. v. Lane*, Id. 148. S. P.

Poultney v. Wilkinson, Id. 907; 3 Mod. 122.

So, again, in a more recent case, a count alleged that at the trial of the said indictment, the said J. H. by means of the false and material testimony of the said J. P. in the said first count of this inquisition mentioned, was unlawfully and untruly found guilty, that a rule *nisi* for a new trial was granted, &c., and that thereupon J. S. made an affidavit in writing that what he had sworn at the trial was true; whereas, &c., it was false *in the particulars in the said first count of this inquisition assigned and set forth, &c.* The defendant having been found guilty, and the judges having intimated that the first count was bad for want of the words, wilfully or corruptly, it was argued, that the count above alluded to was also ineffective, because it contained no assignment of perjury, nor any particular evidence given by the defendant, nor even directly stated that he gave any evidence on the trial with reference to which the affidavit is stated to have been afterwards made. The court concurred in the objection, and arrested the judgment.¹ And by Abbott, C. J., "in the ordinary course of pleading, the first step would have been to charge that there had been a trial, and that the defendant was sworn as a witness; the second, that he swore such and such things; the third, that the matter was false and so on. Here there is no distinct averment that the defendant was sworn as a witness, or of what he swore. But the fact of his having been sworn must be taken by intendment."²

So, where an indictment accused the defendant of having sworn to a false schedule of his effects in the Insolvent Debtors' Court, whereas the said schedule did not contain a full, true, and particular account, &c., the lord chief justice ordered the case to be struck out of the list before all the jury had been sworn, for here were allegations absolutely vague and indefinite; no debt was specified as having been omitted, and, therefore, no information was afforded to the defendant of the particular charges against him.³

But where the prisoner swore falsely to the signing of a particular receipt, and it appeared that the person whose receipt was pretended had signed several similar receipts in the prisoner's presence, the proof was held sufficient. Cockburn, C. J., at first doubted, but afterwards said, that it was only necessary to refer to the receipts incidentally, and as introductory to making out the materiality of the evidence upon which the perjury was assigned.⁴

So, upon a charge of perjury, committed before justices, the indictment stated that the defendant, with a view to injure A. by accusing him of felony, did depose and swear, that A. had put his hand into the defendant's pocket, and had taken out a 5*l.* note;

¹ *R. v. Stevens*, 5 B. & C. 246.

² 5 B. & C. 250.

³ *R. v. Hepper*, Ry. & M., N. P. C. 210; 1 C. & P. 608. See also 3 Inst. 167.

⁴ *R. v. Webster*, Bell, 154; 28

L. J. M. C. 200; 1 Fost. & F. 515.

R. v. Hepper was cited for the prisoner.

it was held that the assignment of perjury upon this could not be sustained. No charge of felony appeared to have been previously made, nor that the defendant then made any charge of felony, nor that any judicial proceeding was pending before the magistrate.¹ Whereas an assignment of perjury, which stated the false oath to have been made upon an information and examination, clearly showed that a charge was pending, and upon such an occasion, Patteson, J., distinguished *R. v. Pearson* upon this ground. The judges likewise held the conviction correct.²

No prudent practitioner would hesitate to adopt the words, "falsely, wilfully, corruptly, and maliciously." But indictments without those most material words "falsely and corruptly," have occasionally been placed on the record. As in an information upon the statute, where the defendant was charged with having committed *voluntarium perjuriam*. Per Shute, J.: "This is not enough; it should be *corrupté et voluntarié*."³ On the other hand, *falsé et corruptivé* were held insufficient without *voluntarié*.⁴ Both expressions must be used,⁵ at all events, in an indictment upon the statute; and it would not be safe, perhaps, at this day, to omit them in an indictment at common law, notwithstanding the authority of *Cox's case*. Upon this last occasion, the words "falsely, maliciously, wickedly, and corruptly" were used, and the charge was at common law. It was moved to arrest the judgment for want of the word "wilfully;" but ten judges met, and were of opinion, that the record was sufficient at common law, because the expressions used implied wilful perjury.⁶ It follows from the foregoing decisions, that should both "wilfully and corruptly" be omitted, the count must necessarily be bad. And in a modern case, the judgment was arrested upon that ground.⁷ "Whether the word 'maliciously'" said Abbott, C. J., "might supply the place of either wilfully or corruptly, it is not necessary to determine, for neither of those words are found in the counts in question, and *Cox's case*, which has been referred to, proves, at all events, that such counts are insufficient."⁸

It is observable here, that these expressions are twice used, once in this place and again at the conclusion. It is indispensable to employ them in both places.⁹ And the clause, "so the defendant committed," &c., at the end, will not help a former omission.¹⁰

¹ *R. v. Pearson*, 8 C. & P. 119. S. C. nom. *R. v. Richards*, 7 D. &

² *R. v. Gardiner*, 2 Moo. C. C. R. 665.
95; S. C. 8 C. & P. 737.

³ Sav. 43.

⁴ *R. v. Lembro and Hamper*,
Cro. El. 147. *Kitton v. Walters*,
Hatl. 12.

⁵ Cro. Jac. 508; 2 Hawk. c. 25,
s. 110.

⁶ *R. v. Cox*, Leach, 71.

⁷ *R. v. Stevens*, 5 B. & C. 246.

⁸ 5 B. & C. 250.

⁹ *R. v. Thomas*, Cro. El. 137.

¹⁰ 3 Inst. 167; Mich. 29 & 30
Eliz.; S. P. 27 El. *R. v. Meller*,
Id.; S. P. Anon., Cro. El. 201,
said to be *R. v. Somerland*. 16
Vin. Ab. 321, l. 2, in the notes.
See also *R. v. Tayler*, 1 Show.
190.

Upon another occasion "falsely" was omitted. The count was "feloniously, knowingly, wilfully, and maliciously;" "and so in like manner and form did commit wilful and corrupt perjury." It was held bad.¹

For want of these words "by his proper act," an indictment upon the statute has been holden bad, because both perjury and subornation being mentioned in 5 Eliz., it is necessary that the nature of the perjury should be specified.²

Assignments.] Very considerable accuracy is required in setting forth the assignments. The matters deposed to must be stated in the first instance, and the truth of all these matters must then be negatived. The expression, "in substance and to the effect following" is better than "according to the tenor and effect," because it does not bind the prosecutor to such a verbal minuteness, and it is, therefore, to be preferred. In either case the courts will not suffer a defendant to escape by a mere clerical error. As where the word "understood" in an affidavit was spelt "undertood."³ So, where the indictment had the abbreviations "Mr. and Mrs.," instead of "Mister and Mistress," which words the defendant used.⁴ Or, the words "in manner and form following" may be used. These do not bind the prosecutor to recite instruments verbatim, and, consequently, are not affected by mere omissions and mistakes. The defendant was indicted for perjury in giving his evidence upon an indictment for an assault. This indictment had the words, "*whereby his life was greatly despaired of.*" The indictment for perjury, speaking of the former charge, had these expressions:—"*which indictment was presented in manner and form following, that is to say,*" but it omitted the word "despaired." It was objected hereupon, that the prosecution must fail. Buller, J., however, overruled the objection, observing that this mistake was a mere matter of form, and a substantial recital only was requisite. A rule to show cause why there should not be a new trial was afterwards granted, but it was dropped.⁵

The false oath alleged was, that the defendant "wrote certain words in the presence of D." Now, the presence of D. might be a fact as material as the writing of the words, and, therefore, the assignment above was said to have been well made, and the court would not inquire into the materiality of it.⁶

The rule, nevertheless, extends only to formal omissions or clerical errors. An indictment for perjury before a select committee of the House of Commons concluded the assignments of

¹ *R. v. Oxley*, 3 Car. & K. 317.

² 3 Inst. 167; but see *Cockeril v. Apthorp*, 3 Bulst. 147; 1 Hawk. c. 69, s. 18.

³ *R. v. Beach*, Cowp. 229; S. C. Leach, 133.

⁴ *R. v. Coppard*, 3 C. & P. 59.

⁵ *R. v. May*, Dougl. 193; Leach, 192.

⁶ *R. v. Schlesinger*, 17 L. J. M. C. 29; 10 Q. B. 670.

perjury, which were numerous, thus: "whereas, in truth and in fact, the said E. L. did not tell the said J. L. that his lordship had given his assurance that it should be so, or that the said expenses should be secured; and so," &c. The short hand-writer swore that his note upon this matter was, that his "lordship had given his assurance," without more. It was immediately contended, that there was a material variance, for that the representation of the defendant before the committee was substantially different from that attributed to him in the indictment, and Lord Ellenborough entertained the same view of the case. A person giving his assurance generally, and giving his assurance for the performance of a particular stipulation, are allowed to be entirely different; and if a man swear falsely to several material questions, these may be included in distinct counts. The learned lord was decidedly in favour of the defendant.¹

It is no objection that intervening expressions have been left out which do not concern the point. As where an indictment charged the defendant with having sworn to an assault, and with denying that he had said, "Give it him, give it him—it will go in one account." Upon the evidence, these words were proved; but it appeared that other matter had intervened between the statement of the assault and the words in question, and it was objected that here was a variance. But by Abbott, C. J., "it is immaterial; what intervenes does not vary the effect of what is stated."² It was alleged in an assignment of perjury, that the defendant, at the time of effecting the said policy, that is to say, a certain policy of insurance, purporting to have been underwritten by — Kite, by his agent, Meyer, on the 13th of August, 1807, &c., (and by other underwriters specified in the indictment,) well knew, &c. It appeared, however, that the policy had been underwritten by Meyer for Kite on the 15th of August, and Lord Ellenborough held the variance fatal.³ So where it was alleged, that the defendant swore to a particular fact on the day of the date of a particular memorandum, and of making a certain bill of exchange, without averring that these days were the same days. The assignment of perjury was, that this fact did not happen on the day of the date of the memorandum, and the indictment was held bad for uncertainty.⁴ Perjury was assigned on the fact sworn to have been committed at Norwich, and it was averred that the fact was not committed at the said city of Norwich. This was holden to be a variance.⁵

Innuendo.] We have already said that no innuendo shall be allowed to operate against defendants by attempting to explain

¹ *R. v. Leefe*, Gent. one, &c. *Callanan*, 6 B. & C. 102; S. C. 2 Campb. 134. ² *R. v. Solomon*, Ry. & M., N. P. C. 252. And see *R. v.*

³ *R. v. Hucks*, 1 Stark. 521.

⁴ *R. v. Burraston*, 4 Jur. 697.

⁵ *R. v. Stone*, 1 Show. 335.

facts which are obscurely alleged. It was charged that the defendant had deposed this: Master G. S., about the middle of July, 1681, was at Newnam, and the information then went on to show where Newnam was, but only in the innuendo. And judgment was arrested for this cause, after several arguments.¹ The use of the innuendo is to explain mistakes or ambiguities. An indictment, after assigning perjury concerning an assault, added, "and at the same *time* threatened to shoot her with a pistol." The information, however, when produced from the Bow Street office had the words "and at the same threatened to shoot her," &c. It was contended that the word *time* being left out, here was a fatal variance, and Lord Ellenborough acceded to the objection. There should have been an innuendo, for the information might have meant at the same place. The defendant was acquitted.²

If there be no occasion for an innuendo, it may be rejected.³

Lastly, it may be added, that if there be but one good assignment, it is sufficient to warrant a judgment for the crown. This was laid down positively by Holt, C. J., in a case where a general verdict had passed for the crown.⁴ And the usual ending, that so the defendant has committed perjury, must be preserved.⁵ Of course, care must be taken not to say, "against the form," &c., if the thing charged be only a perjury at common law.⁶

Information.] An information at common law is said not to require so much certainty as an indictment, whether the latter be at common law or on the statute. Thus, where the information was for perjury upon interrogatories administered in chancery, it was objected, that it had not been shown in what particular one the defendant had been perjured. But the court overruled the objection, saying, that each perjury was punishable by the common law, although they admitted that greater certainty was requisite under the statute.⁷ And an *indictment* at common law demands the same certainty as the statute of Eliz.⁸ It is observable, that the judge at the trial is to notice a variance between the information and the record, and that it is not by any means the province of the jury to do so. As where a matter of this sort had been permitted to be found specially, the court said, that the jury could not have any conusance on the subject. The judge at the trial

¹ *R. v. Gripe*, 1 Lord Raym. 256. *R. v. Chedwicke*, 1 Keb. 612, 635.

² *R. v. Taylor*, 1 Campb. 404.

³ In *R. v. Aylett*, 1 T. R. 70. In *Roberts v. Camden*, 9 East, 93.

⁴ *The Queen v. Rhodes and Cole*, 2 Ld. Raym. 886.

⁵ *R. v. Read*, Tho. Raym. 34. Sid. 66.

⁶ *R. v. Bell*, 3 Bulstr. 322. As to the effect of the word "knowing," as knowing the matters sworn to be false. See *R. v. Lady Lawley*, 1 Barnard, 263, 274, 287, 293, 459.

⁷ *R. v. Wallengen*, 1 Sid. 106.

⁸ Carth. 422, per Holt, C. J.

ought to have determined it. *A venire de novo* was accordingly awarded.¹

Indictment.—County Court.] An indictment for perjury in the county court, committed by a party examined as a witness on his own behalf, needs not to conclude, *contra formam statuti*. Martin, B., said it was perjury at common law.² With regard to the bill, it may be observed, in the first place, that an objection that the indictment had stated the bill to have been directed to Robert Lord Henley, &c., whereas in fact it was directed to Sir Robert Henley, Knight, &c., was overruled in *R. v. Lookup*.³

Answer in Chancery.] The statute 23 Geo. 2, operated to prevent a variance in consequence of a misdescription of the parties to a bill. An indictment stated, that a bill was filed in chancery by one T. against the defendant *and another*. The bill appeared to have been filed against these persons and the attorney-general. The matters, which were material, lay between the defendant and T. It was objected, that the omission of the attorney had created a fatal variance, but Lord Ellenborough said, that it would have been sufficient if the indictment had even omitted the mention of any other than the defendant. The statute would be entirely defeated should such subtleties prevail.⁴ But in a case where the indictment purported to set out the *substance and effect* of the bill, and stated an agreement concerning houses, Abbott, C. J., held that the word "house," which appeared in the original bill, disclosed a fatal variance, being a difference in substance from houses, and the defendant was acquitted.⁵

If an answer be imperfectly entitled, it cannot be treated as a mere nullity. An answer was alleged in the indictment as an answer to the bill of J. C. Aberdeen, whereas the person's name was F. C. Aberdeen. The court having decided that the variance between J. C. A. and F. C. A. was not fatal, held also, that the answer above entitled could not be deemed void.⁶

Affidavit to hold to bail.] As to venue:—If an affidavit be assigned as the perjury in answer to an original application in any court, there is no need to show where that court was, there being a venue as to the false oath.⁷

A bill of Middlesex was described wrongly on one occasion, as issuing out of the office of the chief clerk assigned to inrol pleas, &c., and the court refused to consider these words as surplusage, upon which the prosecution was abandoned.⁸

¹ *Rex v. Sykes*, Tho. Raym. 202. That a party shall not take advantage of errors in the first record, when perjury is assigned upon matters sworn at a trial. See *R. v. Wright*, 1 Sid. 148; Tho. Raym. 74.

² *R. v. Morgan*, 6 Cox, 107.

³ Cited, 1 T. R. 240.

⁴ *R. v. Benson*, 2 Campb. 509. *R. v. Powell*, cor. Abbott, C. J.; Ry. & M., N. P. C. 101.

⁵ *R. v. Spencer*, Ry. & M. N. P. C. 97.

⁶ *R. v. Roper*, 1 Stark. 518.

⁷ *R. v. Crossley*, 7 T. R. 315.

⁸ *R. v. Schoole*, Peake, 112.

If the affidavit be sworn in the country, the expression usually is, "Before E. F., gentleman, then being a commissioner duly authorized and empowered to take and receive affidavits touching and concerning matters and proceedings of or in the court of our said lord the king, before the king himself, to wit, on. &c., at, &c." An indictment charged, that the affidavit was sworn before A. without naming him as a commissioner otherwise than saying at some distance *as such commissioner as aforesaid*, when the word commissioner had not been before used, and Scarlett moved to arrest the judgment. But the court held that it was not necessary to set out the nature of the authority. It had been alleged that A. had power to administer the oath, and that, together with his name, was sufficient.¹

It is usual to add the words *prout patet*, and in indictments upon the statute of Eliz. they are necessary, but it has been solemnly decided, that the omission of the *prout patet* at common law will not vitiate the indictment.²

On the production of an affidavit charged to be false in the indictment, it appeared that the parts set forth were not continuous, but that they were separated by the introduction of other matter. This was pointed out as a variance; but Abbott, C. J., overruled the objection, and the court refused a rule for a new trial.³

The defendant was indicted in Middlesex for perjury committed in an affidavit, and the indictment concluded with a *prout patet* by the affidavit, as filed at Westminster. He was acquitted, but was again indicted for the same offence, with this difference, that the affidavit was here stated to have been sworn in *London*, and there was an averment traversing the jurat, and alleging that the defendant was, in fact, sworn in Middlesex. To this charge the defendant pleaded *autrefois acquit*, and the court gave judgment in his favour, because the jurat was not conclusive evidence of the place of swearing the affidavit, and the whole crime might, consequently, have been tried upon the first indictment.⁴

Indictment for subornation of perjury.] Where the words were, "by sinister means," caused, &c., the court held the allegation sufficient, although the means were not specified.⁵ The words "solicit, persuade," &c., imply that the oath was actually taken, and this is necessary, because there cannot be a subornation without a perjury.⁶ But the attempt to suborn is a heinous offence, and will be severely punished by the court.⁷

Where the indictment charged the defendants *and each of them*, with a suborning of four witnesses, *and each of them*, it was objected, that here were several charges joined in one indictment,

¹ *R. v. Callanan*, 6 B. & C. 102.

² *R. v. Crossley*, 7 T. R. 315.

³ *R. v. Callanan*, 6 B. & C. 102; and see *R. v. Solomon*, Ry. & M., N. P. C. 252.

⁴ *R. v. Emden*, 9 East, 437.

⁵ *The Queen v. Rhodes and Cole*, 2 Ld. Raym. 886.

⁶ 2 Ld. Raym. 886, *ut supra*. *R. v. Hinton & Brown*, 3 Mod. 122; *The Queen v. Darby*, 7 Mod. 101.

⁷ *R. v. Johnson*, 2 Show. 2. *R. v. Tayler and another*, 2 Keb. 399.

and likewise, that it was too general to swear that one H. *and* his brother had committed perjury. The court made a rule to show cause.¹

By 14 & 15 Vict. c. 100, s. 21, in every indictment for subornation of perjury, or for corrupt bargaining, &c., or inciting, &c., unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly to take, &c., any oath, affirmation, &c., it shall be sufficient when the perjury has been committed, to allege the offence as above, and then to allege that the defendant unlawfully, wilfully, and corruptly, did cause and procure, &c. And when no perjury has been committed, the substance of the offence will suffice without setting forth any of the matters hereinbefore rendered unnecessary to be set forth. And by sect. 22, a certificate containing the substance and effect of the indictment and trial, and signed by the clerk of the court, &c., shall be sufficient evidence of such indictment.

Indictment for perjury before a committee of the House of Commons.] In an indictment for perjury before a committee appointed to try a petition concerning the borough of New Malton, a count stated, that an election took place "*by virtue of a certain precept of the high sheriff of the county aforesaid, duly issued to the bailiff of the said borough of New Malton,*" &c.² The precept of the sheriff being produced at the trial, it appeared to be directed, "To the bailiff of the borough of *Malton*." Upon this it was objected, that the precept in the indictment being concerning *New Malton*, there was a variance. But Lord Ellenborough held, that it was not matter of description, and that if the precept was actually issued to the bailiff of the borough of New Malton, it was sufficient, whatever might be the tenor of the direction.³ But the *return to the Crown Office* stated, that the members, naming them, were returned for the borough of *Malton*, and the objection was renewed with effect. It was insisted for the prosecution, that the indictment did not profess to set out the tenor of the return, or the manner in which the members were returned, and that the words *Malton* and *New Malton*, were used indiscriminately in the journals of the House of Commons. But Lord Ellenborough said, that this averment must be understood as a description of something, and the defendant was accordingly acquitted for this variance.⁴

Indictment for perjury before a magistrate.] The indictment for perjury before a magistrate should state, that the offence was committed upon an information and examination. The words "say, depose, swear, charge," and "*give the said justice to be*

¹ *R. v. Longbotom and another*, 1 Barnard. 314; and *Giles v. Gwyn* was cited, and it was said the indictment there was held bad for the first exception.

² But it is better to say, that an

election "came on," &c., without mentioning the precept.

³ *R. v. Leefe*, 2 Campb. 139.

⁴ *R. v. Leefe*, 2 Campb. 141. See also *R. v. Harris*, 5 B. & Ald. 926.

informed," were deemed applicable.¹ On the contrary, where it did not appear that a charge was made or pending, the indictment was held insufficient.² If the perjury be committed at quarter sessions, the chairman is not a competent witness.³

So, to allege, that before M. G., Esq., and T. H. H., clerk, two of the justices, &c., "J. O. came and exhibited a certain information upon oath," was held insufficient, because it did not thereby appear that J. O. was sworn before M. G. and T. H. H.⁴ So, where a deposition is required by statute (as under 6 & 7 Will. 4, c. 65, s. 9,) the absence of such deposition will render the proceedings informal, and a witness for the defendants, who was said to have sworn falsely before the justices, was held not rightly convicted of perjury.⁵

Commissioners of assessed taxes.] The indictment alleged a certain notice of appeal to the assessors. The evidence disclosed a notice of appeal to the surveyors of the commission. This was a fatal mistake, because it is necessary to set out all particulars incident to the jurisdiction.⁶

Of evidence in perjury.] It is said that a party may be punished instantly by the court on the evidence, as it were, of his own confession, *in facie curiæ*. Thus, where a party having sworn to an affidavit in the Court of Common Pleas, appeared in the King's Bench upon a summons, and confessed the falsity of his oath, the court ordered that he should be set in the pillory.⁷ So, bail who prevaricate, may be committed and punished, if the court see fit.⁸

It is important to observe, that throughout all the proceedings for different perjuries, the oath charged against the defendant must be proved to have been deliberately false to the satisfaction of the jury. Mistake, error, inadvertence, are not sufficient grounds for preferring so grave a complaint as perjury.⁹ If a defendant have uttered two contradictory statements upon oath, the course is to point out specifically in the indictment which of the oaths was corrupt, and then to give evidence of the testimony thus given in two ways. This proof will be sufficient without the form of two witnesses, as on other occasions of perjury, and also without showing a corrupt motive, or negating the probability of any mistake. Because, in fact, in such a case the contradiction actually arises on the side of the defendant himself.¹⁰

Witnesses.] The principal observations, however, which we have to make on the general head of evidence apply to witnesses. These

¹ *R. v. Gardiner*, 2 Moo. C. C. 95; 8 C. & P. 737.

² *R. v. Pearson*, 8 C. & P. 119.

³ *R. v. Gazard*, 8 C. & P. 595.

⁴ *R. v. Goodfellow*, Car. & M. 569.

⁵ *R. v. Scotton*, 8 Jur. 409.

⁶ *Rex. v.*—1 Cox, C. C. 50.

⁷ *R. v. Thorogood*, 8 Mod. 179.

⁸ 1 Chit. Rep. 116.

⁹ See 2 Hawk. c. 69, s. 2, citing authorities; and see also s. 7.

¹⁰ *R. v. Knill*, 5 B. & A. 923, n. As to averment of identity, see *R. v. Bennett*, Den. & P. 290.

persons may be considered here in reference,—first, to their number,—secondly, to their competency.

First, it used to be established as a general principle, that two witnesses or proof were necessary to convict a defendant of perjury, and for this simple reason, that there must be a majority of oaths against the accused. Thus, by Parker, C. J., “presumption is ever to be made in favour of innocence, and the oath of the party will have a regard paid to it until disproved. Therefore, to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant, for else there is only oath against oath.”¹ And the court at the Old Bailey laid down this point still more decidedly on one occasion, observing that this must be so upon each assignment of perjury. The law, they said, will not leave it to the jury to determine which oath they will believe, because the person indicted for perjury has already sworn one way.² So, that if there be but oath against oath, the defendant must be acquitted.³ There is an exception, however, to this rule, and it is where the defendant has created evidence against himself. A person named Knill, was convicted of having sworn contradictory oaths, the one before the House of Lords, the other before a committee of the House of Commons. One witness only deposed to the contradictions, yet the court denied a rule *nisi* for a new trial, because the contradiction had happened through the party’s own agency.⁴ So, where there was one *viva voce* witness against the defendant, and a document written by himself contradicting his own statement upon oath.⁵ Moreover, two witnesses are not essentially necessary to disprove the fact which has been sworn to, for if a material circumstance be proved by another witness, it may turn the scale, and warrant a conviction.⁶

So, where the defendant swore that certain invoices were produced by him, D. C., C. was the only witness, and he denied the statement, adding, that the defendant had produced other invoices of the dates of which he made a memorandum. This was held

¹ 10 Mod. 194. S. P. R. v. *Broughton*, 2 Str. 1230. S. P. R. v. *Naylock*, Suppl. to Vin. Ab. vol. 5, p. 379, K. 3, O. B. 1786. R. v. *Browne*, M. & M. 318; 3 C. & P. 572. See 2 Lew. C. C. 259.

² R. v. *Ledwick*, Suppl. to Vin. ut supra, p. 380, O. B. 1788.

³ R. v. *Fanshaw*, Skin. 327.

⁴ R. v. *Knill*, 5 B. & A. 929; ante.

⁵ R. v. *Mayhew*, 6 C. & P. 315.

⁶ R. v. *Lee*, 2 Russ. C. M. 650. See also R. v. *Mudie*, 1 Moo. & Rob. 128. The defendant’s account book, given in by him to the Insolvent Debtors’ Court, was put

in, and several persons whose names were specified in the indictment as debtors, and omitted in the schedule, appeared in the book as debtors to the defendant, and “paid” was marked to their accounts in the defendant’s writing. These persons were called, and stated that they did not pay until after the petition and schedule. It was objected, that here was merely oath against oath, and Lord Tenterden, though he would not stop the case, thought the point worthy of discussion. The defendant, however, was acquitted upon another ground.

corroborative evidence.¹ And the ruling now is, that every part need not be doubly sworn to. It was sworn by the defendant, that A. was not out of his sight between eight and nine A.M. Assignment upon this, one witness proved, that A. was, in fact, at one place, and another witness proved that A. was, in fact, at another place six miles off between those hours. This was held sufficient.² But where the indictment alleged that the defendant swore that he did not play at cards from between six and seven until nine, and then assigned perjury, by an averment that he did play between six and eight, it was held bad. The defendant might have played at five minutes past six, and yet not have played from between six and seven until nine, for the words "from between six and seven" might be any time short of seven, five minutes or five seconds to that hour.³ The prosecutor swore that the prisoner owed him a quarter's rent; the prisoner denied this upon oath at nisi prius, in June, 1851. The son of the prosecutor swore to an admission by the prisoner, that in August, 1850, he owed three or four quarters' rent. This was held insufficient, for the money might have been paid immediately.⁴ Something must be shown likewise to prove that the oath of the prosecutor is preferable to that of the defendant, upon which perjury has been assigned.⁵

If a defendant makes distinct admissions inconsistent with his innocence, one may be proved by one witness and one by another.⁶ And upon one occasion the defendant was allowed to convict himself without any further proof. As where the question was concerning the presence of certain women at a riot at his mill. He gave information upon oath before a justice, that they were so present, and then, having been tampered with, he swore at the trial that they were not at the riot; and Yates, J., deemed this evidence of itself sufficient, and the defendant was convicted upon it alone, and transported.⁷ However, this case does not seem to have been presented to the notice of a learned judge upon a much more modern inquiry. A witness at sessions contradicted the entire of his deposition before the magistrate, and perjury was assigned accordingly. Gurney, B., held this proof insufficient. In order to convict the defendant, the jury ought to have been satisfied either that the testimony given at the sessions was false according to the charge, or that the deposition was true.⁸ *A fortiori* if the evidence is only confirmed in some slight particulars, it will

¹ *R. v. Webster*, 1 Fost. & F. 515.

² *R. v. Roberts*, 2 Car. & K. 607.

³ *R. v. Whitehouse*, 3 Cox, 86.

⁴ *R. v. Boulter*, Den. & P. 396; 3 Car. & K. 236; 21 L. J. M. C. 57.

⁵ S. C.

⁶ *R. v. Hook*, 27 L. J. M. C. 222; Dears. & B. 606.

⁷ Anon., 2 Russ. C. M. 652. And in this opinion Lord Mansfield, Wilmot and Aston, JJ., concurred. Id. note (u); one oath being said to disprove the other. Id. 545.

⁸ *R. v. Wheatland*, 8 C. & P. 238.

be insufficient.¹ So where there was the contradictory oath of the prosecutor, but nothing more, excepting the oath of a woman, who counted certain monies agreeably to the evidence of the prosecutor, but whose evidence was not independent of that evidence.² Something more than the oath of one witness will suffice, but it must be *independent* testimony.³ There needs not be a direct contradiction.⁴

Secondly, we go on to examine the competency of witnesses in perjury,⁵ but many of the following cases are scarcely now applicable by reason of the Act 6 & 7 Vict. c. 85.

Where an action had been brought by B. against C., it was held, that C. could not be examined as a witness upon an indictment for perjury against A., who had given evidence at the trial.⁶ And Mr. Noland in a note to *Strange*, expresses the same opinion, taking a distinction between cases at common law and those upon the statute.⁷ But, on the other hand, Mr. Phillipps observes, that the party injured may be a witness, according to the sense of modern decisions, whether the prosecution be at common law or upon the statute, since, as in an action to recover his moiety, he would be precluded from giving the conviction in evidence, the objection to his competency would seem to be removed.⁸ However, at common law, it was considered, that the party injured might be a witness,⁹ and so it continued to be held, until a notion prevailed that the witness would reap some advantage from the conviction, for instance, that the Court of Chancery would relieve against the consequences of a judgment obtained by perjury. Thus it was said, that in perjury, a person should not be received to give evidence as prosecutor, because he might reap a benefit in case of a verdict for the king.¹⁰ The same law was afterwards laid down where certain defendants in an ejectment were refused as witnesses by the lord chief justice, in an indictment for perjury committed upon the previous trial.¹¹

So, a party who had been compelled to pay a sum of money through the evidence of the defendant, the only witness examined, and who had filed a bill for relief, was rejected, for the Court of Chancery, said Lord Kenyon, upon having this new matter stated in a new or supplemental bill, would direct that the money should be refunded.¹²

So, where a verdict had passed against the prosecutor in consequence of the testimony of the defendant in perjury, Lord Kenyon

¹ *R. v. Yates*, Car. & M. 132.

² *R. v. Braithwaite*, 8 Cox, 254, 444.

³ S. C.

⁴ *R. v. Towey*, 8 Cox, 328.

⁵ *R. v. Povey, Lambert, and others*, 1 Sid. 237.

⁶ *R. v. Bacon*, 2 Ro. Ab. 697. See Bull. N. P. 288, *et seq.*

⁷ 2 Str. 1104, note (1); S. P.

by Sir. W. D. Evans, 1 Salk. 283, note (a).

⁸ Phil. on Ev. 4th ed. p. 120.

⁹ Bull. N. P. 289.

¹⁰ *R. v. Whiting*, 1 Salk. 283;

1 Ld. Raym. 396.

¹¹ *R. v. Ellis*, 2 Str. 1104. S. P.

R. v. Newens, 4 Geo. 1, cited there.

R. v. Nunez, 2 Str. 1043. Cas.

T. H. 265.

¹² *R. v. Dalby*, Peake, 16.

would not suffer the prosecutor to be sworn, he having admitted that he had not paid the debt and costs. It was said, that the bail had been fixed, and would, therefore, be liable at all events, but Lord Kenyon said, that the prosecutor might be relieved in a court of equity against a judgment obtained on the sole evidence of the defendant, in case of a conviction, and the proposed witness was, consequently, rejected.¹

These decisions, however, were at length doubted, and afterwards overturned after considerable discussion. Lord Hardwicke first threw out a hint that *R. v. Whiting*, upon which the other cases followed, was a case in which the credit, rather than the competency, of the witness was at stake,² and in a few years afterwards, a decision was made the other way. There was an indictment against a defendant for a fraudulent oath supposed to have been taken in chancery, and the prosecutor tendered himself for the purpose of being examined. The chief justice (Sir William Lee) received his testimony, saying, that as no bill of exceptions lay, the prosecutor would otherwise be without remedy, whereas the defendant, if convicted, might move for a new trial. Lee, C. J., said further, that in *Nunez's case*, the suit in the exchequer was then still pending, whereas here, the suit in equity seemed at an end. The defendant, however, was acquitted, because there was only one witness against him.³ The next case was mentioned by Lord Mansfield in giving judgment upon a question, whether the borrower was competent to prove usury.⁴ The defendant had bought an estate for the plaintiff; he articulated in his own name, and refused to convey, and by his answer denied any trust. The bill was dismissed, and the defendant was indicted for perjury, and convicted on the evidence of the plaintiff in equity confirmed by circumstances, and by the declaration of the defendant. The plaintiff then petitioned for a supplemental bill in nature of a bill of review, stating the conviction, but the petition was dismissed because the conviction was not evidence.⁵ However, the point was finally decided in a solemn manner soon afterwards. The defendant, in an indictment for perjury, had brought an action against the prosecutor, who filed a bill against him in equity for a discovery and an account, and obtained an injunction. The defendant then denied the allegations of the prosecutor, and obtained a dissolution of the injunction, upon which he was indicted for perjury. The cause and the indictment came on to be tried at the same assizes, the indictment standing first, and the court held, that the testimony of the prosecutor should be received, because he could not avail himself of the conviction, either at law or in equity. The court added, that they could not accede

¹ *R. v. Eden*, 1 Esp. 97.

² Ca. Temp. Hardw. 359; and see Bull. N. P. 283, note (a).

³ *R. v. Broughton*, 2 Str. 1229.

⁴ *Abrahams q. t. v. Bunn*, 4 Burr. 2251, and held that he was. This case confirms the overturning

of the decision above enumerated.

See *R. v. Menetonè*, Peake, 12; cited. *R. v. D'Faria*, Id. 104.

R. v. Pepys, Id. 138.

⁵ *Bartlett v. Pickersgill*, 4 East, 577, 581; 4 Burr. 2255.

to this objection on the part of the defendant without breaking in upon the authority of *Smith v. Prager*,¹ and *Bent v. Baker*,² where it was decided that where a party is not immediately interested in the cause, nor has any interest in the event in support of which the verdict in that cause may be given in evidence by him in any other proceeding instituted by or against him, he is a competent witness. The rule, therefore, which had been obtained for setting aside the verdict and granting a new trial was, accordingly, discharged.³ However, in a later case, where it was clearly admitted that a person who had not paid the debt and costs of a prior action, was not rendered incompetent as a witness for the prosecution, he was, nevertheless, held to be disqualified upon the disclosure of the additional circumstance that he expected the defendant to be a witness against his interest in a similar action coming on for trial after the indictment. This was such an immediate interest as rendered him incompetent.⁴ And, in chancery pending a suit, the complainant's testimony has been rejected.⁵ A. had agreed to indemnify B.'s partners against a suit in chancery which they had instituted against him. A. was indicted for perjury in his answer. Here B. was a good witness against A., notwithstanding the guarantee.⁶

It is no objection to a witness that he has sworn to the fact which he is about to depose to in an indictment for perjury. As where the defendant had filed a cross bill against a witness who, in her answer, had sworn to the very fact she was brought forward to prove upon an indictment. Because her answer would not help her in the Court of Chancery, since other evidence must be adduced there before she could prove her case, and so she could not be said to have an immediate interest in the event of the suit.⁷

Evidence to prove a general indictment for perjury.] The chief points of evidence which tend towards the proof of an indictment for perjury are:—1, the proceedings in which the offence was committed; 2, the oath of the defendant; 3, the matter sworn to; and 4, the assignment of perjury.

First, as to the proceedings.⁸ To show the nature of the cause in which the perjury took place as alleged in the indictment, it is usual to produce the record of the court.⁹ If the trial be for a perjury committed at the assizes or sittings, produce an office copy of the record, or the *nisi prius* record.¹⁰ The production of

¹ *Smith q. t. v. Prager*, 7 T. R. 60.

² 3 T. R. 27.

³ *R. v. Boston*, 4 East, 572; And see *Needham v. Smith*, 2 Vern. 464; 1 Campb. 10.

⁴ *R. v. Hulme*, 7 C. & P. 8.

⁵ *R. v. Fanshaw*, Skin. 327.

⁶ *R. v. Yates*, Car. & M. 132.

⁷ *R. v. Pepys*, Peake, N. P. C. 138.

⁸ Note, that all formal proofs

must be admitted at the trial, or the judge will direct an acquittal. *R. v. Thornhill*, 8 C. & P. 575.

⁹ The chancellor will take care that all proper documents in his court shall be produced. See *Mont. Bank. C.* 214. And so will the lord chief baron, security being given for the safe return of the record. 2 Y. & Jer. 512.

¹⁰ Arch. Crim. Pl. p. 366.

the *postea*, though no evidence of the verdict, is enough to show that a trial took place, so as to introduce an account of what a witness swore at the trial.¹ So, that where an objection was made that a copy of the final judgment ought to have been produced, it was overruled.²

So also, though no *postea* be indorsed, but only a minute of a verdict, the *nisi prius* record is evidence for this purpose, and the examination of one defendant after his acquittal may be proved by parole evidence.³ But if no record is made up, so that it does not appear whether any trial has happened or not, the minutes will not be received, for the main link is wanting in such a case.⁴

It is not competent to travel out of the record, nor to introduce new matter into the proceedings. Therefore, where the defendant was charged with perjury before a magistrate, it was held, that parole evidence could not be brought forward to aid the written deposition by showing other matters sworn to by the defendant upon the same occasion.⁵ But where a document failed to show the presence of certain justices at sessions, by reason of its being faulty as a record, it was held, that parole evidence might be adduced to show the presence of those justices according to the statement made in the indictment.⁶

We must next show that the defendant took an oath. The particular mode of swearing, however, need not be testified, and proof that the party was sworn and examined will satisfy the allegation in the indictment that he was duly sworn, &c.⁷

Thirdly, the matters sworn to must be given in evidence. Should the count allege that the defendant swore certain matters in *substance and effect* (which is not a desirable or prudent allegation), it must be proved that the defendant swore the whole in *substance and effect* of that which is set forth in the count as his evidence. For want of being able to do this the count will fail.⁸ And this rule holds, although there be distinct assignments of perjury in that count.⁹ It is moreover necessary to give the whole of the evidence sworn by the defendant referrible to the fact on which the perjury is assigned. For the defendant may have explained an apparent falsity in a subsequent part of his examination. Therefore, if there be two answers in chancery relative to the same matter, it would be competent for the defendant to prove that the second answer contained a satisfactory

¹ Per Pratt, C. J. Str. 162.

² *R. v. Minns*, *R. v. Iles*, cited, Bull. N. P. 243.

³ *R. v. Browne*, M. & M. 315; 3 C. & P. 572. This case shakes the authority of a decision made by Lord Kenyon upon a trial for perjury, where it appeared that the *postea* had not been indorsed. *R. v. Page*, 6 Esp. 83.

⁴ *The Queen v. Carter*, 6 Mod. 168.

⁵ *R. v. Wylde*, 6 C. & P. 380.

⁶ *R. v. Bellamy*, Ry. & Moo. N. P. C. 171. See also *R. v. Ward*, 6 C. & P. 367.

⁷ *R. v. Rowley*, Ry. & M., N. P. C. 302.

⁸ *R. v. Leefe*, 2 Campb. 134.

⁹ *Id.*

explanation of the first, in which case he would be entitled to an acquittal.¹ And Lord Kenyon directed an acquittal where the witness who had taken down the defendant's evidence proved the words on which the perjury was assigned, but could not speak to any other part of his evidence, and his lordship mentioned *Carr's case*.²

But where the witness stated, that he took no note of the evidence, but that from his duty as attorney's clerk he had paid particular attention, that he would not undertake to say that he had given the whole of the defendant's testimony, but that he would swear that nothing else was said which qualified what he had stated, and that to the best of his recollection he had given all that was material to this inquiry and relating to the transaction in question, Littledale, J., received the evidence, and the prisoner was convicted, and the judges subsequently expressed their approbation of the decision.³

So, where three witnesses stated, that the defendant swore certain matters, but admitted that they did not take down the evidence as it was given, nor did they even profess to relate the whole of the evidence so sworn, the proof was allowed.⁴

So, where an answer on a cross-examination was quite foreign to the general merits of the case, upon an indictment for perjury in this particular, it was held sufficient to prove all the cross-examination, only because that was entirely unconnected with the original examination.⁵

It also lies upon the prosecutor to show that the matters sworn to were material,⁶ or, at all events, bore in some way upon the question at issue; and this proof lies upon the prosecutor, for it will not be taken by intendment.⁷

The statement of a deceased witness being tendered in evidence for the prosecution, certain declarations of the same witness, not upon oath, were proved upon cross-examination, and although these were material to the defendant, they were held to have been properly rejected, not being on oath.⁸ A notice of set-off, intitled in a cause A. B. v. C. D., and signed by C. D.'s attorney, will not satisfy an allegation that a cause was depending between A. B. and C. D.⁹

Lastly, the assignment of perjury must be proved as laid. And this must be done by showing, that the matter sworn to was really false, and not merely supposed to be so from the circumstance of the defendant having written a letter to that effect, or otherwise. The recital of a deed is evidence in other cases, but not to prove

¹ *R. v. Carr*, 1 Sid. 418; 2 Ves. & B. 258.

² *R. v. Jones*, Peake, 38.

³ *R. v. Rowley*, Ry. & M., N. P. C. 299; 1 Moo. C. C. 111.

⁴ *R. v. Munton*, 3 C. & P. 408.

⁵ *R. v. Dowlin*, Peake, 170.

⁶ Under the statute they must

have been immediately material, but indictments are rarely preferred now on 5 Eliz.

⁷ Supp. to Vin. Ab. vol. 5, p. 379, K. 9. See also *R. v. Jary and King*, Palm. 382, 535; Ld. Raym. 889.

⁸ *R. v. Parker*, 3 Dowl. 242.

⁹ *R. v. Stoveld*, 6 C. & P. 489.

perjury, nor a letter of the party indicted, though sworn to be the handwriting of the defendant.¹

Where perjury was assigned upon a statement by the defendant, that his property qualification was 300*l.* a year, in order to enable him to sit in parliament, it was held, that the jury must be satisfied of the negative of this qualification, and likewise of the guilty knowledge of the defendant respecting it.²

And if one assignment be shown to be good, there must, upon a general verdict, be judgment for the crown,³ unless, indeed, several assignments be crowded together into one count, and there be an allegation that the defendant swore *in substance and effect*, in which case all the assignments in that count must be proved.⁴

An award made pursuant to an order of *nisi prius* is not evidence against the defendant, if produced merely as proof that nothing was due to him. The defendant was charged with perjury arising from an application for a *capias* against the prosecutor for 50*l.* An award was put in showing that nothing was due to the defendant. But the court held, that it had been improperly received in evidence. Not because the truth of the statement was necessarily inconsistent with the defendant's believing it to be true, for the defendant's knowledge of its falsehood would require to be proved by other evidence, but because the decision of the arbitrator in respect of that fact, was no more than a declaration of his opinion, and there was no instance of a declaration of such opinion being received in evidence of a fact against the party to be affected by the proof of it in any criminal case.⁵ In perjury, that A. made B. executor, the probate must be produced; to prove that A. devised real estates, the original will must be brought forward, and one of the attesting witnesses called.⁶ In an indictment for perjury, an averment stated a suit in the prerogative court to dispute the validity of a codicil. The production of the original allegation of both parties, signed by their advocates, with proof of their signatures, and of their acting as advocates in that court, was held sufficient without the *caveat*. The allegations were produced from the registrar of the court.⁷

Answer in Chancery.] In this case it is necessary to prove:—1. The bill. 2. The answer, and that it was made on oath before a

¹ *R. v. Carr*, 1 Sid. 418. The defendant was indicted for perjury, he having sworn falsely to his schedule of debts. It was proposed to show, that persons, whose names were *not* mentioned in the indictment, were also debtors to the defendant, and omitted in the schedule; but Lord Tenterden would not permit it. *R. v. Mudie*, 1 Moo. & Rob. 128.

² *Sir J. E. de Beaumont*, 7 C. & P. 17.

³ *The Queen v. Rhodes and Cole*, 1 Ke. 213.

⁴ See *R. v. Buckworth and others*, 1 Sid. 377. It is not competent for a defendant to offer evidence to disprove an assignment of perjury upon which the prosecutor offers no evidence. *R. v. Hemp*, 5 C. & P. 468.

⁵ 17 L. J. Q. B. 187. *R. v. Moreau*, 11 Q. B. 1028.

⁶ *R. v. Turner*, 2 Car. & K. 732.

⁷ S. C.

master in chancery. 3. The falsity of the matters contained in the answers.

First, the bill is produced, or an examined copy, and then the answer, but it is worthy of attention, that no copy of the answer can be received. The *original* of that instrument must always be brought forward in prosecutions for perjury. It is said, however, that, perhaps, a copy might be sufficient to warrant the grand jury in finding the bill of indictment, although the original must, of course, be produced at the trial.¹

A copy of the bill, however, has been admitted, but, if the bill be taken off the file, it is not evidence.²

In proceeding upon an answer to a bill before amendment, the amended bill was put in, and the amendments were proved to have been made by the clerk according to his duty, but the person who actually wrote these corrections was not called. Lord Tenterden held that these proofs were sufficient, and that the amendments were not material to the case.³ But if, upon exceptions, a second answer to a bill be sent in, the defendant has a right to have that also read in order to explain what he had said in his first answer.⁴

Next, it must be shown that the answer was put in upon oath before a master in chancery. And this is done by proving the jurat, and that the name subscribed is the defendant's handwriting. The defendant's signature proves that he was the person who exhibited the answer, and the signature of the master is proof that the person who did exhibit it was regularly sworn to the truth of its contents. Therefore, where the answer purports to be sworn before a master, it is sufficient to prove the handwriting of the master, and that of the defendant.⁵ And so in proving perjury committed in any answer sworn before a baron of the exchequer, you need only prove the handwriting of the baron and that of the defendant.⁶ However, although no proof of identity beyond the facts of a person calling himself A. B. being sworn, and his signing the answer, is necessary,⁷ yet no return of the master will be sufficient without proof of the defendant's oath.⁸ The same law prevails with respect to the proof of depositions in cases of perjury.⁹

It lies upon the defendant to prove that he has been personated, if such should be the case;¹⁰ that is to say, as soon as the evidence of his handwriting, and of that of the master, have been

¹ *Chambers v. Robinson*, Bull. N. P. 239; Trin. 12 Geo. 1. *R. v. Baspoole*, 2 Show. 486; as to depositions in chancery.

² *R. v. Fanshaw*, Skin. 327.

³ *R. v. Laycock*, 4 C. & P. 326.

⁴ *R. v. Carr*, 1 Sid. 418; Taylor on Evidence, 598.

⁵ See *R. v. Morris*, 2 Burr. 1189; S. C. 1 Leach, 50; *R. v. Benson*, 2 Camp. 508.

⁶ *R. v. Nunez*, 2 Str. 1043, in marg.

⁷ Bull. N. P. 239. *R. v. James*, 1 Show. 397. *R. v. Morris*, 2 Burr. 1189.

⁸ Bull. N. P. 239. Anon. 3 Mod. 116.

⁹ Arch. Crim. Pl. 87.

¹⁰ 2 Burr. 1189.

tendered as above mentioned. The recital of the place in the jurat where the oath is administered is sufficient proof that it was there taken. The third and last proof is the falsity of the answer.¹

Affidavit to hold to bail.] The affidavit sworn by the defendant, and the falsehood of it, are the chief features of evidence necessary to support this indictment. There are, therefore, to be proved,—
1. The affidavit sworn by the defendant. 2. The averments of perjury.

The proper officer will produce the affidavit at the trial, and the handwriting of the defendant must then be proved, or that he was sworn to the contents of the instrument, and also, if under the statute, that the affidavit was in some way used in the prosecution to which it has relation, but not if at common law. And the handwriting of the officer who administered the oath must be proved.² The words “by the court” being shown to be in the handwriting of one of the masters of the court, is evidence of the swearing, without proof that the master was present in court at the time.³

Notwithstanding some ancient opinions to the contrary,⁴ it is now necessary to produce the original affidavit, and, therefore, a copy would be rejected as insufficient. The officer will prove that the indictment in question has been filed of record, although at common law the allegation and proof are unnecessary. But it is otherwise upon the statute, for there it must appear that the affidavit was filed of record.⁵ Next, if the proceeding be on the statute, it must be shown that the affidavit was used;⁶ but the crime is complete at common law, whether any use be made of the affidavit or not;⁷ for the perjury is complete when the affidavit is sworn, and the omission of some formal regulation is immaterial.⁸ But in the case of ordinary documents secondary evidence is admissible.⁹

The statute 23 Geo. 2, c. 11, s. 1, having directed that the authority of the person who administers the oath should be alleged, it must appear, that the officer who administered the oath upon this occasion was acting in his usual capacity, upon which the judge will take notice of his authority. In cases where judicial notice cannot be taken of the power to give oaths, evidence must certainly be adduced to prove that authority.¹⁰ But the appointment need not, in general, be shown, as in the case of a commissioner who takes affidavits in the country, and in many other instances.¹¹

¹ *R. v. Spencer*, Ry. & M., N. P. C. 97; 1 C. & P. 260.

² 1 C. & P. 260.

³ *R. v. Turner*, 2 Car. & K. 732.

⁴ See *R. v. James*, 1 Show. 397.

⁵ *R. v. Crossley*, 7 T. R. 315.

⁶ *R. and Reg. v. Taylor*, Holt, 534.

⁷ *R. v. Crossley*, 7 T. R. 315.

⁸ *R. v. Spencer*, supra.

⁹ *R. v. Milne*, 2 Fost. & F. 10.

¹⁰ Archb. Crim. Pl. p. 365.

¹¹ See *R. v. James*, 1 Show. 397. *R. v. Verelst*, 3 Campb. 432. *R.*

Judgment.] The production of the book from the judgment office in which the *incipitur* is entered, will satisfy the allegation that judgment was entered upon an action.¹

Grand jury.] Evidence that the defendant swore differently before the magistrate is not sufficient, because there is no certainty as to which was the true oath, or whether both were alike untrue.² Still, a person may be convicted of perjury for swearing falsely before a grand jury, and a witness, upon the same indictment, and a police officer in the grand jury room may prove the case, for they are not sworn to secrecy like the jury.³

By 9 & 10 Vict. c. 95, s. 111, the clerk of every court holden under this Act shall cause a note of all complaints and summonses, and of all orders, and of all judgments and executions, and returns thereto, and of all fines, and of all other proceedings of the court, to be fairly entered from time to time in a book belonging to the court, which shall be kept at the office of the court; and such entries in the said book, or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, shall at all times be admitted in all courts and places whatsoever as evidence of such entries, and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding, without any further proof.

Subornation.] In this case the principal evidence will be the perjury and the subornation. Thus, the proceedings before the judge, as stated in the present indictment, must be proved, together with the oath of the person suborned, the matters which he swore to, and the falsehood of them. It was, indeed, attempted upon one occasion to produce the record of conviction as sufficient evidence of the perjury, but the prisoner's⁴ counsel insisted that this would not be conclusive, that the prisoner had a right to controvert the guilt of the individual whom he was charged with having suborned, and that the evidence given on the former trial ought to be submitted to the consideration of the present jury. The recorder entertaining the same opinion, compelled the counsel for the crown to go through the whole case, as though the jury had the question of the original prisoner's guilt solely before them.⁵

Thus it is also in the cases of subornation of perjury before commissioners of bankrupts, and concerning a bastard child, above al-

v. *Howard*, 1 Moo. & Rob. 187. "I must take it," said Patteson, J., in the last case, "that somebody swore this affidavit before the commissioners;" and the learned judge recognized the authority of the commissioners without proof of the appointment.

¹ *R. v. Gordon*, Car. & M. 410.

As to the *postea* (indorsement) see *R. v. Page*, 2 Esp. 649, n.

² *R. v. Hughes*, 1 Car. & K. 519.

³ *R. v. Hughes*, ut supra.

⁴ He was indicted for suborning another to take a false oath concerning a seaman's will.

⁵ *R. v. Reilly*, 1 Leach, 454, 455, n.

luded to. The proceedings before the proper tribunal, the oath of the defendant, the matters which he has sworn to, and the falsity of them, constitute the necessary evidence to prove the perjury. There is, however, this distinction in cases of perjury before commissioners of bankrupts between the bankrupt himself and third persons, namely, that where the former is indicted for perjury, strict proof of the proceedings is necessary, whereas in the latter case, the adjudication of the commissioners is sufficient to prove the fact of bankruptcy. Thus, in an indictment against a bankrupt for perjury upon his last examination, Lord Ellenborough was disposed to think, that not only the commission of bankruptcy, but also the trading, the debt of the petitioning creditor, and the act of bankruptcy, should have been given in evidence. His lordship said he would save the point for the defendant, who was, however, acquitted on the merits.¹ In an indictment, on the other hand, against a third person who had been examined before commissioners, their declaration of the bankruptcy was held sufficient by Abbott, J.² But, secondly, you must prove the subornation. This is done by showing that the defendant wilfully incited the other person to take the false oath, (which, as we have seen, must, in fact, be taken in order to constitute this offence,) and, it seems, that the bare solicitation of the defendant for this purpose would be evidence for the jury to consider, in the absence of proof to the contrary, whether the defendant had not acted knowingly and corruptly.

It has been held, that a prisoner convicted of taking a false oath, but pardoned before judgment, was a competent witness against the party who had suborned him, being restored to his former competency and credit by virtue of the pardon.³

County Court.] The judge of a county court made the defendant write his name in court, and impounded the signature, together with that of an instrument supposed to have been signed by him. It seems, that upon an indictment for perjury, the jury might look at both signatures.⁴

Perjury before a committee of the House of Commons.] In this case the usual proofs are, the election, the return of the members, and the matters falsely sworn to. Then follow the proof of the assignments by demonstrating the wilful untruths advanced by the defendant.⁵

The following evidence was deemed sufficient to support an indictment for perjury by falsely taking the freeholder's oath at an election for Middlesex. That oath was administered to a person who polled on the second day in the name of J. W. There was

¹ *R. v. Punshon*, 3 Campb. 96 ; S. C. 223.

² *R. v. Raphael*, at Devon Lent As. 1818, Mann, N. P. Digest, 232.

³ *R. v. Reilly*, 1 Leach, 454.

⁴ *R. v. Taylor*, 6 Cox, C. C.

⁵ See *R. v. Leefe*, 2 Campb. 134.

no such person as J. W. The defendant, himself no freeholder, voted on that day, and subsequently boasted of the success his fraudulent vote had met with. Not more than *one* false vote was given on the day in question, and there was no proof that the defendant voted in his own name, or in any other name than that of J. W. This evidence was considered effective for the purpose of inducing the jury to presume that the defendant had voted thus fraudulently in the name of J. W., and the court held, that he had been properly convicted.¹

The allegation in an indictment, that a committee were sworn to "try the matter of the petition" was held good, although the stat. 10 Geo. 3, used the words "to try and determine the merits of the return."²

Insolvent Court.] If the filing of the petition be proved, it will be presumed that the sittings of the Insolvent Court were properly holden. Therefore, although the facts of due notice and filing, and the appointment of a day for examination, were alleged in the indictment, proof of them was deemed unnecessary, nor was it needful to prove that the prisoner was a trader owing less than 300*l.*, he having, in his petition, so stated it.³

Court of Review.] In a case of perjury before the court of review in bankruptcy, the petitioning creditor proved the handwriting of the defendant to the affidavit on which perjury was assigned, and he likewise gave evidence of the trading and act of bankruptcy. A creditor who had not proved his debt likewise gave evidence of the trading and act of bankruptcy; and an assignee proved the act of bankruptcy. These were the principal witnesses, and the judges were of opinion, upon a reserved case, that their testimony was properly received in support of the prosecution.⁴

The high sheriff.] An indictment alleged that a trial took place before the high sheriff; the evidence was, that neither the high sheriff nor the under sheriff were present, but that the assessor executed the writ of trial. The writ was directed to the sheriff, and the *postea* stated that the trial took place before him. This was held sufficient proof, and the authority of the assessor was deemed well shown, the judge holding that there was no variance.⁵

Bastardy.] The mother's charge is shown by proof of the original order, or by secondary evidence of the order, after a summons to produce it. It is not enough to offer the minutes of the clerk to the justices.⁶

¹ *R. v. Price*, alias *John Wright*, 6 East, 323.

² *R. v. Dunn*, 1 Dowl. & R. 10.

³ *R. v. Westley*, Bell, 193; 29 L. J. M. C. 35.

⁴ *R. v. Keat*, 2 Moo. C. C. 24.

⁵ *R. v. Dunn*, 1 Car. & K. 730.

Diss., Coleridge, Erskine, and Wightman, JJ.; 2 Moo. C. C. 297.

⁶ *R. v. Newall*, 6 Cox, C. C. 21.

Actions on 5 Eliz. c. 9.] Actions upon the statute of Eliz. by the party who has been aggrieved by perjury, are of such rare occurrence, that very few words will be sufficient upon the subjects of pleading and evidence.

First, he must be the party grieved who brings the suit,¹ and he is not at liberty to join any other with him. Thus, an exception was taken where an action had been taken against three, that a surrender, which had been in question, enured to the use of two of the plaintiffs only, so that the third person was not an injured party, and it was the opinion of Wray and Southcote, JJ., that the writ should abate.² On the other hand, it was said at the bar, upon one occasion, and not denied, that if two parties be grieved, they must join, the one being incompetent to maintain his suit without the other.³

Great accuracy is required in setting out the statute, if it be attempted to do so; but this is not necessary, for where it was moved to arrest the judgment because the plaintiff had omitted the words of the statute in his declaration, the court would not hearken to the objection, but gave judgment for the plaintiff.⁴

The only ground for the objection was, that it ought to have appeared whether the defendant had been guilty of perjury, or of subornation; but as Mr. Serjeant Hawkins has observed, all perjury whatsoever must come under one of those heads, there being no medium, and, therefore, the prosecutor would be equally grieved in either case. He would be placed under the difficulty not only of proving the perjury, if such an objection were to prevail, but also of showing it to be within one of the branches of the distinction, which would be superfluous.⁵

Nevertheless, the words of the statute must be strictly pursued in the allegations of the defendant's oath, and of his tortious intention. Thus it was adjudged that the plaintiff should take nothing by his writ for want of the word, *voluntariè*, in an action of debt upon the statute.⁶ An action of debt, was brought upon the statute for perjury committed in an action of debt, and the record of this last action was stated to have been as of Hil. 27 Eliz. In truth, the action was brought in Hil. 28 Eliz. and so the "recital did miss the record." It was contended, that here was a fatal variance, inasmuch as the party charged with perjury might thus be doubly proceeded against. But by Coke, *arguendo*, it is between the same parties, and in the same cause, and a circumstance only is mistaken. Clench, J. It is needful to show in what action the first perjury was committed, for he says in trespass, whereas in truth it was in debt; all is naught. Gawdy, J. If no action be alleged, he cannot sue upon the statute of 5 Eliz.⁷

¹ 3 Bulst. 147.

² Anon. 2 Leon. 12.

³ *R. v. Deakins*, Hetl. 73.

⁴ *Cockerill v. Apthorp*, 3 Bulst. 147.

⁵ 1 Hawk. P. C. c. 69, s. 18.

⁶ *Kitton v. Walters*, Hetl. 12;

Brookes v. Hall, 2 Ro. Rep. 76.

R. v. Cox, 1 Leach, 71.

⁷ *R. v. Dennie and Turner*, Godb. 88.

The authority of the judge or commissioner must also appear upon the record. Where it was alleged that the defendant came to R., a master in chancery having authority to take affidavits, &c., and that the defendant made a false affidavit, but did not allege that the affidavit in question was in chancery, *in curia cancellariæ*, it was held to be no perjury within the statute.¹

Moreover, it must appear upon the face of the declaration, that the party was in reality aggrieved, so that where upon a question concerning the surrender of a copyhold, it was alleged that perjury had been committed, it was held a good exception that the certainty of the copyhold did not appear upon the pleading.²

Trial in perjury generally.] By 14 & 15 Vict. c. 100, s. 22, on trials for perjury and subornation, a certificate of the indictment and trial on which perjury is assigned shall be sufficient evidence of the trial. The record being duly made up, and the *venire facias*³ complied with by the appearance of a proper jury, the trial commences. But the judge is authorized to refuse the inquiry altogether if the indictment appear unquestionably to be bad. As where it could not be in any way collected from the record that the matters sworn to and alleged as perjuries were material to the question at issue.⁴ So again, where an indictment for perjury had been found at the quarter sessions, and had been removed into the Court of King's Bench by *certiorari*, because the quarter sessions have no jurisdiction over the offence, Mr. Justice Gaselee refused to try the charge in this instance.⁵ But it is otherwise where the materiality of the thing sworn can be traced on the record, although there be no allegation to that effect. The objection for want of such an allegation is on the record, and can be taken advantage of in arrest of judgment, if necessary.⁶

Verdict.] Upon an indictment containing four counts, the jury found a verdict of guilty of the perjury and misdemeanor aforesaid. The *venire* was stated on the record—to try whether the defendants were guilty of the perjury and misdemeanor aforesaid. It was held that perjury was *nomen collectivum*, that, therefore, the *venire* and verdict applied to all the counts, and that, although a general judgment had been entered, yet that, being for imprisonment only, it was divisible.⁷ In this case, the court said, that *R. v. Powell*⁸ was not in the least interfered with: neither in *O'Connell v. Reg.* nor in *Campbell v. Reg.* was it intended to overrule *R. v. Powell*.⁹

It is not now necessary to produce the record in order to prove

¹ Anon. Lat. 38. *Luther v. Holland*, Id. 132.

² Anon. 2 Leon. 12.

³ See Doug. 791, 794.

⁴ *R. v. Tremearne*, Ry. & M., N. P. C. 147.

⁵ *R. v. Haynes*, Id. 298.

⁶ *R. v. Souter*, 2 Stark. 423.

⁷ *R. v. Ryalls*, 17 L. J. M. C. 92. Affirmed in error, 18 L. J. M. C. 69; 11 Q. B. 781.

⁸ 2 B. & Adol. 75.

⁹ 18 L. J. M. C. 69.

a conviction or acquittal, but a certificate under the hand of the clerk of the court is sufficient. Yet, where this certificate was wanting, the caption, the indictment, the indorsement of the verdict and sentence, with the minutes of the trial, were held sufficient to warrant a conviction.¹

Judgment.] The trial being over, and the verdict given,² judgment is entered up according to the finding of the jury. And there was this additional penalty to the statute of Eliz., namely, that the disability formed part of the judgment. Consequently, a pardon under the great seal or sign manual restored the attainted perjurer to his competency, after a conviction at common law, but not so if he had received judgment under the statute 5 Eliz.³ The statute 6 & 7 Vict. c. 85, reaches the case even of perjured persons, and renders them competent.

One R. was convicted of perjury upon the oath of D., but R. subsequently caused D. himself to be convicted of perjury in accusing R. It was thereupon moved, that as judgment had not been given, an entry might be made upon the record that R. was acquitted of the first perjury, but the court said, they could not do that. R. might bring error if he would. However the court restored him to his place of one of their attornies.⁴

The following is an example of an erroneous entry of the intended judgment:—"It is *ordered*, that the said L. K. be transported, &c.," the mistake being in the word, "*ordered*," instead of "*considered*." The defendant brought a writ of error, but the court observed that no *judgment* had been given, there being merely an *order*, and they awarded a *procedendo* to the court below to give judgment on the conviction. In the meantime, they thought that the prisoner might procure bail for his personal appearance to receive that judgment at the next Chester sessions.⁵

New trial.] The judgment being pronounced, the defendant in perjury has three courses open to him for the purpose of avoiding the mischief which he has encountered. He may move for a new trial, or in arrest of judgment, or may bring a writ of error.⁶

¹ *R. v. Newman*, Den. & P. 390; 21 L. J. M. C. 75; 3 Car. & K. 240.

² Which must be, if against the defendant, that he is guilty of wilful and corrupt perjury, otherwise the jury must acquit him. 1 Mod. 351.

³ 2 Salk. 514, 689, 691; Anon. 3 Salk. 155; 1 Ld. Raym. 257.

⁴ *R. v. Read*, 1 Sid. 217.

⁵ *R. v. Kenworthy*, 1 B. & C. 711; S. C. 3 D. & Ry. 173.

⁶ It is no ground for postponing the judgment upon a convicted defendant, that the witness against him is indicted for perjury, for giving the very evidence upon which the defendant was found guilty; at least not if the defendant be so interested in the event of the second trial as to become thereby disqualified as a witness. *R. v. Haydon*, 2 Burr. 1387.

First, as to the new trial. If there be a verdict of acquittal, the courts will not suffer it to be disturbed; but if the jury find for the crown, there are some circumstances, which we shall mention presently, which will induce the granting of another inquiry. Two persons were charged with perjury and *acquitted*, and after some discussion the judges, except Windham, J., were of opinion that no new trial should be had.¹ And this opinion of Windham, J., was the more strange, because he had himself laid it down two years before, that no new trial could be had in the event of an acquittal for perjury, *unless by consent*, to which the judges then agreed.²

On the other hand, where a verdict has passed for the crown, it is quite clear that a new trial may be awarded in favour of the defendant. At one time, indeed, it was supposed, that this could not be done without the consent of the king's counsel,³ although the court said, they could not do without such consent in debt upon an information, inasmuch as the party had an interest in that case.⁴ However, some years afterwards, upon a conviction by information for perjury, it turned out, that the false oath had not been taken wilfully, and the court granted a new trial upon motion, mentioning *R. v. Sir John Jackson*,⁵ and *R. v. Fenwick*,⁶ as authorities for doing so.⁷

The granting of the new inquiry is, nevertheless, entirely at the discretion of the court, who sometimes will refuse the application, if they should think that the matter has been fully heard. In the case of a trial at bar, it appeared that the jury hesitated very much, and, in fact, found at first a verdict of guilty, but not of wilful and corrupt perjury. They at length pronounced the defendant guilty generally, but some of them said at the time that they were not satisfied that the perjury had been wilful and corrupt. The court held, that when a cause was tried at bar,⁸ a new trial was never granted, for the single reason that the jury went against evidence, but it seems that the matter was adjourned upon the other point.⁹ And it is quite clear, that a judge at the present day would not receive a verdict of guilty accompanied by such a qualification as we find in the preceding case.

Costs.] By 7 Geo. 4, c. 64, s. 23, the costs and expenses of prosecutions in certain cases of misdemeanor may be allowed by the court as in cases of felony; and the offences of perjury and subornation of perjury are included within the last. The prosecutor is

¹ *R. v. Fenwick and Holt*, 1 Sid. 153. Anon. 1 Lev. 9, 124. *R. v. Bowden*, 1 Lev. 9, cited there. ² *R. v. Williams*, 1 Keb. 124. Cited by Windham, J. ³ *Read v. Dawson*, 1 Sid. 49. ⁴ *Id.* ⁵ 1 Lev. 10, 124. ⁶ 1 Sid. 149, 153; 1 Keb. 546. 568. ⁷ *R. v. Smith*, 2 Show. 165. Pemberton, C. J., at first doubting. *R. v. Cornelius*, 3 Keb. 525. ⁸ But this strictness is no longer kept up. ⁹ *R. v. Melling*, 5 Mod. 349.

entitled to his costs, as prosecutor, though his name be included in a *subpœna*, and although he be not bound over to prosecute, and his expenses are not thereby limited to such as he has incurred in being a witness.¹

A false affidavit in chancery failed of its effect; moreover, the persons were only interested as executors; yet, an application to set aside a side bar rule for costs, was refused, the case being within 5 & 6 Wm. & M. c. 11. The defendant had moved an indictment for perjury by *certiorari* into the Queen's Bench.²

Costs upon a new trial.] The court will not in general allow the defendant the costs of the former prosecution upon the granting of a new trial in cases of perjury. Should the defendant make out a charge of oppression, the court might possibly interfere on his behalf, but not under ordinary circumstances. The prosecutor having removed an indictment into the King's Bench by *certiorari*, it was moved on behalf of the defendant, that the proceedings should be stayed until the costs of former indictments for the same offence had been paid by the prosecutor. On the first occasion, the judge refused to try the case, by reason of the appearance of manifest imperfections upon the face of the record; and on the second, a new trial was granted, because a minor was sworn and served upon the jury in the room of his father. The prosecutor did not carry that record down again, but preferred a new indictment. By the court.—No case of oppression has been made out by the defendant. His application for a new trial has made further expenses necessary, and it can make no difference to him, as to such expenses, whether he is again tried upon the old or upon a new indictment.³

Arrest of judgment.] Another course which the defendant may avail himself of, is to move in arrest of judgment, if there be a ground for doing so. And he may do this after verdict, or after judgment by default, but not after a failure upon demurrer. Judgment having passed against a defendant by *nihil dicit*, it was doubted whether he could then move to arrest, but Holt, C. J., observed, that he was not too late, although it was otherwise upon demurrer.⁴

The time for moving in arrest of judgment is when the party is called up for sentence, so that if he be afterwards taken upon a *capias* on account of the nonpayment of a fine, or otherwise, it will then be too late to insist upon moving as of right. In such a case, Holt, C. J., said, that the court would hear the objections in mitigation of the fine, although they could not allow them in arrest of judgment after the *capias*.⁵

¹ *R. v. Sheering*, 7 C. & P. 440.

⁴ *The Queen v. Deman*, 2 Ld.

² *R. v. Major*, 21 L. J. M. C. Raym. 1221.

221; Dears. 13.

⁵ *The Queen v. Darby*, 1 Salk.

³ *R. v. Tremearne*, 5 B. & C. 78.
761; S. C. 8 Dowl. & Ry. 590.

Further, a defendant can only move in respect of errors on the record of the indictment or information for perjury; he cannot interfere with the prior record on the trial of which the false oath is alleged to have taken place.¹

The judge made an order to amend the *postea* upon these facts. The judges in summing up altered the order of three assignments and reversed them: upon which the jury found a perverse verdict. The amendment was made from the recollection of the judge. It was held to be erroneous.²

Punishment for perjury.] It seems that, at common law, except in the case of attain of jurors,³ there was not any particular course for the punishment of perjury, but the heinousness of the offence was such, that the star chamber and spiritual courts took cognizance of it,⁴ and, treating it as a high misdemeanor, inflicted a penalty accordingly. And the king's counsel also used to meet occasionally for the same purpose, when they were accustomed to punish for this offence at their discretion.⁵ Before the conquest, indeed, the severity of death was sometimes exercised against this crime, and sometimes offenders were banished. Corporal punishment also, as the cutting out of the tongue, was now and then inflicted; but, subsequently, the rigour of the law gradually declined, till the forfeiture of movables, and an incompetency to bear testimony, were the only known penalties;⁶ and at length, as at the present day, the common law recognized fine and imprisonment,⁷ and "never to bear testimony," to which, both as to perjury and subornation, the statute 3 Geo. 4, c. 114, has added hard labour.

By 5 El. c. 9, s. 3,⁸ all persons who shall corruptly procure any witness by letters, rewards, promises, &c., to commit wilful and corrupt perjury, in any matter depending in suit by writ, action, bill, complaint, or information, concerning lands or hereditaments, goods, debts, or damages in any of the queen's courts of record, &c.⁹ or shall corruptly procure or suborn any witness sworn to testify *in perpetuam rei memoriam*, such offenders shall, on conviction, forfeit 40*l.* By sect. 6, the crime of perjury, whether committed in consequence of subornation, or by the voluntary act of the false swearer, is made liable to a fine of 20*l.*, and imprisonment for six months, together with incompetency as a witness.

¹ *R. v. Wright*, 1 Sid. 148.

² *R. v. Virrier*, 12 Ad. & El. 317; 4 Per. & D. 161.

³ Dy. 242.

⁴ See *R. v. Onslowe*, Dy. 242. *R. v. Spicer and Read*, Hob. 62.

⁵ Cro. El. 521.

⁶ 3 Inst. 163, 164; 16 Vin. Ab. 310. B. 1; 4 Comm. 138.

⁷ 3 Inst. 163. *R. v. Nureys and another*, 1 Sir W. Bl. 416. See *R. v. Lookup*, 3 Burr. 1901. The

pillory was likewise added. See 1 Hawk. c. 69, s. 16; 3 Inst. 219. But it was entirely abolished by 1 Vict. c. 23.

⁸ Made perpetual by 29 El. c. 5, and 21 Jac. 1, c. 28, s. 8.

⁹ The queen's courts of chancery or of record, the leet; view of frankpledge or law day; ancient demesne court; hundred court; courts baron; courts of the stannary in Devon and Cornwall.

Lastly, by 2 Geo. 2, c. 25, s. 2,¹ besides the punishments already in force against perjury and subornation, the court, or judge before whom the conviction takes place, may sentence the offender to be sent to some house of correction for seven years, there to be kept to hard labour during all the term, or may award judgment of transportation for seven years. The breaking prison or voluntary escape, or return from transportation, was declared, moreover, to be capital. The transportation or commitment was also expressly declared to be over and above such punishment as should be adjudged to be inflicted agreeably to the laws then in being.

But by sect. 5, no attainder for any offence thereby made felony should work any corruption of blood, loss of dower, or disherison of heirs. By 18 Geo. 2, c. 18, s. 1, for the punishing of perjuries at county elections, the punishments awarded by both the Acts of 5 El. and 2 Geo. 2,² were directed to be inflicted on the offender, and these penalties have since been held to be cumulative. For in a case where the Court of King's Bench had passed sentence upon certain persons convicted of such a perjury, that they should be imprisoned for one calendar month, and then be transported for seven years, that court resolved afterwards to arrest its judgment. For, on consideration, they found that the penalties were cumulative, and Lord Ellenborough observed, that the sentence might be vacated at any time within the same term in which it had been pronounced. Accordingly, the prisoners were fined 20*l.*, and ordered to be imprisoned for six months, and judgment of incompetency as witnesses was added. This is part of the judgment by statute, but at common law it is only the consequence.³ And moreover, that at the end of six months, the prisoners should be transported for six years.⁴

But the court may still punish at common law, without inflicting the punishments prescribed by the 2 Geo. 2, and accordingly, they frequently inflict fine and imprisonment only, without the severer penalty.⁵

Consequences of a conviction and judgment in cases of perjury.]
We come now, in the last place, to explain the consequences which attach upon the parties who are convicted of perjury or subornation. And the most striking evil which fell upon the attainted offender

¹ Made perpetual by 9 Geo. 2, c. 18. This Act does not extend to Scotland, but the crime of perjury is made punishable there by the confiscation of movables, piercing of the tongue, and infamy. In aggravated cases, the judge may, moreover, direct any other punishment which the occasion calls for—1555, c. 47. The Irish Act is 3 Geo. 3, c. 4, s. 2.

² In effect repealed.

³ 2 Salk. 514.

⁴ *R. v. Price and others*, 6 East, 327.

⁵ Whether surety of the peace can be required in addition, *qy?* *R. v. Dunn*, 12 Jur. 99. It was held that surety of the peace for a time certain might be required in all cases of misdemeanor punishable by imprisonment. *Dunn v. Reg.* (in error), 18 L. J. M. C. 41.

was disability to be examined in any court of record, or elsewhere, as a witness. But the words of 6 & 7 Vict. c. 85, s. 1, are too general even to exclude perjurers. It is also a principal cause of challenge to a juror, that he has been convicted of perjury as a witness.¹ But it is necessary to show that the party has had sentence, because there might have been an arrest of judgment.² The statute disables the party from being a witness in any court of record, but it seems that a legal incapacity to bear testimony anywhere arises as a consequence at common law.³

By 5 El. c. 9, s. 5, no person convicted of subornation of perjury, and by sect. 6, no person convicted of perjury shall be received as a witness in any court of record, until his judgment be reversed by attaint or otherwise, and also until damages be recovered by the convicted parties in an action on the case against such as originally procured the judgment to be given against them.

However, the mischief, heavy as it is, ended there. The law did not go the length of preventing such convicts from making affidavits in certain cases for their own benefit, as to set aside a judgment for irregularity. For by Holt, C. J., upon an objection being made to the reading of a defendant's affidavit, because he had been convicted of perjury, "Must he, therefore, suffer all injuries, and have no way to help himself?" Powell, J. You ought to have the record of conviction in your hands when you make this objection. Holt, C. J. If he had, it would be nothing to the purpose.⁴ However, this course can only be allowed to rescue a defendant from the consequences of a charge, and cannot be permitted him in support of a complaint.⁵

By 12 Geo. 1, c. 29, s. 4, if any person convicted of perjury or subornation shall act or practise as an attorney or solicitor, or agent in any suit or action in any court of law or equity in England, the judge or judges where such suit or action is brought shall, upon complaint or information thereof, examine the matter in a summary way in open court, and if it shall appear to the satisfaction of such judge or judges that the party has offended contrary to the Act, they shall cause the offender to be transported for seven years.

Pardon.] Probably, the following sentences are merely matters of history, but we must not omit to say that as to the strong words of the statute of 5 Eliz., which inflicted the pain of incompetency as a witness, the better opinion was that a pardon for a perjury at common law would so operate, but that the words of the statute were too strong to allow the beneficial result of a pardon.⁶

"I do not find it clearly settled," says Mr. Serjeant Hawkins,

¹ 16 Vin. Ab. 320, H. 1, citing Trials per Pais, 141, c. 9, 2 Hawk. c. 43, s. 25.

² Cowp. 3, by Lord Mansfield.

³ 2 Hawk. c. 46, s. 101.

⁴ *R. v. Davis and Carter*, Holt. 501.

⁵ *Walker v. Kearney*, 2 Hawk. c. 46, s. 103, and see 2 Str. 1148.

⁶ 2 Salk. 689.

"whether the pardon of a conviction of perjury makes the party a good witness."¹ And formerly it was said, on one or two occasions, that a pardon would not restore the party to his credit,² or to his *liberam legem*.³ But in this last case, Holt, C. J., spoke of the party as having stood in the pillory, from whence it is clear that the statute of Eliz. operated immediately to destroy the competency, and it does not appear but that in the other case the conviction might have proceeded on the statute. To render the distinction still more clear, it may be added, that a case occurred not many years since, where a person was admitted to bear testimony against a prisoner who had suborned him to take a false oath for the purpose of obtaining prize money, and His Majesty's pardon having been specially granted for that offence, was produced. It is true that he never received judgment, but Wilson, J., who delivered the opinion of the judges in favour of the evidence thus received, distinctly declared that the pardon not only respites the convict from punishment, but entirely absolves him from the crime, and restores him completely to his former competency and credit.⁴ Nevertheless, if there be an Act of parliament pardoning all crimes whatsoever, it should seem, that perjury under the statute of Eliz., will be included. And thus it was said, that one convicted of perjury would be competent to give evidence by reason of the act of oblivion.⁵

Arbitration.] All the matters in difference, whether in perjury or conspiracy, may be referred if verdict of acquittal be taken. It must, however, appear that there has been no attempt to stifle a prosecution.⁶

¹ 2 Hawk. c. 37, s. 52; Id. c. 46, s. 112.

² 1 Sid. 52.

³ 5 Mod. 16, by Holt, C. J.

⁴ *R. v. Reilly*, 1 Leach, 454, case of *Macdaniel*.

⁵ 1 Keb. 780.

⁶ *R. v. Hardey*, 14 Q. B. 529.

CHAPTER II.

OF CONSPIRACY.

Conspiracy.] Conspiracy is a combination and agreement by persons to do some illegal act, or a combination and agreement to effect a legal purpose by illegal means.¹ The conspiracies which we now shall speak of may be designated as public and private. Instances of both kinds are very numerous, but there are certain principles applicable to both which must be adhered to in order to support an indictment against parties for the crime. There must, in the first instance, be a legal foundation for the charge in question, with reference to the particular circumstances which form the subject matter of it. For where the cause of complaint is without legal existence, there cannot be a conspiracy in respect of it. There must, again, be somewhat of certainty in the ground-work of the prosecution, for where the alleged fraud concerns a profit or advantage so precarious as to admit of doubt whether it will, in reality, turn out to be beneficial, the court will not entertain an indictment for conspiracy in regard of it. Again, the mere breach of a civil contract, without a violation of public morals, will not amount to a conspiracy, although several persons may be engaged in a transaction by no means creditable to their character, and may, even virtually, be said to defraud the object of their intrigue. And, we shall see, by and by, that the same principle exists in the case of a civil trespass, unless it is intended to commit a breach of the public peace. If an agreement be entered into to indict or acquit, so as to leave the question of right and wrong indifferent, it is a conspiracy.² So, where certain persons agreed to hiss at the Birmingham Theatre, although *one* might have hissed without offence.³ So, a combination amongst officers to resign their commissions is a conspiracy. The military service cannot be determined by such a confederacy.⁴

Public frauds.] If people conspire together to defraud the community at large, the rule is general that they may be indicted for such an illegal combination. Thus to endeavour by an united agency to raise the price of necessaries is an example of this rule. Thus, an information was applied for and granted for combining to fix the price of salt.⁵ And the same law would apply in the case of corn or any other commodity.

¹ By Alderson, B., 9 C. & P. 109.

² 9 Rep. 56; 1 Salk. 374. See 33 Edw. 1, st. 3.

³ *R. v. Clifford*, 2 Campb. 372.

⁴ 3 Burr. 2476.

⁵ *R. v. Norris and others*, 2 Lord Keny. 300.

If a false rumour be raised for the purpose of raising or lowering the price of government securities, with a fraudulent intent, it is an offence of this nature, for it is a fraud levelled against all who might possibly have anything to do with the funds on the particular day when the trick operates. And it is no excuse to say, that there might not be any purchasers, for it is a principle in conspiracy, that whether the intended evil be successful or not, the character of the crime, and its consequences remain the same. De Berenger and others were convicted of a conspiracy of this nature by spreading reports of the death of Buonaparte during the war, and the likelihood of immediate peace.¹ A conspiracy to defraud the king of his revenue is punishable under this head. As where certain persons entered into a confederacy to impoverish the farmers of excise.² So, where persons united to cheat the crown through the medium of false vouchers.³

Again, combinations on the part of masters to lower the wages of their workmen, and by workmen to raise the price of labour, were, till a modern date, illegal. The journeymen tailors of Cambridge were once convicted of such a conspiracy. And a principle applicable at this day to the subject of conspiracy was recognized upon that occasion, that the refusal to work was not the crime, but the conspiracy to advance the rate of wages. But in connection with this law, there existed, at the same moment, a code which fixed the price of wages, and when the legislature resolved to remove all restrictions from trade, it was also determined to legalize combinations of this nature, provided there should be no intimidation nor violence towards individuals. Accordingly by the 4th section of 6 Geo. 4, c. 129, the following combined meetings amongst workmen were excluded from prosecution or penalty—such as take place for the sole purpose of consulting upon and determining the rate of wages or prices, which the parties entering into such agreement, or any of them, shall require or demand for his or their work, or the hours of time for which he or they will work in any manufacture, trade, or business, and that persons so meeting for the purposes aforesaid, or entering into such agreement aforesaid, shall not be liable to any prosecution or penalty for so doing, any law or statute to the contrary notwithstanding. Mr. Baron Rolfe is reported to have said:—"Those who employ

¹ *R. v. De Berenger and others*, 3 M. & S. 67. In this case likewise the court took judicial notice of the existence of a war with France, there being so many statutes upon that subject. *Id.* 69. It was also objected that no person in particular was alleged to have been defrauded; but this omission was held to be quite immaterial, since it was possible that no one had been defrauded. The offence was complete independently of that

consideration. And it was objected that there were not any funds of the United Kingdom, as stated in the indictment, the charges for the interest and debt being imposed upon Great Britain and Ireland separately, but this objection was likewise overruled, and judgment was passed.

² *R. v. Starling and others*, 1 Sid. 174.

³ *R. v. Brisac and another*, 4 East, 164.

labour may meet and say, we will not give more than such and such a rate, or we will stipulate for such and such a number of hours' work; we will make, in short, regulations beneficial to ourselves as employers, and we agree that we will not take any workmen that require more. On the other hand, the workmen may meet and say, we will not work for less than such and such a sum, and if anybody think to employ us on low wages, we agree we will not work for them. And we agree to form a fund and support one another until we get them to come to proper terms. My opinion is, that if there was no other object than to persuade people that it was their interest not to work except for certain wages, and not to work under certain regulations, complied with in a peaceable way, it was not illegal."¹

Then follows the 5th section for the protection of masters, excluding likewise from prosecution or penalty similar meetings on the part of masters, for the sole purpose of consulting upon and determining the rate of wages or prices which they shall pay to their journeymen or servants, or the hours of work in any manufacture, trade, or business. And agreements for the same purpose, whether verbal or written, are within the same protection.

But no threats, violence, intimidation, or molestation can be lawfully used in respect of these meetings, or any association upon the subject of wages. The 3rd section provides for this case. It is thereby enacted that, if any person shall by violence to the person or property of another, or by threats or intimidation, or by molesting, or in any way obstructing another, force, or endeavour to force, any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work, or to return his work before the same shall be finished, or prevent, or endeavour to prevent any journeyman, manufacturer, workman, or other person not being hired or employed, from hiring himself to, or from accepting work or employment from any person or persons, or if any person shall use or employ violence to the person or property of another, or threats or intimidation, or shall molest or in any way obstruct another for the purpose of forcing or inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association, or not having contributed, or having refused to contribute, to any common fund, or to pay any fine or penalty, or on account of his not having complied, or of his refusing to comply with any rules, orders, regulations, or resolutions made to obtain an advance, or to reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work, or to regulate the mode of carrying on any manufacture, trade or business, or the management thereof; or if any person shall by violence to the person or property of another, or by threats or intimidation, or by molesting

¹ In *R. v. Selsby and others*, cited, Den. & P. 384, n.

facts which are obscurely alleged. It was charged that the defendant had deposed this: Master G. S., about the middle of July, 1681, was at Newnam, and the information then went on to show where Newnam was, but only in the innuendo. And judgment was arrested for this cause, after several arguments.¹ The use of the innuendo is to explain mistakes or ambiguities. An indictment, after assigning perjury concerning an assault, added, "and at the same *time* threatened to shoot her with a pistol." The information, however, when produced from the Bow Street office had the words "and at the same threatened to shoot her," &c. It was contended that the word *time* being left out, here was a fatal variance, and Lord Ellenborough acceded to the objection. There should have been an innuendo, for the information might have meant at the same place. The defendant was acquitted.²

If there be no occasion for an innuendo, it may be rejected.³

Lastly, it may be added, that if there be but one good assignment, it is sufficient to warrant a judgment for the crown. This was laid down positively by Holt, C. J., in a case where a general verdict had passed for the crown.⁴ And the usual ending, that so the defendant has committed perjury, must be preserved.⁵ Of course, care must be taken not to say, "against the form," &c., if the thing charged be only a perjury at common law.⁶

Information.] An information at common law is said not to require so much certainty as an indictment, whether the latter be at common law or on the statute. Thus, where the information was for perjury upon interrogatories administered in chancery, it was objected, that it had not been shown in what particular one the defendant had been perjured. But the court overruled the objection, saying, that each perjury was punishable by the common law, although they admitted that greater certainty was requisite under the statute.⁷ And an *indictment* at common law demands the same certainty as the statute of Eliz.⁸ It is observable, that the judge at the trial is to notice a variance between the information and the record, and that it is not by any means the province of the jury to do so. As where a matter of this sort had been permitted to be found specially, the court said, that the jury could not have any conusance on the subject. The judge at the trial

¹ *R. v. Gripe*, 1 Lord Raym. 256. *R. v. Chedwicke*, 1 Keb. 612, 635.

² *R. v. Taylor*, 1 Campb. 404.

³ In *R. v. Aylett*, 1 T. R. 70. In *Roberts v. Camden*, 9 East, 93.

⁴ *The Queen v. Rhodes and Cole*, 2 Ld. Raym. 886.

⁵ *R. v. Read*, Tho. Raym. 34. Sid. 66.

⁶ *R. v. Bell*, 3 Bulstr. 322. As to the effect of the word "knowing," as knowing the matters sworn to be false. See *R. v. Lady Lawley*, 1 Barnard, 263, 274, 287, 293, 459.

⁷ *R. v. Wallengen*, 1 Sid. 106.

⁸ Carth. 422, per Holt, C. J.

ought to have determined it. *A venire de novo* was accordingly awarded.¹

Indictment.—County Court.] An indictment for perjury in the county court, committed by a party examined as a witness on his own behalf, needs not to conclude, *contra formam statuti*. Martin, B., said it was perjury at common law.² With regard to the bill, it may be observed, in the first place, that an objection that the indictment had stated the bill to have been directed to Robert Lord Henley, &c., whereas in fact it was directed to Sir Robert Henley, Knight, &c., was overruled in *R. v. Lookup*.³

Answer in Chancery.] The statute 23 Geo. 2, operated to prevent a variance in consequence of a misdescription of the parties to a bill. An indictment stated, that a bill was filed in chancery by one T. against the defendant *and another*. The bill appeared to have been filed against these persons and the attorney-general. The matters, which were material, lay between the defendant and T. It was objected, that the omission of the attorney had created a fatal variance, but Lord Ellenborough said, that it would have been sufficient if the indictment had even omitted the mention of any other than the defendant. The statute would be entirely defeated should such subtleties prevail.⁴ But in a case where the indictment purported to set out the *substance and effect* of the bill, and stated an agreement concerning houses, Abbott, C. J., held that the word “house,” which appeared in the original bill, disclosed a fatal variance, being a difference in substance from houses, and the defendant was acquitted.⁵

If an answer be imperfectly entitled, it cannot be treated as a mere nullity. An answer was alleged in the indictment as an answer to the bill of J. C. Aberdeen, whereas the person's name was F. C. Aberdeen. The court having decided that the variance between J. C. A. and F. C. A. was not fatal, held also, that the answer above entitled could not be deemed void.⁶

Affidavit to hold to bail.] As to venue:—If an affidavit be assigned as the perjury in answer to an original application in any court, there is no need to show where that court was, there being a venue as to the false oath.⁷

A bill of Middlesex was described wrongly on one occasion, as issuing out of the office of the chief clerk assigned to inrol pleas, &c., and the court refused to consider these words as surplusage, upon which the prosecution was abandoned.⁸

¹ *Rex v. Sykes*, Tho. Raym. 202. That a party shall not take advantage of errors in the first record, when perjury is assigned upon matters sworn at a trial. See *R. v. Wright*, 1 Sid. 148; Tho. Raym. 74.

² *R. v. Morgan*, 6 Cox, 107.

³ Cited, 1 T. R. 240.

⁴ *R. v. Benson*, 2 Campb. 509. *R. v. Powell*, cor. Abbott, C. J.; Ry. & M., N. P. C. 101.

⁵ *R. v. Spencer*, Ry. & M. N. P. C. 97.

⁶ *R. v. Roper*, 1 Stark. 518.

⁷ *R. v. Crossley*, 7 T. R. 315.

⁸ *R. v. Schoole*, Peake, 112.

If the affidavit be sworn in the country, the expression usually is, "Before E. F., gentleman, then being a commissioner duly authorized and empowered to take and receive affidavits touching and concerning matters and proceedings of or in the court of our said lord the king, before the king himself, to wit, on. &c., at, &c." An indictment charged, that the affidavit was sworn before A. without naming him as a commissioner otherwise than saying at some distance *as such commissioner as aforesaid*, when the word commissioner had not been before used, and Scarlett moved to arrest the judgment. But the court held that it was not necessary to set out the nature of the authority. It had been alleged that A. had power to administer the oath, and that, together with his name, was sufficient.¹

It is usual to add the words *prout patet*, and in indictments upon the statute of Eliz. they are necessary, but it has been solemnly decided, that the omission of the *prout patet* at common law will not vitiate the indictment.²

On the production of an affidavit charged to be false in the indictment, it appeared that the parts set forth were not continuous, but that they were separated by the introduction of other matter. This was pointed out as a variance; but Abbott, C. J., overruled the objection, and the court refused a rule for a new trial.³

The defendant was indicted in Middlesex for perjury committed in an affidavit, and the indictment concluded with a *prout patet* by the affidavit, as filed at Westminster. He was acquitted, but was again indicted for the same offence, with this difference, that the affidavit was here stated to have been sworn in *London*, and there was an averment traversing the jurat, and alleging that the defendant was, in fact, sworn in Middlesex. To this charge the defendant pleaded *autrefois acquit*, and the court gave judgment in his favour, because the jurat was not conclusive evidence of the place of swearing the affidavit, and the whole crime might, consequently, have been tried upon the first indictment.⁴

Indictment for subornation of perjury.] Where the words were, "by sinister means," caused, &c., the court held the allegation sufficient, although the means were not specified.⁵ The words "solicit, persuade," &c., imply that the oath was actually taken, and this is necessary, because there cannot be a subornation without a perjury.⁶ But the attempt to suborn is a heinous offence, and will be severely punished by the court.⁷

Where the indictment charged the defendants *and each of them*, with a suborning of four witnesses, *and each of them*, it was objected, that here were several charges joined in one indictment,

¹ *R. v. Callanan*, 6 B. & C. 102.

² *R. v. Crossley*, 7 T. R. 315.

³ *R. v. Callanan*, 6 B. & C. 102; and see *R. v. Solomon*, Ry. & M., N. P. C. 252.

⁴ *R. v. Emden*, 9 East, 437.

⁵ *The Queen v. Rhodes and Cole*, 2 Ld. Raym. 886.

⁶ 2 Ld. Raym, 886, *ut supra*. *R. v. Hinton & Brown*, 3 Mod. 122; *The Queen v. Darby*, 7 Mod. 101.

⁷ *R. v. Johnson*, 2 Show. 2. *R. v. Tayler and another*, 2 Keb. 399.

and likewise, that it was too general to swear that one H. *and* his brother had committed perjury. The court made a rule to show cause.¹

By 14 & 15 Vict. c. 100, s. 21, in every indictment for subornation of perjury, or for corrupt bargaining, &c., or inciting, &c., unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly to take, &c., any oath, affirmation, &c., it shall be sufficient when the perjury has been committed, to allege the offence as above, and then to allege that the defendant unlawfully, wilfully, and corruptly, did cause and procure, &c. And when no perjury has been committed, the substance of the offence will suffice without setting forth any of the matters hereinbefore rendered unnecessary to be set forth. And by sect. 22, a certificate containing the substance and effect of the indictment and trial, and signed by the clerk of the court, &c., shall be sufficient evidence of such indictment.

Indictment for perjury before a committee of the House of Commons.] In an indictment for perjury before a committee appointed to try a petition concerning the borough of New Malton, a count stated, that an election took place "*by virtue of a certain precept of the high sheriff of the county aforesaid, duly issued to the bailiff of the said borough of New Malton,*" &c.² The precept of the sheriff being produced at the trial, it appeared to be directed, "To the bailiff of the borough of *Malton*." Upon this it was objected, that the precept in the indictment being concerning *New Malton*, there was a variance. But Lord Ellenborough held, that it was not matter of description, and that if the precept was actually issued to the bailiff of the borough of New Malton, it was sufficient, whatever might be the tenor of the direction.³ But the *return to the Crown Office* stated, that the members, naming them, were returned for the borough of *Malton*, and the objection was renewed with effect. It was insisted for the prosecution, that the indictment did not profess to set out the tenor of the return, or the manner in which the members were returned, and that the words *Malton* and *New Malton*, were used indiscriminately in the journals of the House of Commons. But Lord Ellenborough said, that this averment must be understood as a description of something, and the defendant was accordingly acquitted for this variance.⁴

Indictment for perjury before a magistrate.] The indictment for perjury before a magistrate should state, that the offence was committed upon an information and examination. The words "say, depose, swear, charge," and "*give the said justice to be*

¹ *R. v. Longbotom and another*, 1 Barnard. 314; and *Giles v. Gwyn* was cited, and it was said the indictment there was held bad for the first exception.

² But it is better to say, that an

election "came on," &c., without mentioning the precept.

³ *R. v. Leefe*, 2 Campb. 139.

⁴ *R. v. Leefe*, 2 Campb. 141. See also *R. v. Harris*, 5 B. & Ald. 926.

informed," were deemed applicable.¹ On the contrary, where it did not appear that a charge was made or pending, the indictment was held insufficient.² If the perjury be committed at quarter sessions, the chairman is not a competent witness.³

So, to allege, that before M. G., Esq., and T. H. H., clerk, two of the justices, &c., "J. O. came and exhibited a certain information upon oath," was held insufficient, because it did not thereby appear that J. O. was sworn before M. G. and T. H. H.⁴ So, where a deposition is required by statute (as under 6 & 7 Will. 4, c. 65, s. 9,) the absence of such deposition will render the proceedings informal, and a witness for the defendants, who was said to have sworn falsely before the justices, was held not rightly convicted of perjury.⁵

Commissioners of assessed taxes.] The indictment alleged a certain notice of appeal to the assessors. The evidence disclosed a notice of appeal to the surveyors of the commission. This was a fatal mistake, because it is necessary to set out all particulars incident to the jurisdiction.⁶

Of evidence in perjury.] It is said that a party may be punished instantly by the court on the evidence, as it were, of his own confession, *in facie curiæ*. Thus, where a party having sworn to an affidavit in the Court of Common Pleas, appeared in the King's Bench upon a summons, and confessed the falsity of his oath, the court ordered that he should be set in the pillory.⁷ So, bail who prevaricate, may be committed and punished, if the court see fit.⁸

It is important to observe, that throughout all the proceedings for different perjuries, the oath charged against the defendant must be proved to have been deliberately false to the satisfaction of the jury. Mistake, error, inadvertence, are not sufficient grounds for preferring so grave a complaint as perjury.⁹ If a defendant have uttered two contradictory statements upon oath, the course is to point out specifically in the indictment which of the oaths was corrupt, and then to give evidence of the testimony thus given in two ways. This proof will be sufficient without the form of two witnesses, as on other occasions of perjury, and also without showing a corrupt motive, or negating the probability of any mistake. Because, in fact, in such a case the contradiction actually arises on the side of the defendant himself.¹⁰

Witnesses.] The principal observations, however, which we have to make on the general head of evidence apply to witnesses. These

¹ *R. v. Gardiner*, 2 Moo. C. C. 95; 8 C. & P. 737.

² *R. v. Pearson*, 8 C. & P. 119.

³ *R. v. Gazard*, 8 C. & P. 595.

⁴ *R. v. Goodfellow*, Car. & M. 569.

⁵ *R. v. Scotton*, 8 Jur. 409.

⁶ *Rex. v.*—1 Cox, C. C. 50.

⁷ *R. v. Thorogood*, 8 Mod. 179.

⁸ 1 Chit. Rep. 116.

⁹ See 2 Hawk. c. 69, s. 2, citing authorities; and see also s. 7.

¹⁰ *R. v. Knill*, 5 B. & A. 929, n. As to averment of identity, see *R. v. Bennett*, Den. & P. 290.

persons may be considered here in reference,—first, to their number,—secondly, to their competency.

First, it used to be established as a general principle, that two witnesses or proof were necessary to convict a defendant of perjury, and for this simple reason, that there must be a majority of oaths against the accused. Thus, by Parker, C. J., “presumption is ever to be made in favour of innocence, and the oath of the party will have a regard paid to it until disproved. Therefore, to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant, for else there is only oath against oath.”¹ And the court at the Old Bailey laid down this point still more decidedly on one occasion, observing that this must be so upon each assignment of perjury. The law, they said, will not leave it to the jury to determine which oath they will believe, because the person indicted for perjury has already sworn one way.² So, that if there be but oath against oath, the defendant must be acquitted.³ There is an exception, however, to this rule, and it is where the defendant has created evidence against himself. A person named Knill, was convicted of having sworn contradictory oaths, the one before the House of Lords, the other before a committee of the House of Commons. One witness only deposed to the contradictions, yet the court denied a rule *nisi* for a new trial, because the contradiction had happened through the party’s own agency.⁴ So, where there was one *vivâ voce* witness against the defendant, and a document written by himself contradicting his own statement upon oath.⁵ Moreover, two witnesses are not essentially necessary to disprove the fact which has been sworn to, for if a material circumstance be proved by another witness, it may turn the scale, and warrant a conviction.⁶

So, where the defendant swore that certain invoices were produced by him, D. C., C. was the only witness, and he denied the statement, adding, that the defendant had produced other invoices of the dates of which he made a memorandum. This was held

¹ 10 Mod. 194. S. P. R. v. *Broughton*, 2 Str. 1230. S. P. R. v. *Naylock*, Suppl. to Vin. Ab. vol. 5, p. 379, K. 3, O. B. 1786. R. v. *Browne*, M. & M. 318; 3 C. & P. 572. See 2 Lew. C. C. 259.

² R. v. *Ledwick*, Suppl. to Vin. ut supra, p. 380, O. B. 1788.

³ R. v. *Fanshaw*, Skin. 327.

⁴ R. v. *Knill*, 5 B. & A. 929; ante.

⁵ R. v. *Mayhew*, 6 C. & P. 315.

⁶ R. v. *Lee*, 2 Russ. C. M. 650. See also R. v. *Mudie*, 1 Moo. & Rob. 128. The defendant’s account book, given in by him to the Insolvent Debtors’ Court, was put

in, and several persons whose names were specified in the indictment as debtors, and omitted in the schedule, appeared in the book as debtors to the defendant, and “paid” was marked to their accounts in the defendant’s writing. These persons were called, and stated that they did not pay until after the petition and schedule. It was objected, that here was merely oath against oath, and Lord Tenterden, though he would not stop the case, thought the point worthy of discussion. The defendant, however, was acquitted upon another ground.

corroborative evidence.¹ And the ruling now is, that every part need not be doubly sworn to. It was sworn by the defendant, that A. was not out of his sight between eight and nine A.M. Assignment upon this, one witness proved, that A. was, in fact, at one place, and another witness proved that A. was, in fact, at another place six miles off between those hours. This was held sufficient.² But where the indictment alleged that the defendant swore that he did not play at cards from between six and seven until nine, and then assigned perjury, by an averment that he did play between six and eight, it was held bad. The defendant might have played at five minutes past six, and yet not have played from between six and seven until nine, for the words "from between six and seven" might be any time short of seven, five minutes or five seconds to that hour.³ The prosecutor swore that the prisoner owed him a quarter's rent; the prisoner denied this upon oath at nisi prius, in June, 1851. The son of the prosecutor swore to an admission by the prisoner, that in August, 1850, he owed three or four quarters' rent. This was held insufficient, for the money might have been paid immediately.⁴ Something must be shown likewise to prove that the oath of the prosecutor is preferable to that of the defendant, upon which perjury has been assigned.⁵

If a defendant makes distinct admissions inconsistent with his innocence, one may be proved by one witness and one by another.⁶ And upon one occasion the defendant was allowed to convict himself without any further proof. As where the question was concerning the presence of certain women at a riot at his mill. He gave information upon oath before a justice, that they were so present, and then, having been tampered with, he swore at the trial that they were not at the riot; and Yates, J., deemed this evidence of itself sufficient, and the defendant was convicted upon it alone, and transported.⁷ However, this case does not seem to have been presented to the notice of a learned judge upon a much more modern inquiry. A witness at sessions contradicted the entire of his deposition before the magistrate, and perjury was assigned accordingly. Gurney, B., held this proof insufficient. In order to convict the defendant, the jury ought to have been satisfied either that the testimony given at the sessions was false according to the charge, or that the deposition was true.⁸ *A fortiori* if the evidence is only confirmed in some slight particulars, it will

¹ *R. v. Webster*, 1 Fost. & F. 515.

² *R. v. Roberts*, 2 Car. & K. 607.

³ *R. v. Whitehouse*, 3 Cox, 86.

⁴ *R. v. Boulter*, Den. & P. 396; 3 Car. & K. 236; 21 L. J. M. C. 57.

⁵ S. C.

⁶ *R. v. Hook*, 27 L. J. M. C. 222; Dears. & B. 606.

⁷ Anon., 2 Russ. C. M. 652. And in this opinion Lord Mansfield, Wilmot and Aston, JJ., concurred. Id. note (u); one oath being said to disprove the other. Id. 545.

⁸ *R. v. Wheatland*, 8 C. & P. 238.

be insufficient.¹ So where there was the contradictory oath of the prosecutor, but nothing more, excepting the oath of a woman, who counted certain monies agreeably to the evidence of the prosecutor, but whose evidence was not independent of that evidence.² Something more than the oath of one witness will suffice, but it must be *independent* testimony.³ There needs not be a direct contradiction.⁴

Secondly, we go on to examine the competency of witnesses in perjury,⁵ but many of the following cases are scarcely now applicable by reason of the Act 6 & 7 Vict. c. 85.

Where an action had been brought by B. against C., it was held, that C. could not be examined as a witness upon an indictment for perjury against A., who had given evidence at the trial.⁶ And Mr. Noland in a note to *Strange*, expresses the same opinion, taking a distinction between cases at common law and those upon the statute.⁷ But, on the other hand, Mr. Phillipps observes, that the party injured may be a witness, according to the sense of modern decisions, whether the prosecution be at common law or upon the statute, since, as in an action to recover his moiety, he would be precluded from giving the conviction in evidence, the objection to his competency would seem to be removed.⁸ However, at common law, it was considered, that the party injured might be a witness,⁹ and so it continued to be held, until a notion prevailed that the witness would reap some advantage from the conviction, for instance, that the Court of Chancery would relieve against the consequences of a judgment obtained by perjury. Thus it was said, that in perjury, a person should not be received to give evidence as prosecutor, because he might reap a benefit in case of a verdict for the king.¹⁰ The same law was afterwards laid down where certain defendants in an ejectment were refused as witnesses by the lord chief justice, in an indictment for perjury committed upon the previous trial.¹¹

So, a party who had been compelled to pay a sum of money through the evidence of the defendant, the only witness examined, and who had filed a bill for relief, was rejected, for the Court of Chancery, said Lord Kenyon, upon having this new matter stated in a new or supplemental bill, would direct that the money should be refunded.¹²

So, where a verdict had passed against the prosecutor in consequence of the testimony of the defendant in perjury, Lord Kenyon

¹ *R. v. Yates*, Car. & M. 132.

² *R. v. Braithwaite*, 8 Cox, 254, 444.

³ S. C.

⁴ *R. v. Towey*, 8 Cox, 328.

⁵ *R. v. Povey, Lambert, and others*, 1 Sid 237.

⁶ *R. v. Bacon*, 2 Ro. Ab. 697. See Bull. N. P. 288, *et seq.*

⁷ 2 Str. 1104, note (1); S. P.

by Sir. W. D. Evans, 1 Salk. 283, note (a).

⁸ Phil. on Ev. 4th ed. p. 120.

⁹ Bull. N. P. 289.

¹⁰ *R. v. Whiting*, 1 Salk. 283;

1 Ld. Raym. 396.

¹¹ *R. v. Ellis*, 2 Str. 1104. S. P.

R. v. Newens, 4 Geo. 1, cited there.

R. v. Nunez, 2 Str. 1043. Cas.

T. H. 265.

¹² *R. v. Dalby*, Peake, 16.

would not suffer the prosecutor to be sworn, he having admitted that he had not paid the debt and costs. It was said, that the bail had been fixed, and would, therefore, be liable at all events, but Lord Kenyon said, that the prosecutor might be relieved in a court of equity against a judgment obtained on the sole evidence of the defendant, in case of a conviction, and the proposed witness was, consequently, rejected.¹

These decisions, however, were at length doubted, and afterwards overturned after considerable discussion. Lord Hardwicke first threw out a hint that *R. v. Whiting*, upon which the other cases followed, was a case in which the credit, rather than the competency, of the witness was at stake,² and in a few years afterwards, a decision was made the other way. There was an indictment against a defendant for a fraudulent oath supposed to have been taken in chancery, and the prosecutor tendered himself for the purpose of being examined. The chief justice (Sir William Lee) received his testimony, saying, that as no bill of exceptions lay, the prosecutor would otherwise be without remedy, whereas the defendant, if convicted, might move for a new trial. Lee, C. J., said further, that in *Nunez's case*, the suit in the exchequer was then still pending, whereas here, the suit in equity seemed at an end. The defendant, however, was acquitted, because there was only one witness against him.³ The next case was mentioned by Lord Mansfield in giving judgment upon a question, whether the borrower was competent to prove usury.⁴ The defendant had bought an estate for the plaintiff; he articulated in his own name, and refused to convey, and by his answer denied any trust. The bill was dismissed, and the defendant was indicted for perjury, and convicted on the evidence of the plaintiff in equity confirmed by circumstances, and by the declaration of the defendant. The plaintiff then petitioned for a supplemental bill in nature of a bill of review, stating the conviction, but the petition was dismissed because the conviction was not evidence.⁵ However, the point was finally decided in a solemn manner soon afterwards. The defendant, in an indictment for perjury, had brought an action against the prosecutor, who filed a bill against him in equity for a discovery and an account, and obtained an injunction. The defendant then denied the allegations of the prosecutor, and obtained a dissolution of the injunction, upon which he was indicted for perjury. The cause and the indictment came on to be tried at the same assizes, the indictment standing first, and the court held, that the testimony of the prosecutor should be received, because he could not avail himself of the conviction, either at law or in equity. The court added, that they could not accede

¹ *R. v. Eden*, 1 Esp. 97.

² Ca. Temp. Hardw. 359; and see Bull. N. P. 283, note (a).

³ *R. v. Broughton*, 2 Str. 1229.

⁴ *Abrahams q. t. v. Bunn*, 4 Burr. 2251, and held that he was. This case confirms the overturning

of the decision above enumerated.

See *R. v. Menetonè*, Peake, 12; cited. *R. v. D'Faria*, Id. 104.

R. v. Pepys, Id. 138.

⁵ *Bartlett v. Pickersgill*, 4 East, 577, 581; 4 Burr. 2255.

to this objection on the part of the defendant without breaking in upon the authority of *Smith v. Prager*,¹ and *Bent v. Baker*,² where it was decided that where a party is not immediately interested in the cause, nor has any interest in the event in support of which the verdict in that cause may be given in evidence by him in any other proceeding instituted by or against him, he is a competent witness. The rule, therefore, which had been obtained for setting aside the verdict and granting a new trial was, accordingly, discharged.³ However, in a later case, where it was clearly admitted that a person who had not paid the debt and costs of a prior action, was not rendered incompetent as a witness for the prosecution, he was, nevertheless, held to be disqualified upon the disclosure of the additional circumstance that he expected the defendant to be a witness against his interest in a similar action coming on for trial after the indictment. This was such an immediate interest as rendered him incompetent.⁴ And, in chancery pending a suit, the complainant's testimony has been rejected.⁵ A. had agreed to indemnify B.'s partners against a suit in chancery which they had instituted against him. A. was indicted for perjury in his answer. Here B. was a good witness against A., notwithstanding the guarantee.⁶

It is no objection to a witness that he has sworn to the fact which he is about to depose to in an indictment for perjury. As where the defendant had filed a cross bill against a witness who, in her answer, had sworn to the very fact she was brought forward to prove upon an indictment. Because her answer would not help her in the Court of Chancery, since other evidence must be adduced there before she could prove her case, and so she could not be said to have an immediate interest in the event of the suit.⁷

Evidence to prove a general indictment for perjury.] The chief points of evidence which tend towards the proof of an indictment for perjury are:—1, the proceedings in which the offence was committed; 2, the oath of the defendant; 3, the matter sworn to; and 4, the assignment of perjury.

First, as to the proceedings.⁸ To show the nature of the cause in which the perjury took place as alleged in the indictment, it is usual to produce the record of the court.⁹ If the trial be for a perjury committed at the assizes or sittings, produce an office copy of the record, or the *nisi prius* record.¹⁰ The production of

¹ *Smith q. t. v. Prager*, 7 T. R. 60.

² 3 T. R. 27.

³ *R. v. Boston*, 4 East, 572; And see *Needham v. Smith*, 2 Vern. 464; 1 Campb. 10.

⁴ *R. v. Hulme*, 7 C. & P. 8.

⁵ *R. v. Fanshaw*, Skin. 327.

⁶ *R. v. Yates*, Car. & M. 132.

⁷ *R. v. Pepys*, Peake, N. P. C. 138.

⁸ Note, that all formal proofs

must be admitted at the trial, or the judge will direct an acquittal. *R. v. Thornhill*, 8 C. & P. 575.

⁹ The chancellor will take care that all proper documents in his court shall be produced. See *Mont. Bank. C.* 214. And so will the lord chief baron, security being given for the safe return of the record. 2 Y. & Jer. 512.

¹⁰ Arch. Crim. Pl. p. 366.

the *postea*, though no evidence of the verdict, is enough to show that a trial took place, so as to introduce an account of what a witness swore at the trial.¹ So, that where an objection was made that a copy of the final judgment ought to have been produced, it was overruled.²

So also, though no *postea* be indorsed, but only a minute of a verdict, the *nisi prius* record is evidence for this purpose, and the examination of one defendant after his acquittal may be proved by parole evidence.³ But if no record is made up, so that it does not appear whether any trial has happened or not, the minutes will not be received, for the main link is wanting in such a case.⁴

It is not competent to travel out of the record, nor to introduce new matter into the proceedings. Therefore, where the defendant was charged with perjury before a magistrate, it was held, that parole evidence could not be brought forward to aid the written deposition by showing other matters sworn to by the defendant upon the same occasion.⁵ But where a document failed to show the presence of certain justices at sessions, by reason of its being faulty as a record, it was held, that parole evidence might be adduced to show the presence of those justices according to the statement made in the indictment.⁶

We must next show that the defendant took an oath. The particular mode of swearing, however, need not be testified, and proof that the party was sworn and examined will satisfy the allegation in the indictment that he was duly sworn, &c.⁷

Thirdly, the matters sworn to must be given in evidence. Should the count allege that the defendant swore certain matters in *substance and effect* (which is not a desirable or prudent allegation), it must be proved that the defendant swore the whole in *substance and effect* of that which is set forth in the count as his evidence. For want of being able to do this the count will fail.⁸ And this rule holds, although there be distinct assignments of perjury in that count.⁹ It is moreover necessary to give the whole of the evidence sworn by the defendant referrible to the fact on which the perjury is assigned. For the defendant may have explained an apparent falsity in a subsequent part of his examination. Therefore, if there be two answers in chancery relative to the same matter, it would be competent for the defendant to prove that the second answer contained a satisfactory

¹ Per Pratt, C. J. Str. 162.

² *R. v. Minns*, *R. v. Iles*, cited, Bull. N. P. 243.

³ *R. v. Browne*, M. & M. 315; 3 C. & P. 572. This case shakes the authority of a decision made by Lord Kenyon upon a trial for perjury, where it appeared that the *postea* had not been indorsed. *R. v. Page*, 6 Esp. 83.

⁴ *The Queen v. Carter*, 6 Mod. 168.

⁵ *R. v. Wylde*, 6 C. & P. 380.

⁶ *R. v. Bellamy*, Ry. & Moo. N. P. C. 171. See also *R. v. Ward*, 6 C. & P. 367.

⁷ *R. v. Rowley*, Ry. & M., N. P. C. 302.

⁸ *R. v. Leefe*, 2 Campb. 134.

⁹ *Id.*

explanation of the first, in which case he would be entitled to an acquittal.¹ And Lord Kenyon directed an acquittal where the witness who had taken down the defendant's evidence proved the words on which the perjury was assigned, but could not speak to any other part of his evidence, and his lordship mentioned *Carr's case*.²

But where the witness stated, that he took no note of the evidence, but that from his duty as attorney's clerk he had paid particular attention, that he would not undertake to say that he had given the whole of the defendant's testimony, but that he would swear that nothing else was said which qualified what he had stated, and that to the best of his recollection he had given all that was material to this inquiry and relating to the transaction in question, Littledale, J., received the evidence, and the prisoner was convicted, and the judges subsequently expressed their approbation of the decision.³

So, where three witnesses stated, that the defendant swore certain matters, but admitted that they did not take down the evidence as it was given, nor did they even profess to relate the whole of the evidence so sworn, the proof was allowed.⁴

So, where an answer on a cross-examination was quite foreign to the general merits of the case, upon an indictment for perjury in this particular, it was held sufficient to prove all the cross-examination, only because that was entirely unconnected with the original examination.⁵

It also lies upon the prosecutor to show that the matters sworn to were material,⁶ or, at all events, bore in some way upon the question at issue; and this proof lies upon the prosecutor, for it will not be taken by intendment.⁷

The statement of a deceased witness being tendered in evidence for the prosecution, certain declarations of the same witness, not upon oath, were proved upon cross-examination, and although these were material to the defendant, they were held to have been properly rejected, not being on oath.⁸ A notice of set-off, intitled in a cause *A. B. v. C. D.*, and signed by C. D.'s attorney, will not satisfy an allegation that a cause was depending between A. B. and C. D.⁹

Lastly, the assignment of perjury must be proved as laid. And this must be done by showing, that the matter sworn to was really false, and not merely supposed to be so from the circumstance of the defendant having written a letter to that effect, or otherwise. The recital of a deed is evidence in other cases, but not to prove

¹ *R. v. Carr*, 1 Sid. 418; 2 Ves. & B. 258.

² *R. v. Jones*, Peake, 38.

³ *R. v. Rowley*, Ry. & M., N. P. C. 299; 1 Moo. C. C. 111.

⁴ *R. v. Munton*, 3 C. & P. 498.

⁵ *R. v. Dowlin*, Peake, 170.

⁶ Under the statute they must

have been immediately material, but indictments are rarely preferred now on 5 Eliz.

⁷ Supp. to Vin. Ab. vol. 5, p. 379, K. 9. See also *R. v. Jary and King*, Palm. 382, 535; Ld. Raym. 889.

⁸ *R. v. Parker*, 3 Dowl. 242.

⁹ *R. v. Stoveld*, 6 C. & P. 489.

perjury, nor a letter of the party indicted, though sworn to be the handwriting of the defendant.¹

Where perjury was assigned upon a statement by the defendant, that his property qualification was 300*l.* a year, in order to enable him to sit in parliament, it was held, that the jury must be satisfied of the negative of this qualification, and likewise of the guilty knowledge of the defendant respecting it.²

And if one assignment be shown to be good, there must, upon a general verdict, be judgment for the crown,³ unless, indeed, several assignments be crowded together into one count, and there be an allegation that the defendant swore *in substance and effect*, in which case all the assignments in that count must be proved.⁴

An award made pursuant to an order of *nisi prius* is not evidence against the defendant, if produced merely as proof that nothing was due to him. The defendant was charged with perjury arising from an application for a *capias* against the prosecutor for 50*l.* An award was put in showing that nothing was due to the defendant. But the court held, that it had been improperly received in evidence. Not because the truth of the statement was necessarily inconsistent with the defendant's believing it to be true, for the defendant's knowledge of its falsehood would require to be proved by other evidence, but because the decision of the arbitrator in respect of that fact, was no more than a declaration of his opinion, and there was no instance of a declaration of such opinion being received in evidence of a fact against the party to be affected by the proof of it in any criminal case.⁵ In perjury, that A. made B. executor, the probate must be produced; to prove that A. devised real estates, the original will must be brought forward, and one of the attesting witnesses called.⁶ In an indictment for perjury, an averment stated a suit in the prerogative court to dispute the validity of a codicil. The production of the original allegation of both parties, signed by their advocates, with proof of their signatures, and of their acting as advocates in that court, was held sufficient without the *caveat*. The allegations were produced from the registrar of the court.⁷

Answer in Chancery.] In this case it is necessary to prove:—1. The bill. 2. The answer, and that it was made on oath before a

¹ *R. v. Carr*, 1 Sid. 418. The defendant was indicted for perjury, he having sworn falsely to his schedule of debts. It was proposed to show, that persons, whose names were *not* mentioned in the indictment, were also debtors to the defendant, and omitted in the schedule; but Lord Tenterden would not permit it. *R. v. Mudie*, 1 Moo. & Rob. 128.

² *Sir J. E. de Beauvoir*, 7 C. & P. 17.

³ *The Queen v. Rhodes and Cole*, *Ld. Raym.* 886; 1 Ke. 213.

⁴ See *R. v. Buckworth and others*, 1 Sid. 377. It is not competent for a defendant to offer evidence to disprove an assignment of perjury upon which the prosecutor offers no evidence. *R. v. Hemp*, 5 C. & P. 468.

⁵ 17 L. J. Q. B. 187. *R. v. Moreau*, 11 Q. B. 1028.

⁶ *R. v. Turner*, 2 Car. & K. 732.

⁷ S. C.

master in chancery. 3. The falsity of the matters contained in the answers.

First, the bill is produced, or an examined copy, and then the answer, but it is worthy of attention, that no copy of the answer can be received. The *original* of that instrument must always be brought forward in prosecutions for perjury. It is said, however, that, perhaps, a copy might be sufficient to warrant the grand jury in finding the bill of indictment, although the original must, of course, be produced at the trial.¹

A copy of the bill, however, has been admitted, but, if the bill be taken off the file, it is not evidence.²

In proceeding upon an answer to a bill before amendment, the amended bill was put in, and the amendments were proved to have been made by the clerk according to his duty, but the person who actually wrote these corrections was not called. Lord Tenterden held that these proofs were sufficient, and that the amendments were not material to the case.³ But if, upon exceptions, a second answer to a bill be sent in, the defendant has a right to have that also read in order to explain what he had said in his first answer.⁴

Next, it must be shown that the answer was put in upon oath before a master in chancery. And this is done by proving the jurat, and that the name subscribed is the defendant's handwriting. The defendant's signature proves that he was the person who exhibited the answer, and the signature of the master is proof that the person who did exhibit it was regularly sworn to the truth of its contents. Therefore, where the answer purports to be sworn before a master, it is sufficient to prove the handwriting of the master, and that of the defendant.⁵ And so in proving perjury committed in any answer sworn before a baron of the exchequer, you need only prove the handwriting of the baron and that of the defendant.⁶ However, although no proof of identity beyond the facts of a person calling himself A.B. being sworn, and his signing the answer, is necessary,⁷ yet no return of the master will be sufficient without proof of the defendant's oath.⁸ The same law prevails with respect to the proof of depositions in cases of perjury.⁹

It lies upon the defendant to prove that he has been personated, if such should be the case;¹⁰ that is to say, as soon as the evidence of his handwriting, and of that of the master, have been

¹ *Chambers v. Robinson*, Bull. N. P. 239; Trin. 12 Geo. 1. *R. v. Baspoole*, 2 Show. 486; as to depositions in chancery.

² *R. v. Fanshaw*, Skin. 327.

³ *R. v. Laycock*, 4 C. & P. 326.

⁴ *R. v. Carr*, 1 Sid. 418; Taylor on Evidence, 598.

⁵ See *R. v. Morris*, 2 Burr. 1189; S. C. 1 Leach, 50; *R. v. Benson*, 2 Camp. 508.

⁶ *R. v. Nunez*, 2 Str. 1043, in marg.

⁷ Bull. N. P. 239. *R. v. James*, 1 Show. 397. *R. v. Morris*, 2 Burr. 1189.

⁸ Bull. N. P. 239. Anon. 3 Mod. 116.

⁹ Arch. Crim. Pl. 87.

¹⁰ 2 Burr. 1189.

tendered as above mentioned. The recital of the place in the jurat where the oath is administered is sufficient proof that it was there taken. The third and last proof is the falsity of the answer.¹

Affidavit to hold to bail.] The affidavit sworn by the defendant, and the falsehood of it, are the chief features of evidence necessary to support this indictment. There are, therefore, to be proved,—
1. The affidavit sworn by the defendant. 2. The averments of perjury.

The proper officer will produce the affidavit at the trial, and the handwriting of the defendant must then be proved, or that he was sworn to the contents of the instrument, and also, if under the statute, that the affidavit was in some way used in the prosecution to which it has relation, but not if at common law. And the handwriting of the officer who administered the oath must be proved.² The words “by the court” being shown to be in the handwriting of one of the masters of the court, is evidence of the swearing, without proof that the master was present in court at the time.³

Notwithstanding some ancient opinions to the contrary,⁴ it is now necessary to produce the original affidavit, and, therefore, a copy would be rejected as insufficient. The officer will prove that the indictment in question has been filed of record, although at common law the allegation and proof are unnecessary. But it is otherwise upon the statute, for there it must appear that the affidavit was filed of record.⁵ Next, if the proceeding be on the statute, it must be shown that the affidavit was used;⁶ but the crime is complete at common law, whether any use be made of the affidavit or not;⁷ for the perjury is complete when the affidavit is sworn, and the omission of some formal regulation is immaterial.⁸ But in the case of ordinary documents secondary evidence is admissible.⁹

The statute 23 Geo. 2, c. 11, s. 1, having directed that the authority of the person who administers the oath should be alleged, it must appear, that the officer who administered the oath upon this occasion was acting in his usual capacity, upon which the judge will take notice of his authority. In cases where judicial notice cannot be taken of the power to give oaths, evidence must certainly be adduced to prove that authority.¹⁰ But the appointment need not, in general, be shown, as in the case of a commissioner who takes affidavits in the country, and in many other instances.¹¹

¹ *R. v. Spencer*, Ry. & M., N. P. C. 97; 1 C. & P. 260.

² 1 C. & P. 260.

³ *R. v. Turner*, 2 Car. & K. 732.

⁴ See *R. v. James*, 1 Show. 397.

⁵ *R. v. Crossley*, 7 T. R. 315.

⁶ *R. and Reg. v. Taylor*, Holt, 534.

⁷ *R. v. Crossley*, 7 T. R. 315.

⁸ *R. v. Spencer*, supra.

⁹ *R. v. Milne*, 2 Fost. & F. 10.

¹⁰ Archb. Crim. Pl. p. 365.

¹¹ See *R. v. James*, 1 Show. 397. *R. v. Verelst*, 3 Campb. 432. *R.*

Judgment.] The production of the book from the judgment office in which the *incipitur* is entered, will satisfy the allegation that judgment was entered upon an action.¹

Grand jury.] Evidence that the defendant swore differently before the magistrate is not sufficient, because there is no certainty as to which was the true oath, or whether both were alike untrue.² Still, a person may be convicted of perjury for swearing falsely before a grand jury, and a witness, upon the same indictment, and a police officer in the grand jury room may prove the case, for they are not sworn to secrecy like the jury.³

By 9 & 10 Vict. c. 95, s. 111, the clerk of every court holden under this Act shall cause a note of all complaints and summonses, and of all orders, and of all judgments and executions, and returns thereto, and of all fines, and of all other proceedings of the court, to be fairly entered from time to time in a book belonging to the court, which shall be kept at the office of the court; and such entries in the said book, or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, shall at all times be admitted in all courts and places whatsoever as evidence of such entries, and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding, without any further proof.

Subornation.] In this case the principal evidence will be the perjury and the subornation. Thus, the proceedings before the judge, as stated in the present indictment, must be proved, together with the oath of the person suborned, the matters which he swore to, and the falsehood of them. It was, indeed, attempted upon one occasion to produce the record of conviction as sufficient evidence of the perjury, but the prisoner's⁴ counsel insisted that this would not be conclusive, that the prisoner had a right to controvert the guilt of the individual whom he was charged with having suborned, and that the evidence given on the former trial ought to be submitted to the consideration of the present jury. The recorder entertaining the same opinion, compelled the counsel for the crown to go through the whole case, as though the jury had the question of the original prisoner's guilt solely before them.⁵

Thus it is also in the cases of subornation of perjury before commissioners of bankrupts, and concerning a bastard child, above al-

v. *Howard*, 1 Moo. & Rob. 187. "I must take it," said Patteson, J., in the last case, "that somebody swore this affidavit before the commissioners;" and the learned judge recognized the authority of the commissioners without proof of the appointment.

¹ *R. v. Gordon*, Car. & M. 410.

As to the *postea* (indorsement) see *R. v. Page*, 2 Esp. 649, n.

² *R. v. Hughes*, 1 Car. & K. 519.

³ *R. v. Hughes*, ut supra.

⁴ He was indicted for suborning another to take a false oath concerning a seaman's will.

⁵ *R. v. Reilly*, 1 Leach, 454,

455, n.

luded to. The proceedings before the proper tribunal, the oath of the defendant, the matters which he has sworn to, and the falsity of them, constitute the necessary evidence to prove the perjury. There is, however, this distinction in cases of perjury before commissioners of bankrupts between the bankrupt himself and third persons, namely, that where the former is indicted for perjury, strict proof of the proceedings is necessary, whereas in the latter case, the adjudication of the commissioners is sufficient to prove the fact of bankruptcy. Thus, in an indictment against a bankrupt for perjury upon his last examination, Lord Ellenborough was disposed to think, that not only the commission of bankruptcy, but also the trading, the debt of the petitioning creditor, and the act of bankruptcy, should have been given in evidence. His lordship said he would save the point for the defendant, who was, however, acquitted on the merits.¹ In an indictment, on the other hand, against a third person who had been examined before commissioners, their declaration of the bankruptcy was held sufficient by Abbott, J.² But, secondly, you must prove the subornation. This is done by showing that the defendant wilfully incited the other person to take the false oath, (which, as we have seen, must, in fact, be taken in order to constitute this offence,) and, it seems, that the bare solicitation of the defendant for this purpose would be evidence for the jury to consider, in the absence of proof to the contrary, whether the defendant had not acted knowingly and corruptly.

It has been held, that a prisoner convicted of taking a false oath, but pardoned before judgment, was a competent witness against the party who had suborned him, being restored to his former competency and credit by virtue of the pardon.³

County Court.] The judge of a county court made the defendant write his name in court, and impounded the signature, together with that of an instrument supposed to have been signed by him. It seems, that upon an indictment for perjury, the jury might look at both signatures.⁴

Perjury before a committee of the House of Commons.] In this case the usual proofs are, the election, the return of the members, and the matters falsely sworn to. Then follow the proof of the assignments by demonstrating the wilful untruths advanced by the defendant.⁵

The following evidence was deemed sufficient to support an indictment for perjury by falsely taking the freeholder's oath at an election for Middlesex. That oath was administered to a person who polled on the second day in the name of J. W. There was

¹ *R. v. Punshon*, 3 Campb. 96 ;
S. C. 223.

² *R. v. Raphael*, at Devon Lent
As. 1818, Mann, N. P. Digest,
232.

³ *R. v. Reilly*, 1 Leach, 454.

⁴ *R. v. Taylor*, 6 Cox, C. C.

⁵ See *R. v. Leefe*, 2 Campb.
134.

no such person as J. W. The defendant, himself no freeholder, voted on that day, and subsequently boasted of the success his fraudulent vote had met with. Not more than *one* false vote was given on the day in question, and there was no proof that the defendant voted in his own name, or in any other name than that of J. W. This evidence was considered effective for the purpose of inducing the jury to presume that the defendant had voted thus fraudulently in the name of J. W., and the court held, that he had been properly convicted.¹

The allegation in an indictment, that a committee were sworn to "try the matter of the petition" was held good, although the stat. 10 Geo. 3, used the words "to try and determine the merits of the return."²

Insolvent Court.] If the filing of the petition be proved, it will be presumed that the sittings of the Insolvent Court were properly holden. Therefore, although the facts of due notice and filing, and the appointment of a day for examination, were alleged in the indictment, proof of them was deemed unnecessary, nor was it needful to prove that the prisoner was a trader owing less than 300*l.*, he having, in his petition, so stated it.³

Court of Review.] In a case of perjury before the court of review in bankruptcy, the petitioning creditor proved the handwriting of the defendant to the affidavit on which perjury was assigned, and he likewise gave evidence of the trading and act of bankruptcy. A creditor who had not proved his debt likewise gave evidence of the trading and act of bankruptcy; and an assignee proved the act of bankruptcy. These were the principal witnesses, and the judges were of opinion, upon a reserved case, that their testimony was properly received in support of the prosecution.⁴

The high sheriff.] An indictment alleged that a trial took place before the high sheriff; the evidence was, that neither the high sheriff nor the under sheriff were present, but that the assessor executed the writ of trial. The writ was directed to the sheriff, and the *postea* stated that the trial took place before him. This was held sufficient proof, and the authority of the assessor was deemed well shown, the judge holding that there was no variance.⁵

Bastardy.] The mother's charge is shown by proof of the original order, or by secondary evidence of the order, after a summons to produce it. It is not enough to offer the minutes of the clerk to the justices.⁶

¹ *R. v. Price*, alias *John Wright*, 6 East, 323.

² *R. v. Dunn*, 1 Dowl. & R. 10.

³ *R. v. Westley*, Bell, 193; 29 L. J. M. C. 35.

⁴ *R. v. Keat*, 2 Moo. C. C. 24.

⁵ *R. v. Dunn*, 1 Car. & K. 730.

Diss., Coleridge, Erskine, and Wightman, JJ.; 2 Moo. C. C. 297.

⁶ *R. v. Newall*, 6 Cox, C. C. 21.

Actions on 5 Eliz. c. 9.] Actions upon the statute of Eliz. by the party who has been aggrieved by perjury, are of such rare occurrence, that very few words will be sufficient upon the subjects of pleading and evidence.

First, he must be the party grieved who brings the suit,¹ and he is not at liberty to join any other with him. Thus, an exception was taken where an action had been taken against three, that a surrender, which had been in question, enured to the use of two of the plaintiffs only, so that the third person was not an injured party, and it was the opinion of Wray and Southcote, JJ., that the writ should abate.² On the other hand, it was said at the bar, upon one occasion, and not denied, that if two parties be grieved, they must join, the one being incompetent to maintain his suit without the other.³

Great accuracy is required in setting out the statute, if it be attempted to do so; but this is not necessary, for where it was moved to arrest the judgment because the plaintiff had omitted the words of the statute in his declaration, the court would not hearken to the objection, but gave judgment for the plaintiff.⁴

The only ground for the objection was, that it ought to have appeared whether the defendant had been guilty of perjury, or of subornation; but as Mr. Serjeant Hawkins has observed, all perjury whatsoever must come under one of those heads, there being no medium, and, therefore, the prosecutor would be equally grieved in either case. He would be placed under the difficulty not only of proving the perjury, if such an objection were to prevail, but also of showing it to be within one of the branches of the distinction, which would be superfluous.⁵

Nevertheless, the words of the statute must be strictly pursued in the allegations of the defendant's oath, and of his tortious intention. Thus it was adjudged that the plaintiff should take nothing by his writ for want of the word, *voluntariè*, in an action of debt upon the statute.⁶ An action of debt, was brought upon the statute for perjury committed in an action of debt, and the record of this last action was stated to have been as of Hil. 27 Eliz. In truth, the action was brought in Hil. 28 Eliz. and so the "recital did miss the record." It was contended, that here was a fatal variance, inasmuch as the party charged with perjury might thus be doubly proceeded against. But by Coke, *arguendo*, it is between the same parties, and in the same cause, and a circumstance only is mistaken. Clench, J. It is needful to show in what action the first perjury was committed, for he says in trespass, whereas in truth it was in debt; all is naught. Gawdy, J. If no action be alleged, he cannot sue upon the statute of 5 Eliz.⁷

¹ 3 Bulst. 147.

² Anon. 2 Leon. 12.

³ *R. v. Deakins*, Hetl. 73.

⁴ *Cockerill v. Apthorp*, 3 Bulst. 147.

⁵ 1 Hawk. P. C. c. 69, s. 18.

⁶ *Kitton v. Walters*, Hetl. 12; *Brookes v. Hall*, 2 Ro. Rep. 76.

R. v. Cox, 1 Leach, 71.

⁷ *R. v. Dennie and Turner*, Godb. 88.

The authority of the judge or commissioner must also appear upon the record. Where it was alleged that the defendant came to R., a master in chancery having authority to take affidavits, &c., and that the defendant made a false affidavit, but did not allege that the affidavit in question was in chancery, *in curiâ cancellariæ*, it was held to be no perjury within the statute.¹

Moreover, it must appear upon the face of the declaration, that the party was in reality aggrieved, so that where upon a question concerning the surrender of a copyhold, it was alleged that perjury had been committed, it was held a good exception that the certainty of the copyhold did not appear upon the pleading.²

Trial in perjury generally.] By 14 & 15 Vict. c. 100, s. 22, on trials for perjury and subornation, a certificate of the indictment and trial on which perjury is assigned shall be sufficient evidence of the trial. The record being duly made up, and the *venire facias*³ complied with by the appearance of a proper jury, the trial commences. But the judge is authorized to refuse the inquiry altogether if the indictment appear unquestionably to be bad. As where it could not be in any way collected from the record that the matters sworn to and alleged as perjuries were material to the question at issue.⁴ So again, where an indictment for perjury had been found at the quarter sessions, and had been removed into the Court of King's Bench by *certiorari*, because the quarter sessions have no jurisdiction over the offence, Mr. Justice Gaselee refused to try the charge in this instance.⁵ But it is otherwise where the materiality of the thing sworn can be traced on the record, although there be no allegation to that effect. The objection for want of such an allegation is on the record, and can be taken advantage of in arrest of judgment, if necessary.⁶

Verdict.] Upon an indictment containing four counts, the jury found a verdict of guilty of the perjury and misdemeanor aforesaid. The *venire* was stated on the record—to try whether the defendants were guilty of the perjury and misdemeanor aforesaid. It was held that perjury was *nomen collectivum*, that, therefore, the *venire* and verdict applied to all the counts, and that, although a general judgment had been entered, yet that, being for imprisonment only, it was divisible.⁷ In this case, the court said, that *R. v. Powell*⁸ was not in the least interfered with: neither in *O'Connell v. Reg.* nor in *Campbell v. Reg.* was it intended to overrule *R. v. Powell*.⁹

It is not now necessary to produce the record in order to prove

¹ Anon. Lat. 38. *Luther v. Holland*, Id. 132.

² Anon. 2 Leon. 12.

³ See Doug. 791, 794.

⁴ *R. v. Tremearne*, Ry. & M., N. P. C. 147.

⁵ *R. v. Haynes*, Id. 298.

⁶ *R. v. Souter*, 2 Stark. 423.

⁷ *R. v. Ryalls*, 17 L. J. M. C. 92. Affirmed in error, 18 L. J. M. C. 69; 11 Q. B. 781.

⁸ 2 B. & Adol. 75.

⁹ 18 L. J. M. C. 69.

a conviction or acquittal, but a certificate under the hand of the clerk of the court is sufficient. Yet, where this certificate was wanting, the caption, the indictment, the indorsement of the verdict and sentence, with the minutes of the trial, were held sufficient to warrant a conviction.¹

Judgment.] The trial being over, and the verdict given,² judgment is entered up according to the finding of the jury. And there was this additional penalty to the statute of Eliz., namely, that the disability formed part of the judgment. Consequently, a pardon under the great seal or sign manual restored the attainted perjurer to his competency, after a conviction at common law, but not so if he had received judgment under the statute 5 Eliz.³ The statute 6 & 7 Vict. c. 85, reaches the case even of perjured persons, and renders them competent.

One R. was convicted of perjury upon the oath of D., but R. subsequently caused D. himself to be convicted of perjury in accusing R. It was thereupon moved, that as judgment had not been given, an entry might be made upon the record that R. was acquitted of the first perjury, but the court said, they could not do that. R. might bring error if he would. However the court restored him to his place of one of their attornies.⁴

The following is an example of an erroneous entry of the intended judgment:—"It is *ordered*, that the said L. K. be transported, &c.," the mistake being in the word, "*ordered*," instead of "*considered*." The defendant brought a writ of error, but the court observed that no *judgment* had been given, there being merely an *order*, and they awarded a *procedendo* to the court below to give judgment on the conviction. In the meantime, they thought that the prisoner might procure bail for his personal appearance to receive that judgment at the next Chester sessions.⁵

New trial.] The judgment being pronounced, the defendant in perjury has three courses open to him for the purpose of avoiding the mischief which he has encountered. He may move for a new trial, or in arrest of judgment, or may bring a writ of error.⁶

¹ *R. v. Newman*, Den. & P. 390; 21 L. J. M. C. 75; 3 Car. & K. 240.

² Which must be, if against the defendant, that he is guilty of wilful and corrupt perjury, otherwise the jury must acquit him. 1 Mod. 351.

³ 2 Salk. 514, 689, 691; Anon. 3 Salk. 155; 1 Ld. Raym. 257.

⁴ *R. v. Read*, 1 Sid. 217.

⁵ *R. v. Kenworthy*, 1 B. & C. 711; S. C. 3 D. & Ry. 173.

⁶ It is no ground for postponing the judgment upon a convicted defendant, that the witness against him is indicted for perjury, for giving the very evidence upon which the defendant was found guilty; at least not if the defendant be so interested in the event of the second trial as to become thereby disqualified as a witness. *R. v. Haydon*, 2 Burr. 1387.

First, as to the new trial. If there be a verdict of acquittal, the courts will not suffer it to be disturbed; but if the jury find for the crown, there are some circumstances, which we shall mention presently, which will induce the granting of another inquiry. Two persons were charged with perjury and *acquitted*, and after some discussion the judges, except Windham, J., were of opinion that no new trial should be had.¹ And this opinion of Windham, J., was the more strange, because he had himself laid it down two years before, that no new trial could be had in the event of an acquittal for perjury, *unless by consent*, to which the judges then agreed.²

On the other hand, where a verdict has passed for the crown, it is quite clear that a new trial may be awarded in favour of the defendant. At one time, indeed, it was supposed, that this could not be done without the consent of the king's counsel,³ although the court said, they could not do without such consent in debt upon an information, inasmuch as the party had an interest in that case.⁴ However, some years afterwards, upon a conviction by information for perjury, it turned out, that the false oath had not been taken wilfully, and the court granted a new trial upon motion, mentioning *R. v. Sir John Jackson*,⁵ and *R. v. Fenwick*,⁶ as authorities for doing so.⁷

The granting of the new inquiry is, nevertheless, entirely at the discretion of the court, who sometimes will refuse the application, if they should think that the matter has been fully heard. In the case of a trial at bar, it appeared that the jury hesitated very much, and, in fact, found at first a verdict of guilty, but not of wilful and corrupt perjury. They at length pronounced the defendant guilty generally, but some of them said at the time that they were not satisfied that the perjury had been wilful and corrupt. The court held, that when a cause was tried at bar,⁸ a new trial was never granted, for the single reason that the jury went against evidence, but it seems that the matter was adjourned upon the other point.⁹ And it is quite clear, that a judge at the present day would not receive a verdict of guilty accompanied by such a qualification as we find in the preceding case.

Costs.] By 7 Geo. 4, c. 64, s. 23, the costs and expenses of prosecutions in certain cases of misdemeanor may be allowed by the court as in cases of felony; and the offences of perjury and subornation of perjury are included within the last. The prosecutor is

¹ *R. v. Fenwick and Holt*, 1 Sid. 153. Anon. 1 Lev. 9, 124. ⁶ 1 Sid. 149, 153; 1 Keb. 546. 568.

R. v. Bowden, 1 Lev. 9, cited there. ⁷ *R. v. Smith*, 2 Show. 165. Pemberton, C. J., at first doubting.

² *R. v. Williams*, 1 Keb. 124. Cited by Windham, J. *R. v. Cornelius*, 3 Keb. 525.

³ *Read v. Dawson*, 1 Sid. 49. ⁸ But this strictness is no longer kept up.

⁴ *Id.* ⁹ *R. v. Melling*, 5 Mod. 349.

⁵ 1 Lev. 10, 124.

entitled to his costs, as prosecutor, though his name be included in a *subpœna*, and although he be not bound over to prosecute, and his expenses are not thereby limited to such as he has incurred in being a witness.¹

A false affidavit in chancery failed of its effect; moreover, the persons were only interested as executors; yet, an application to set aside a side bar rule for costs, was refused, the case being within 5 & 6 Wm. & M. c. 11. The defendant had moved an indictment for perjury by *certiorari* into the Queen's Bench.²

Costs upon a new trial.] The court will not in general allow the defendant the costs of the former prosecution upon the granting of a new trial in cases of perjury. Should the defendant make out a charge of oppression, the court might possibly interfere on his behalf, but not under ordinary circumstances. The prosecutor having removed an indictment into the King's Bench by *certiorari*, it was moved on behalf of the defendant, that the proceedings should be stayed until the costs of former indictments for the same offence had been paid by the prosecutor. On the first occasion, the judge refused to try the case, by reason of the appearance of manifest imperfections upon the face of the record; and on the second, a new trial was granted, because a minor was sworn and served upon the jury in the room of his father. The prosecutor did not carry that record down again, but preferred a new indictment. By the court.—No case of oppression has been made out by the defendant. His application for a new trial has made further expenses necessary, and it can make no difference to him, as to such expenses, whether he is again tried upon the old or upon a new indictment.³

Arrest of judgment.] Another course which the defendant may avail himself of, is to move in arrest of judgment, if there be a ground for doing so. And he may do this after verdict, or after judgment by default, but not after a failure upon demurrer. Judgment having passed against a defendant by *nihil dicit*, it was doubted whether he could then move to arrest, but Holt, C. J., observed, that he was not too late, although it was otherwise upon demurrer.⁴

The time for moving in arrest of judgment is when the party is called up for sentence, so that if he be afterwards taken upon a *capias* on account of the nonpayment of a fine, or otherwise, it will then be too late to insist upon moving as of right. In such a case, Holt, C. J., said, that the court would hear the objections in mitigation of the fine, although they could not allow them in arrest of judgment after the *capias*.⁵

¹ *R. v. Sheering*, 7 C. & P. 440.

⁴ *The Queen v. Deman*, 2 Ld.

² *R. v. Major*, 21 L. J. M. C. Raym. 1221.

221; Dears. 13.

⁵ *The Queen v. Darby*, 1 Salk.

³ *R. v. Tremearne*, 5 B. & C. 78.
761; S. C. 8 Dowl. & Ry. 590.

Further, a defendant can only move in respect of errors on the record of the indictment or information for perjury; he cannot interfere with the prior record on the trial of which the false oath is alleged to have taken place.¹

The judge made an order to amend the *postea* upon these facts. The judges in summing up altered the order of three assignments and reversed them: upon which the jury found a perverse verdict. The amendment was made from the recollection of the judge. It was held to be erroneous.²

Punishment for perjury.] It seems that, at common law, except in the case of attain of jurors,³ there was not any particular course for the punishment of perjury, but the heinousness of the offence was such, that the star chamber and spiritual courts took cognizance of it,⁴ and, treating it as a high misdemeanor, inflicted a penalty accordingly. And the king's counsel also used to meet occasionally for the same purpose, when they were accustomed to punish for this offence at their discretion.⁵ Before the conquest, indeed, the severity of death was sometimes exercised against this crime, and sometimes offenders were banished. Corporal punishment also, as the cutting out of the tongue, was now and then inflicted; but, subsequently, the rigour of the law gradually declined, till the forfeiture of movables, and an incompetency to bear testimony, were the only known penalties;⁶ and at length, as at the present day, the common law recognized fine and imprisonment,⁷ and "never to bear testimony," to which, both as to perjury and subornation, the statute 3 Geo. 4, c. 114, has added hard labour.

By 5 El. c. 9, s. 3,⁸ all persons who shall corruptly procure any witness by letters, rewards, promises, &c., to commit wilful and corrupt perjury, in any matter depending in suit by writ, action, bill, complaint, or information, concerning lands or hereditaments, goods, debts, or damages in any of the queen's courts of record, &c.⁹ or shall corruptly procure or suborn any witness sworn to testify *in perpetuam rei memoriam*, such offenders shall, on conviction, forfeit 40*l.* By sect. 6, the crime of perjury, whether committed in consequence of subornation, or by the voluntary act of the false swearer, is made liable to a fine of 20*l.*, and imprisonment for six months, together with incompetency as a witness.

¹ *R. v. Wright*, 1 Sid. 148.

² *R. v. Virrier*, 12 Ad. & El. 317; 4 Per. & D. 161.

³ Dy. 242.

⁴ See *R. v. Onslowe*, Dy. 242. *R. v. Spicer and Read*, Hob. 62.

⁵ Cro. El. 521.

⁶ 3 Inst. 163, 164; 16 Vin. Ab. 310. B. 1; 4 Comm. 138.

⁷ 3 Inst. 163. *R. v. Nureys and another*, 1 Sir W. Bl. 416. See *R. v. Lookup*, 3 Burr. 1901. The

pillory was likewise added. See 1 Hawk. c. 69, s. 16; 3 Inst. 219. But it was entirely abolished by 1 Vict. c. 23.

⁸ Made perpetual by 29 El. c. 5, and 21 Jac. 1, c. 28, s. 8.

⁹ The queen's courts of chancery or of record, the leet; view of frankpledge or law day; ancient demesne court; hundred court; courts baron; courts of the stannary in Devon and Cornwall.

Lastly, by 2 Geo. 2, c. 25, s. 2,¹ besides the punishments already in force against perjury and subornation, the court, or judge before whom the conviction takes place, may sentence the offender to be sent to some house of correction for seven years, there to be kept to hard labour during all the term, or may award judgment of transportation for seven years. The breaking prison or voluntary escape, or return from transportation, was declared, moreover, to be capital. The transportation or commitment was also expressly declared to be over and above such punishment as should be adjudged to be inflicted agreeably to the laws then in being.

But by sect. 5, no attainder for any offence thereby made felony should work any corruption of blood, loss of dower, or disherison of heirs. By 18 Geo. 2, c. 18, s. 1, for the punishing of perjuries at county elections, the punishments awarded by both the Acts of 5 El. and 2 Geo. 2,² were directed to be inflicted on the offender, and these penalties have since been held to be cumulative. For in a case where the Court of King's Bench had passed sentence upon certain persons convicted of such a perjury, that they should be imprisoned for one calendar month, and then be transported for seven years, that court resolved afterwards to arrest its judgment. For, on consideration, they found that the penalties were cumulative, and Lord Ellenborough observed, that the sentence might be vacated at any time within the same term in which it had been pronounced. Accordingly, the prisoners were fined 20*l.*, and ordered to be imprisoned for six months, and judgment of incompetency as witnesses was added. This is part of the judgment by statute, but at common law it is only the consequence.³ And moreover, that at the end of six months, the prisoners should be transported for six years.⁴

But the court may still punish at common law, without inflicting the punishments prescribed by the 2 Geo. 2, and accordingly, they frequently inflict fine and imprisonment only, without the severer penalty.⁵

Consequences of a conviction and judgment in cases of perjury.]
We come now, in the last place, to explain the consequences which attach upon the parties who are convicted of perjury or subornation. And the most striking evil which fell upon the attainted offender

¹ Made perpetual by 9 Geo. 2, c. 18. This Act does not extend to Scotland, but the crime of perjury is made punishable there by the confiscation of movables, piercing of the tongue, and infamy. In aggravated cases, the judge may, moreover, direct any other punishment which the occasion calls for—1555, c. 47. The Irish Act is 3 Geo. 3, c. 4, s. 2.

² In effect repealed.

³ 2 Salk. 514.

⁴ *R. v. Price and others*, 6 East, 327.

⁵ Whether surety of the peace can be required in addition, *qy?* *R. v. Dunn*, 12 Jur. 99. It was held that surety of the peace for a time certain might be required in all cases of misdemeanor punishable by imprisonment. *Dunn v. Reg.* (in error), 18 L. J. M. C. 41.

was disability to be examined in any court of record, or elsewhere, as a witness. But the words of 6 & 7 Vict. c. 85, s. 1, are too general even to exclude perjurers. It is also a principal cause of challenge to a juror, that he has been convicted of perjury as a witness.¹ But it is necessary to show that the party has had sentence, because there might have been an arrest of judgment.² The statute disables the party from being a witness in any court of record, but it seems that a legal incapacity to bear testimony anywhere arises as a consequence at common law.³

By 5 El. c. 9, s. 5, no person convicted of subornation of perjury, and by sect. 6, no person convicted of perjury shall be received as a witness in any court of record, until his judgment be reversed by attaint or otherwise, and also until damages be recovered by the convicted parties in an action on the case against such as originally procured the judgment to be given against them.

However, the mischief, heavy as it is, ended there. The law did not go the length of preventing such convicts from making affidavits in certain cases for their own benefit, as to set aside a judgment for irregularity. For by Holt, C. J., upon an objection being made to the reading of a defendant's affidavit, because he had been convicted of perjury, "Must he, therefore, suffer all injuries, and have no way to help himself?" Powell, J. You ought to have the record of conviction in your hands when you make this objection. Holt, C. J. If he had, it would be nothing to the purpose.⁴ However, this course can only be allowed to rescue a defendant from the consequences of a charge, and cannot be permitted him in support of a complaint.⁵

By 12 Geo. 1, c. 29, s. 4, if any person convicted of perjury or subornation shall act or practise as an attorney or solicitor, or agent in any suit or action in any court of law or equity in England, the judge or judges where such suit or action is brought shall, upon complaint or information thereof, examine the matter in a summary way in open court, and if it shall appear to the satisfaction of such judge or judges that the party has offended contrary to the Act, they shall cause the offender to be transported for seven years.

Pardon.] Probably, the following sentences are merely matters of history, but we must not omit to say that as to the strong words of the statute of 5 Eliz., which inflicted the pain of incompetency as a witness, the better opinion was that a pardon for a perjury at common law would so operate, but that the words of the statute were too strong to allow the beneficial result of a pardon.⁶

"I do not find it clearly settled," says Mr. Serjeant Hawkins,

¹ 16 Vin. Ab. 320, H. 1, citing Trials per Pais, 141, c. 9, 2 Hawk. c. 43, s. 25.

² Cowp. 3, by Lord Mansfield.

³ 2 Hawk. c. 46, s. 101.

⁴ *R. v. Davis and Carter*, Holt. 501.

⁵ *Walker v. Kearney*, 2 Hawk. c. 46, s. 103, and see 2 Str. 1148.

⁶ 2 Salk. 689.

"whether the pardon of a conviction of perjury makes the party a good witness."¹ And formerly it was said, on one or two occasions, that a pardon would not restore the party to his credit,² or to his *liberam legem*.³ But in this last case, Holt, C. J., spoke of the party as having stood in the pillory, from whence it is clear that the statute of Eliz. operated immediately to destroy the competency, and it does not appear but that in the other case the conviction might have proceeded on the statute. To render the distinction still more clear, it may be added, that a case occurred not many years since, where a person was admitted to bear testimony against a prisoner who had suborned him to take a false oath for the purpose of obtaining prize money, and His Majesty's pardon having been specially granted for that offence, was produced. It is true that he never received judgment, but Wilson, J., who delivered the opinion of the judges in favour of the evidence thus received, distinctly declared that the pardon not only respites the convict from punishment, but entirely absolves him from the crime, and restores him completely to his former competency and credit.⁴ Nevertheless, if there be an Act of parliament pardoning all crimes whatsoever, it should seem, that perjury under the statute of Eliz., will be included. And thus it was said, that one convicted of perjury would be competent to give evidence by reason of the act of oblivion.⁵

Arbitration.] All the matters in difference, whether in perjury or conspiracy, may be referred if verdict of acquittal be taken. It must, however, appear that there has been no attempt to stifle a prosecution.⁶

¹ 2 Hawk. c. 37, s. 52 ; Id. c. 46, s. 112.

² 1 Sid. 52.

³ 5 Mod. 16, by Holt, C. J.

⁴ *R. v. Reilly*, 1 Leach, 454, case of *Macdaniel*.

⁵ 1 Keb. 780.

⁶ *R. v. Hardey*, 14 Q. B. 529.

CHAPTER II.

OF CONSPIRACY.

Conspiracy.] Conspiracy is a combination and agreement by persons to do some illegal act, or a combination and agreement to effect a legal purpose by illegal means.¹ The conspiracies which we now shall speak of may be designated as public and private. Instances of both kinds are very numerous, but there are certain principles applicable to both which must be adhered to in order to support an indictment against parties for the crime. There must, in the first instance, be a legal foundation for the charge in question, with reference to the particular circumstances which form the subject matter of it. For where the cause of complaint is without legal existence, there cannot be a conspiracy in respect of it. There must, again, be somewhat of certainty in the ground-work of the prosecution, for where the alleged fraud concerns a profit or advantage so precarious as to admit of doubt whether it will, in reality, turn out to be beneficial, the court will not entertain an indictment for conspiracy in regard of it. Again, the mere breach of a civil contract, without a violation of public morals, will not amount to a conspiracy, although several persons may be engaged in a transaction by no means creditable to their character, and may, even virtually, be said to defraud the object of their intrigue. And, we shall see, by and by, that the same principle exists in the case of a civil trespass, unless it is intended to commit a breach of the public peace. If an agreement be entered into to indict or acquit, so as to leave the question of right and wrong indifferent, it is a conspiracy.² So, where certain persons agreed to hiss at the Birmingham Theatre, although *one* might have hissed without offence.³ So, a combination amongst officers to resign their commissions is a conspiracy. The military service cannot be determined by such a confederacy.⁴

Public frauds.] If people conspire together to defraud the community at large, the rule is general that they may be indicted for such an illegal combination. Thus to endeavour by an united agency to raise the price of necessaries is an example of this rule. Thus, an information was applied for and granted for combining to fix the price of salt.⁵ And the same law would apply in the case of corn or any other commodity.

¹ By Alderson, B., 9 C. & P. 109.

² 9 Rep. 56; 1 Salk. 374. See 33 Edw. 1, st. 3.

³ *R. v. Clifford*, 2 Campb. 372.

⁴ 3 Burr. 2476.

⁵ *R. v. Norris and others*, 2 Lord Keny. 300.

If a false rumour be raised for the purpose of raising or lowering the price of government securities, with a fraudulent intent, it is an offence of this nature, for it is a fraud levelled against all who might possibly have anything to do with the funds on the particular day when the trick operates. And it is no excuse to say, that there might not be any purchasers, for it is a principle in conspiracy, that whether the intended evil be successful or not, the character of the crime, and its consequences remain the same. De Berenger and others were convicted of a conspiracy of this nature by spreading reports of the death of Buonaparte during the war, and the likelihood of immediate peace.¹ A conspiracy to defraud the king of his revenue is punishable under this head. As where certain persons entered into a confederacy to impoverish the farmers of excise.² So, where persons united to cheat the crown through the medium of false vouchers.³

Again, combinations on the part of masters to lower the wages of their workmen, and by workmen to raise the price of labour, were, till a modern date, illegal. The journeymen tailors of Cambridge were once convicted of such a conspiracy. And a principle applicable at this day to the subject of conspiracy was recognized upon that occasion, that the refusal to work was not the crime, but the conspiracy to advance the rate of wages. But in connection with this law, there existed, at the same moment, a code which fixed the price of wages, and when the legislature resolved to remove all restrictions from trade, it was also determined to legalize combinations of this nature, provided there should be no intimidation nor violence towards individuals. Accordingly by the 4th section of 6 Geo. 4, c. 129, the following combined meetings amongst workmen were excluded from prosecution or penalty—such as take place for the sole purpose of consulting upon and determining the rate of wages or prices, which the parties entering into such agreement, or any of them, shall require or demand for his or their work, or the hours of time for which he or they will work in any manufacture, trade, or business, and that persons so meeting for the purposes aforesaid, or entering into such agreement aforesaid, shall not be liable to any prosecution or penalty for so doing, any law or statute to the contrary notwithstanding. Mr. Baron Rolfe is reported to have said:—"Those who employ

¹ *R. v. De Berenger and others*, 3 M. & S. 67. In this case likewise the court took judicial notice of the existence of a war with France, there being so many statutes upon that subject. *Id.* 69. It was also objected that no person in particular was alleged to have been defrauded; but this omission was held to be quite immaterial, since it was possible that no one had been defrauded. The offence was complete independently of that

consideration. And it was objected that there were not any funds of the United Kingdom, as stated in the indictment, the charges for the interest and debt being imposed upon Great Britain and Ireland separately, but this objection was likewise overruled, and judgment was passed.

² *R. v. Starling and others*, 1 Sid. 174.

³ *R. v. Brisac and another*, 4 East, 164.

labour may meet and say, we will not give more than such and such a rate, or we will stipulate for such and such a number of hours' work; we will make, in short, regulations beneficial to ourselves as employers, and we agree that we will not take any workmen that require more. On the other hand, the workmen may meet and say, we will not work for less than such and such a sum, and if anybody think to employ us on low wages, we agree we will not work for them. And we agree to form a fund and support one another until we get them to come to proper terms. My opinion is, that if there was no other object than to persuade people that it was their interest not to work except for certain wages, and not to work under certain regulations, complied with in a peaceable way, it was not illegal."¹

Then follows the 5th section for the protection of masters, excluding likewise from prosecution or penalty similar meetings on the part of masters, for the sole purpose of consulting upon and determining the rate of wages or prices which they shall pay to their journeymen or servants, or the hours of work in any manufacture, trade, or business. And agreements for the same purpose, whether verbal or written, are within the same protection.

But no threats, violence, intimidation, or molestation can be lawfully used in respect of these meetings, or any association upon the subject of wages. The 3rd section provides for this case. It is thereby enacted that, if any person shall by violence to the person or property of another, or by threats or intimidation, or by molesting, or in any way obstructing another, force, or endeavour to force, any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work, or to return his work before the same shall be finished, or prevent, or endeavour to prevent any journeyman, manufacturer, workman, or other person not being hired or employed, from hiring himself to, or from accepting work or employment from any person or persons, or if any person shall use or employ violence to the person or property of another, or threats or intimidation, or shall molest or in any way obstruct another for the purpose of forcing or inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association, or not having contributed, or having refused to contribute, to any common fund, or to pay any fine or penalty, or on account of his not having complied, or of his refusing to comply with any rules, orders, regulations, or resolutions made to obtain an advance, or to reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work, or to regulate the mode of carrying on any manufacture, trade or business, or the management thereof; or if any person shall by violence to the person or property of another, or by threats or intimidation, or by molesting

¹ In *R. v. Selsby and others*, cited, Den. & P. 384, n.

or in any way obstructing another, force or endeavour to force any manufacturer, or person carrying on any trade or business, to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, trade, or business, or to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants, every person so offending, or aiding, abetting, or assisting therein, being convicted thereof in manner thereafter mentioned, shall be imprisoned only, or shall and may be imprisoned and kept to hard labour for any time not exceeding three calendar months.

This removal of restraint, however, was never intended to enable workmen to dictate to the masters the persons whom they should employ. And, therefore, where the defendants were proved to have entered into an association, for the purpose of procuring the discharge of certain workmen, Patteson, J., told the jury that the statute never contemplated such a meeting as this had been, and he held the compulsion to be clearly illegal.¹ So, where a member of a society was fined for working, by leave of his master, for four days, in a yard where steam machinery was used, and on his refusal to pay, the society struck work, and so compelled the master to discharge the person so refusing: this was held to be a conspiracy.²

Another public fraud is accomplished by brokers at auctions, who arrange amongst themselves to effect biddings under particular circumstances, so as to interfere with a fair competition on the part of the public, and then to divide the goods or supposed profits thus obtained at another place. It is not usual to prosecute persons for this offence, but such a practice has been branded with the character of illegality, and is certainly the subject of an indictment for conspiracy.³

It is manifestly a public fraud for persons to unite together for the purpose of defrauding tradesmen. And, therefore, where the defendants were indicted for conspiring together for the purpose of causing themselves to be reputed persons of considerable property, no question was entertained as to their liability to be tried for this offence. It was an indictment, said Lord Ellenborough, for a conspiracy to carry on the business of common cheats.⁴ So strong, indeed, is the feeling of the court against these general depredators, that where an information was applied for against cheats, and it turned out, that the application was made by other gamblers against their own brethren, the court refused to interfere, and left the complainants to their ordinary remedy by indictment.⁵ So, in a case of a conspiracy to defraud a person at a public-house by a trick, it was no good objection that the prosecutor might have cheated the prisoners if he would.⁶ So, where persons joined to-

¹ *R. v. Bykerdyke*, 1 Moo. & Rob. 179. See likewise *R. v. Eccles*, Leach, 274.

² *R. v. Newill*, 5 Cox, 162.

³ *Levi v. Levi*, 6 C. & P. 239.

⁴ *R. v. Roberts and others*, 1 Campb. 399.

⁵ *R. v. Peach and others*, 1 Burr. 548.

⁶ *R. v. Hudson*, 8 Cox, 205.

gether in order to defraud any person that they might be able to trick, by means of falsely assuming themselves to be the payees or indorsees of bills of exchange, they were held liable to an indictment for a conspiracy, and were accordingly convicted.¹ So where persons not particularly interested in furthering a fraudulent association, nor having any knowledge of transactions which ended in insolvency, but nevertheless favoured the common design, and were aware of what it must lead to, they were held guilty of conspiracy.² So, although the representation as to the solvency of a trader be oral, and no action lies under 9 Geo. 4, c. 14, s. 16; but there must be collusion with the other person to defraud.³

A conspiracy to issue out a fraudulent commission of bankruptcy is clearly indictable, and the chancellor will direct the proper documents to be laid before the attorney-general for the purpose of a prosecution.⁴ And either an indictment or an information may be adopted.⁵ So a fraudulent representation by bankers, that they have laid out money in the funds, may amount to a conspiracy.⁶

It used to be a common practice for overseers and others to compel marriages under certain circumstances, for the purpose of shifting the burden of a woman's maintenance to another parish. This, although now a rare occurrence, is a public fraud, and punishable as a conspiracy where two or more are concerned in it.⁷ But there must be some duress or compulsion. Where upon an indictment against parish officers, the man and woman swore that they were willing to marry at the time; Buller, J., directed an acquittal, notwithstanding the proof of money having been given to obtain such consent, and of the putative father having been apprehended under a magistrate's warrant, and being in the overseer's custody. For there must be an absence of the voluntary consent, or inclination of the parties;⁸ and it must likewise appear, that the parties were chargeable to the indicting parish. Where, therefore, A. B. was described as a poor man unable to maintain himself and his family, and it turned out that he was a servant in husbandry, and quite of ability to support himself, Ashhurst, J., held that the averment was negatived, and that the inducing a person to marry under such circumstances was not an offence, and an acquittal was directed.⁹ This case has been sustained upon a

¹ *R. v. Hevey and others*, Leach, 232; East, P. C. 1010.

² *R. v. Esdaile and others*, 1 Fost. & F. 213.

³ *R. v. Timothy and another*, 1 Fost. & F. 39.

⁴ Buck. B. C. 422.

⁵ *Ex parte Cawthorn*, 19 Ves. Jun. 260. See *Ex parte Warren*, Id. 163.

⁶ 18 Ves. Jun. 203.

⁷ See *R. v. Edwards and others*,

8 Mod. 320; Say. 260; Anon. 2 Str. 707. *R. v. Tarrant*, 4 Burr.

2106. *R. v. Compton*, Cald. 246.

R. v. Upsdale, Id. 247, n. *R. v.*

Herbert and others, 2 Ld. Keny.

466. *R. v. Wilson and others*, 1

Wils. 41.

⁸ *R. v. Fowler and others*, East, P. C. 461.

⁹ *R. v. Tanner and others*, 1

Esp. 306. It was determined in the

same case, that if the party, at the

recent occasion, where the principle of consent was recognized, and the use of forcible or fraudulent means, combined with an unwillingness to marry, was laid down to be necessary, in order to constitute the offence. And, at the same time it was determined, that the person must be actually chargeable. The facts of a woman being poor, and unmarried and with child, are not sufficient to show that she is a burden to the parish.¹

Again, a bribe given by overseers, in order to procure a marriage, is illegal.² So again, a conspiracy to let land to a pauper, for the purpose of conferring a settlement upon him, is illegal.³

The issuing of false certificates on the part of magistrates, and others,⁴ either fraudulently, or for the purpose of misleading the court before whom the documents are presentable, is an offence. And, therefore, where certain parties combined to certify that a way was in good repair, in order to deceive the court of quarter sessions, no doubt was entertained of their liability to be tried for conspiracy,⁵ although it was attempted to be argued that the guilty knowledge of non-repair should have been alleged to have existed at the time of the conspiracy.⁶ The justices should have known, said Lord Kenyon, that the road was in repair before they agreed to certify that it was so.⁷

And it is a conspiracy of a very foul nature to accuse a person of a crime, for the purpose of obtaining an advantage or reward upon his conviction,⁸ or to extort money from him.⁹ Nor does it make any difference whether the indictment be actually preferred or not,¹⁰ or whether the party be guilty or not.¹¹ So, to lay an information for penalties, wrongfully and with a fraudulent intent, will amount to a conspiracy.¹² So, an agreement by a witness, who has been bound over to prosecute in misdemeanor, not to appear, is an indictable offence, although the intent was not to defeat justice, but to extricate himself from a scrape.¹³ However, an association

time of his removal, was settled in the parish which indicted, it should not be presumed that he had acquired a subsequent settlement. Such proof must be given by the defendants. *Id.* See also *R. v. Flint*, Ca. Temp. Hardw. 370.

¹ *R. v. Seward*, 1 Ad. & El. 706; 3 Nev. & M. 557. And see 11 East, 381.

² *R. v. Wright and others*, 1 Wils. 41. See also *R. v. Bushby*, 1 Bott, P. L. 335.

³ 8 Mod. 321, by the court.

⁴ 6 T. R. 635.

⁵ *R. v. Mawbey and others*, 6 T. R. 619.

⁶ *Id.* 634.

⁷ *R. v. Mawbey and others*, 6 T. R. 634.

⁸ *R. v. M' Daniel and others*, Fost. 131; S. C. Leach, 44. But they were acquitted. See Leach, 45.

⁹ *R. v. Timberley and another*, 1 Sid. 68. *R. v. Best and others*, 1 Salk. 174. *R. v. Armstrong*, 1 Ventr. 305. *R. v. Kinnersley and another*, 1 Str. 193. *R. v. Rispal*, 3 Burr. 1320.

¹⁰ See the above cases.

¹¹ *R. v. Sir A. Ashley*, 12 Rep. 90.

¹² *R. v. Biers and another*, 1 Ad. & El. 327.

¹³ *R. v. Hamp and others*, 6 Cox, 167.

for the prosecution of felons is not an illegal confederacy, not although they propose to include political offenders within their rules.¹ By 14 & 15 Vict. c. 55, s. 2, costs are given for conspiring to charge any person with felony, or to indict any person for felony, or to conspire to commit any felony.

Private frauds.] Numerous private frauds may be the subjects of indictments for conspiracy: as the suppression of a will;² causing an illiterate person to execute a deed to his prejudice, by reading it over to him in false words;³ cheating at a foot race by a previous combination;⁴ pretending to procure an office for a person upon the payment of a certain sum, whereas, in fact, no such office existed.⁵ So, to combine with another, by personating the master of one of the defendants, and so solemnizing a marriage together, in order to raise a title to the property of the master, was deemed to be an act of fraudulent conspiracy.⁶ So, by false representations to persuade an individual into a marriage, for the sake of a fortune, and so to get him to execute bonds to a stranger.⁷ The same law prevails in cases of enticement from the paternal roof, in order to procure a marriage, or by contriving marriage without the publication of banns.⁸ And it was held no objection, that it was not the eldest son and heir who was seduced from his father's dwelling.⁹ Mackarty and Fordenborough were charged with a cheat, in bartering pretended wine for hats. The liquor turned out to be neither wine, nor even wholesome to drink; and after some consideration, judgment was given for the Queen,¹⁰ on the ground, said Denison, J., in another case, of its being a conspiracy.¹¹ So, obtaining the signature of the prosecutor to an acceptance, although the bill was ready written in the hands of the defendant. And the charge for defrauding the prosecutor of his monies was held good, although the prosecutor had no money, nor intended to take up the acceptance, nor, except for the purpose of accepting, ever had the

¹ *R. v. Murray and others*, 1 Ch. Burn, 817.

² *R. v. Breerton*, Noy. Rep. 103; 1 Hawk. c. 71, s. 1.

³ *R. v. Skirret and others*, 1 Sid. 312.

⁴ *R. v. Orbell*, 6 Mod. 42. *R. v. Absolan*, 1 Fost. & F. 498. There may be judgment against one conspirator, although the other or others may be absent or dead. S. C. 12 Mod. 499.

⁵ *R. v. Parry and others*, 2 Ld. Raym. 865. That a conspiracy to procure an office under government, even without fraud, is indictable, see *post*. Concerning a

conspiracy to give a false account, whereby a fraud was committed, see *R. v. Snead*, 2 Show. 339.

⁶ *R. v. Robinson and another*, East, P. C. 1010; S. C. Leach, 37.

⁷ *R. v. Allibone and others*, Trem. P. C. 97; S. P. Id. 98, 99.

⁸ *Priestley v. Lamb*, 6 Ves. 421.

⁹ *R. v. Green and others*, 3 Doug. 36. See several cases cited, Id. 37. *R. v. Lord Ossulston and others*, S. P. Id. 38.

¹⁰ *R. v. Mackarty and another*, 2 Ld. R. 1179.

¹¹ 2 Burr. 1129; East, P. C. 824. And see *R. v. Macarty*, 1 Sir. Wm. Bl. 275.

bill in his hands. In this case an unstamped warrant of attorney given by the defendant to a prosecutor, as a counter security, was admitted in evidence, 1st, as a part of the fraud; and, 2ndly, to confirm the story of the prosecutor.¹ Again, there was a case for using materials for dyeing without the owner's consent. It was held not to be the less a conspiracy because the overt act charged a felony, and the evidence disclosed a felony, as the taking of the materials for dyeing.² A. sold a mare for 39*l.* to B. B. and C. conspired together, and B. got A. to take 27*l.* for her, upon the strength of a representation by C. that she was unsound, and that B. had sold her for 27*l.* Both these statements were false. This was a conspiracy.³ So, a count for a general conspiracy to defraud is supported by overt acts from which a conspiracy may be inferred, without having recourse to the proof of any false pretence. And counts charging conspiracy by representation of an offence to defraud tradesmen, are supported by overt acts from whence a conspiracy may be inferred without having recourse to proof of any false pretence. But counts charging a false pretence by representations of influence and integrity were held not to be supported, because it did not appear that the goods were got by such statements.⁴

Again, it has been held, that to fabricate shares in addition to a limited amount already issued on behalf of a company, is indictable in this manner, although there was originally an imperfection in the formation of the company.⁵ So, if traders dispose of their goods in contemplation of bankruptcy, they are indictable for conspiracy, and a clandestine removal is evidence of the offence; it is an overt act.⁶

And there is this distinction between a false pretence which common care can guard against, and a conspiracy:—in the one case, it is the duty of a person to be awake to an intrigue which he can easily detect;—in the other, ordinary caution will not afford protection.⁷

Upon a survey of the authorities above mentioned, some few principles may be deduced upon the subject of conspiracy generally. First, there must be a combination of two persons,⁸ for although twenty may be included in an indictment for conspiracy, yet, if it should turn out that the matter at issue was worked by one without the concurrence of the rest, the charge falls to the ground. And there must be a union for the purpose of accomplishing the same fraud. So that, however fraudulent the general habits of A. and B. may be, if A. engage himself in working out one fraud, and

¹ *R. v. Gompertz*, 11 Jur. 209; 2 Cox, 245.

² *R. v. Button*, 12 Jur. 1017; Q. B. 929.

³ *R. v. Carlisle and Brown*, 23 L. J. M. C. 109; Dears. 337.

⁴ *R. v. Whitehouse*, 6 Cox, 38.

⁵ *R. v. Mott and others*, 2 C. & P. 521. And this is not like

a case where the society is in itself illegal. See 1 Campb. 549, *n.*

⁶ *R. v. Hall and others*, 1 Fost. & F. 33.

⁷ 2 Burr. 1127, by *Ld. Mansfield*.

⁸ *Sty.* 57; 3 T. R. 58, per *Buller, J.*

B. employ himself in attempting another, neither of them can be convicted of conspiracy in respect of their several frauds.¹ Whereas, if they are labouring to perpetrate the same fraud, both need not be present at the same time during any part of the transaction.² Nor, indeed, is it necessary, that all the conspirators in an illegal transaction should even be acquainted with each other.³ And if A. and B. even were to meet together, and devise a general system of fraud, without agreeing upon the particulars, they would be guilty of a conspiracy.⁴

Secondly, this combination must have reference to some matter which has a legal foundation, or for which a person is criminally responsible, or which affects his character. A man cannot be answerable with reference to an illegal society, nor is such a society without the protection of the law, so as to make a defendant criminally liable for an offence against it. Certain individuals were charged with attempting to deprive one Thompson of the office of secretary to the Philanthropic Annuity Society, and to prosecute him without reasonable or probable cause for obtaining money under false pretences. This society turned out to be an unincorporated company with transferable shares, and it appeared that the secretary had been tried and acquitted for so obtaining subscriptions, on the ground of his having acted with a fraudulent intention. Lord Ellenborough, upon this, directed an acquittal. There was no legal foundation for the matter in question to rest upon: the society was illegal, and to deprive a person of an office in it could not be a crime. Nor was the prisoner indicted for obtaining money upon false pretences without reasonable or probable cause, for he pretended that there was a real society of which he was secretary, whereas no such society existed, and then, although without any fraudulent intention, he did, in effect, obtain money under a false pretence.⁵

It was formerly considered that a man could be charged criminally in respect of that which is only a civil injury. And therefore, where the defendant was indicted for a conspiracy to cheat by selling an unsound and worthless horse with a warranty, Lord Ellenborough said, that an action might be maintained on the warranty for the breach of a civil contract, but that the case did not assume the shape of conspiracy. Had there been evidence of concert between the parties to accomplish a fraud, the case might have been different.⁶ Turner and seven others were charged with conspiracy, for agreeing together to go by night into a certain

¹ See *R. v. Hilbers*, 2 Chit. Rep. 163.

² *R. v. Cope and others*, 1 Str. 144. *R. v. Lord Grey and others*, 9 St. Tr. 127.

³ By Lord Mansfield, 1 Hawk. c. 72, s. 2, in the note. Although some must, in all probability, be

respectively acquainted, in order to set the illegal transaction on foot.

⁴ *R. v. Gill and another*, 2 B. & A. 204.

⁵ *R. v. Stratton and others*, 1 Campb. 549, n.

⁶ *R. v. Pywell and others*, 1 Stark. 402.

preserve for hares, in order to snare and take them away, and also for uniting, with large bludgeons, to obstruct any one who might attempt to oppose them. After a verdict of guilty, however, it was moved to arrest the judgment, and Lord Ellenborough said, that the cases of conspiracy against individuals had been pushed far enough, and that he should be sorry "to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment." The rule was made absolute.¹ But upon the trial of an indictment for conspiracy to force workmen to depart from their employment, Erle, J., said,² that *R. v. Pynwell* had been overruled,³ and Lord Campbell said,⁴ he was satisfied that *R. v. Turner* was not law.⁵

Again, although perhaps the fact in question may not be one which involves a criminal responsibility, yet if it should affect the character of the prosecutor, an indictment for conspiracy may be entertained. As where the charge was for conspiring to accuse another of taking hair out of a bag, but the taking was not alleged to be felonious. Lord Mansfield observed, that the gist of the offence was the unlawful conspiracy to do an injury to another by a false charge, and whether it be to charge a man with criminal acts, or such only as may affect his reputation, is sufficient.⁶ *A fortiori*, where the defendants conspired to charge the prosecutor with being the father of a bastard child; for that act it was at least punishable in the spiritual court.⁷ And the acquittal of the party charged does not seem to be necessary to be shown, in order to prove the accusers guilty of conspiracy.⁸

A third principle is thus developed, that is, that the conspiracy itself is the gist of the whole transaction. And hence it is no matter whether the fraud be prosecuted or not for successful issue.⁹ And lastly, it may be remarked, that a lawful object may be attempted by an unlawful association, and illegal means. So that if the purpose of a confederation be not improper, it lies on the prosecutor to show that it has been put in action by a course of

¹ *R. v. Turner and others*, 13 East, 228.

² 2 Den. & P. 386.

³ *R. v. Kenrick*, 5 Q. B. 49.

⁴ 2 Den. & P. 388.

⁵ See also 21 L. J. M. C. 83, 84. So also was the opinion of Grose, J., 6 T. R. 636; by Crompton, J., 24 L. J. Q. B. 355, but this law was denied by Lord Campbell, 24 L. J. Q. B. 359.

⁶ *R. v. Rispal*, 1 Sir Wm. Bl. 368; S. C. 3 Burr. 1320.

⁷ *R. v. Best*, 2 Ld. Raym. 1167.

⁸ 1 Hawk. c. 72, s. 2; *contra*, 3

Inst. 143. See 33 Edw. 1, st. 2; and, of course, on the other hand, an acquittal of a defendant does not make those guilty of conspiracy who have lawfully indicted him. Keilw. 81.

⁹ See *R. v. De Berenger and others*, 3 M. & S. 67. And herein is the difference between an indictment and an action. The latter will not lie unless the conspiracy be carried into execution. See *Savile v. Roberts*, 1 Ld. Raym. 378.

irregular conduct. Thus, there is no illegality in persuading certain parties to consent to a marriage, but as soon as it appears that threats or duress have been used for the purpose of compelling such a union, the character of the transaction is altered, and that proceeding, which in itself is lawful, becomes vitiated by the unlawful measures employed to accomplish it.¹

The acquittal in *R. v. Pymell* proceeded on the ground that the conspirators were not acting in concert, one being ignorant of the fraud. But where two appeared to induce A., of whom B., one of the two, had bought a horse for 39*l.*, to accept 27*l.* for it, on the false representation that a veterinary surgeon had pronounced it unsound, the Court of Criminal Appeal held them guilty of conspiracy. The fraud needs not to be successful. The prosecutor might have recovered the difference in this particular case, but the offence was the same.²

So, before the statute 6 Geo. 4, c. 129, if one man refused to work for certain wages, he was quite at liberty to do so, but if he brought others into an association for that object, he immediately became involved in the guilt of conspiracy.³ It was the application of unlawful means to a lawful act. And even now, if the workman combines with others to use any threat or menace to induce persons to come into his terms, that combination as to wages, which by itself is correct, becomes the medium of a conspiracy.⁴ So, where certain persons went to a debtor, and threatened him with imprisonment if he did not give security for his debt, it was held that as they did this under a false pretence of being officers, the whole party were indictable for conspiracy.⁵

A. died possessed of East Indian stock, leaving a widow. The defendants conspired to obtain the means and power of selling the stock, and exhibited a false affidavit, upon which a grant of administration was obtained. The indictment then charged overt acts of a similar nature, by which the defendants obtained the stock. It seemed to the court that an unlawful conspiracy was sufficiently disclosed, but, at all events, the overt acts themselves constituted a misdemeanor. Although a count which merely charges a conspiracy without any overt act is bad.⁶

*The indictment.*⁷] The indictment for a conspiracy to cheat

¹ See East, P. C. 461, 462; and *ante*. See also, 2 Str. 866.

² *R. v. Carlisle and another*, Dears. 337.

³ *R. v. Tailors of Cambridge*, 8 Mod. 11.

⁴ See also upon this point generally, *R. v. Robinson and another*, Leach, 37; 3 Burr. 1439. *R. v. Best*, 1 Salk. 174.

⁵ *Bloomfield v. Blake*, 6 C. & P. 75. A. was bail for D., and B. and C. were pretended officers.

⁶ *Wright v. Reg.* (in error), 14 Q. B. 148; 2 Cox, 336.

⁷ In aggravated cases an information will be granted, but the court will not adopt this measure when the parties are poor, or indeed in an ordinary situation of life. And circumstances will weigh with the court either towards granting or refusing an information. See 8 Mod. 320, n. (b); 1 East, P. C. 462.

usually states that the defendants (or if there be only one, that he with certain persons unknown)¹ intending to defraud the prosecutor, did, amongst themselves, conspire² to cheat him, and it is then very common to set out the manner by which the design was effected, or set on foot.³

If the indictment simply charges that the defendants unlawfully, &c., did conspire, combine, confederate, and agree together by divers false pretences and indirect means to cheat and defraud A., it is sufficient.⁴

If it be to cheat him *and others*, as where an overt act was laid of obtaining goods from B., the word "others" must mean partners. So, that evidence of conspiring to defraud others than partners cannot be admitted: such evidence having been received, the conviction was held wrong.⁵ The overt act must be within the object of the conspiracy. If the prisoners are charged with a conspiracy to defraud such persons as may be desirous of purchasing horses, it must be averred, that the prosecutor, from whom they obtained the money, was willing to have purchased, and did purchase. But the general counts for conspiracy were resorted to, and a verdict of guilty ensued.⁶ Again, although an indictment ended, after setting out certain overt acts, with an averment that the said —, in manner and by the means aforesaid, unlawfully did cheat and defraud the said —, &c., it was held that it was not bad for duplicity; and although an unnecessary way of summing up the overt acts, it was not a charge of obtaining goods under false pretences.⁷

And it may be said, that in all indictments for conspiracies, the gist of the offence being the conspiracy, it is sufficient to allege the combining, and that it was for a fraudulent purpose, together with the means employed to carry that end into execution. Not but that an indictment would be correct upon some occasions without mentioning the means, as where the act attempted to be accomplished is, upon the face of it, illegal and criminal.⁸ Yet

¹ See 1 Hawk. c. 72, s. 8; Chit. C. L. 1141.

² "Conspire" is the usual word, and it would be most imprudent to leave it out, but perhaps a statement that the defendants did the acts charged *together*, might be tantamount. See East, P. C. 824; 6 East, 133.

³ If the indictment omit the words "on divers other days and times," it is still competent at all events to give evidence of acts done on different days where there is more than one count in the indictment, and so it was held, in a case where the 13th of September was

the only day mentioned, and there were two counts for a conspiracy and one for a riot. *R. v. Levy and others*, 2 Stark. 458, cor. Abbott, C. J.

⁴ *R. v. Gompertz*, 9 Q. B. 824; 16 L. J. Q. B. 121.

⁵ *R. v. Steel*, 2 Moo. C. C. 246; Car. & M. 337.

⁶ *R. v. Henry and another*, 1 Cox, 101.

⁷ *R. v. King*, 13 L. J. M. C. 118; 7 Q. B. 782.

⁸ As a conspiracy to extort money, *R. v. Hollingberry*, 4 B. & C. 329; 6 D. & Ry. 345. See *R. v. —*, 1 Chit. Rep. 698, where the court was applied to to quash an

where several circumstances must be taken together, in order to verify the accusation, and the conspiracy becomes a matter of inference to be deduced from those events,¹ it is then necessary to allege one or more overt acts done in prosecution of the plan which forms the subject matter of the indictment.² The point as to the general omission of overt acts has indeed been a matter of objection more than once. Upon one occasion the defendants were indicted for a conspiracy to cheat, and it was urged that no information had been given to the defendants of any specific charge, against which they were to defend themselves. But the court held the indictment correct. And Abbott, C. J., observed, that : s a general resolution to commit frauds was indictable without any particular cheat in immediate prospect, the law could never require that the particular means should be set forth.³ So it was where the defendant and A. were charged with conspiring to defraud B. of his goods and chattels. It was objected that no sufficient conspiracy was alleged without specifying the pretences, and that the indictment failed to use the word "unlawfully." But the court, relying upon *R. v. Gill and Henry*, overruled the objections, and said that they did not overrule *R. v. Biers*.⁴

An indictment as follows was held good upon a motion to arrest the judgment. A., &c., being in the employment of B. a dyer, conspired to use his vats in dyeing wool not belonging to themselves, and not intrusted to them for that purpose by B., and thus to get profit to themselves, and deprive B. of his vats, and in pursuance of such conspiracy, the defendants, without leave of B., received materials which they dyed with the vats and dye of B. for various persons for their own profit.⁵

And this was not a new doctrine. Certain defendants were indicted for a conspiracy to hinder a man from working at his trade, and an objection for not setting forth the overt acts was overruled.⁶ In this last case, Willes, J., referred to an authority in *Strange*, where the matter was fully considered, and the principle above laid down with regard to overt acts recognized by the court.⁷ So a charge of cheating and defrauding the lawful creditors of A. was held insufficient without explanation, but the case was not stopped. But as all these decisions refer to matters obviously illegal in themselves, the qualification we have submitted must be taken into consideration where the deed is not criminal, unless it become such by accompanying circumstances. So that if A., B., and C. be concerned in a system of swindling, and A. and B. become active

indictment, because the particular goods of which the prosecutor was said to have been defrauded, were not set out. But the court denied the motion, observing that the gist of the matter was the conspiracy.

¹ See 4 East, 171.

² Stark. C. P. 155.

³ *R. v. Gill and another*, 2 B. & A. 204.

⁴ *Sydserrff v. Reg.* 11 Q. B. 245. *R. v. Biers* went wholly on the one objection to the special counts. Wilde, C. J.

⁵ *R. v. Button*, 13 L. J. M. C. 19; 11 Q. B. 929.

⁶ *R. v. Eccles, Leach*, 274; S. C. 3 Dougl. 337.

⁷ 1 Str. 193.

agents in the business, and C. remains behind, it is necessary to recur to some overt act in order to implicate C. It is not illegal for C. to be in the company of A. and B. at particular times, nor for C. to address himself to an individual for the purpose of effecting some minor machinery of the fraud, but when all these incidents become linked together, and are expressed in the indictment as overt acts, the jury can then draw their conclusion, if they please, that C.'s presence with A. and B., and his conversation with other persons, were intended to promote one common design of cheating. So if A. and B. be manifestly connected with a dishonest combination, and C. come forward and do a single act calculated to favour the success of the trick, it would be proper to lay that as an overt act in order to involve C. in the conspiracy; for C. might not, in point of fact, be acquainted either with A. or with B., as the case might happen. So, where the defendants were charged with conspiring to defraud persons of certain merchandises, the count was held bad for want of setting out the means by which the fraud was to be effected. But the court observed, that the names of the persons to be cheated need not be set out.¹

Yet, although the needlessness of setting out the names of the parties to be defrauded was recognized in this case,² the judgment was reversed in error for want of the *names* of the persons defrauded, or the class intended to be defrauded, and an allegation of overt acts was held not to help the mistake.³ So, if the charge be of a conspiracy to obtain goods under false pretences, the indictment must state to whom the goods belonged.⁴ It is insufficient to say that the defendants conspired to obtain goods from A., and did fraudulently so obtain them, and did defraud A. thereof. This allegation does not show that the goods were the goods of A.⁵ An indictment stated that one of the defendants fraudulently obtained credit from tradesmen, and procured certain goods to be delivered to her, and that they were not paid for. Then the defendants pretended that there was a debt due from the defendant first alluded to to the other defendants. Upon this writs of *fieri facias* were sued out, and thus the tradesmen were cheated by the conspiracy. It was held that these overt acts supported the charge at all events, and that the concluding allegation did not disclose another offence, namely, that of obtaining goods under false pretences, but was an unnecessary summing up of the whole.⁶ So it was where the defendants deceived the prosecutor, who bought a horse by their false pretences, which were not set out in the indictment.⁷ So it was not necessary to specify the goods, wares, &c., which had not paid customs' dues by reason of a conspiracy.⁸

¹ *Peck v. The Queen*, 1 Per. & Dav. 508.

² *R. v. King*, 13 L. J. 118; Dav. & M. 741.

³ *King v. Reg.* 14 L. J. M. C. 172; 7 Q. B. 782.

⁴ *R. v. Parker*, 3 Q. B. 292; 2 Gale & D. 709. Held bad in arrest of judgment.

⁵ S. C. 6 Jur. 822.

⁶ *R. v. King*, Dav. & M. 741; ante, 1058.

⁷ *R. v. Kendrick*, 12 L. J. M. C. 135; 5 Q. B. 49.

⁸ *R. v. Blake*, 6 Q. B. 126; overruling *R. v. Pywell*. See Den. & P. 386, Erle, J.

So, a count was held defective which charged a confederacy to defraud by means of a fraudulent deed of bargain and sale of certain stock in trade, without adding facts to show in what manner the deed was fraudulent.¹ So, in the case of a fraudulent conveyance in contravention of 13 El. c. 5, s. 3, Maule, J., held, that the specific acts which constituted the fraud needed not to be set out. *Peck v. The Queen* was cited for the prisoner, but the judge answered: "there the act was not unlawful, here the statute has made it unlawful. The sale of merchandise is a lawful act, but the making of a covinous deed is of itself illegal under the statute."²

Enough has been said to show that the gist of these unlawful deeds is the conspiracy, and that, in general, it is not material to set out the overt acts. If the conspiring be well alleged, the requisites demanded by the law in most indictments will be satisfied. And it is more prudent to avoid stating too much, than to hazard an incorrect allegation which might prove fatal upon the ground of its misleading the defendant. As where a charge was alleged in the indictment as having been made at a "general sessions holden before the justices of the great sessions," and the proof was that the issue was joined at "great sessions." So where the indictment spoke of "John Doe, on the demise of W. R. and D. T.," and the proof was "John Doe, plaintiff, on the joint demise, and also on the several demises of W. R. and D. T." These were held to be fatal variances, not being mere allegations, but matters of description.³ Upon the same principle, it is not necessary in an indictment for a conspiracy affecting the public interest, to give the names of any persons who have been defrauded, for the gravamen being the combination for an illegal purpose, perhaps no individual might have sustained injury.⁴ Again, upon the same ground, the innocence of a person charged by conspirators with some crime or offence need not be averred, and the distinction between this case and perjury, where the falsehood of the oath must be alleged, has been recognized.⁵ Innocence will be presumed until the contrary appears.⁶ And, again, the same principle involves the falsehood of the charge. So that although very usual, it is not necessary to say that the defendants did "falsely" conspire. Therefore an indictment which charged the defendants with having wickedly and maliciously conspired, was held sufficient without the addition of "falsely."⁷ And hence it follows that the charge itself need not be averred to be false.⁸ So that it was deemed unnecessary to allege that the prosecutor was not the father of a certain bastard child, or that the child was likely to

¹ *Peck v. The Queen*, 1 Per. & Dav. 508.

² *R. v. Smith*, 6 Cox, 81.

³ *R. v. Thomas and others*, 1 C. & P. 472.

⁴ *R. v. De Berenger and others*, 3 M. & S. 57.

⁵ *R. v. Kinnersley and another*, Str. 193.

⁶ *R. v. Best*, 1 Salk. 174.

⁷ *R. v. Spragg and another*, 2 Burr. 993.

⁸ *R. v. Best*, 2 Ld. Raym. 1167.

become chargeable, in an indictment for conspiring to accuse him of fornication.¹ If the defendants were in a situation to have pleaded a conviction for that offence, the indictment would then have been barred.² So upon an indictment for a conspiracy for forcing workmen to leave their employment, it was deemed unnecessary to set forth the means.³

Again, carrying on the same principle, the particular accusation need not be mentioned in the count. And, therefore, upon a general verdict of guilty against two persons for charging the prosecutor with a capital crime, where the first count of the indictment omitted to set forth the particular offence in question, the court rested upon the doctrine so frequently propounded, that the charge could be well enough maintained for the unlawful agreement and conspiracy without more.⁴ Nor need it be said, that the defendants knew that their proceedings were false. Where certain parties published a false certificate as to the repair of a highway, it was held, that they ought to have known the fact to be true which they had agreed to certify as such, and the omission of an allegation of the guilty knowledge was held to be immaterial.⁵

However, notwithstanding the broad ground above commented upon and illustrated,—that the conspiracy is the gist of the matter, and that it is, consequently, unnecessary, as a general principle, to set out the means by which it is worked, and although it is enough to say that the defendants conspired without adding “falsely,” it is, nevertheless, indispensable to place such facts on the record as will in point of law amount to an offence, for uncertainty upon so grave a charge cannot be allowed, much less can defendants be convicted for doing acts which of themselves are harmless. Therefore a charge against persons for conspiring to deprive the prosecutor of the fruits of a verdict is too general, and cannot be supported.⁶ But it is not too uncertain to allege that by means of the conspiracy, the prosecutor had been defrauded of certain goods, without specifying them.⁷

A persuasion by officers or others to induce A. to marry B. is not illegal, and therefore an indictment against such persons for conspiring to effect that union would, alone, be insufficient.⁸ But as to where it is stated upon the record, that the solicitation was accompanied by threats and menaces, the case is altered, for intimidation

¹ *R. v. Best*, 2 Ld. Raym. 1167. An indictment lies before acquittal, but an action on the case not till afterwards. Id.

² 2 Ld. Raym. 1169.

³ *R. v. Rowlands and others*, Den. & P. 364; 21 L. J. M. C. 81. In this case three counts charged a conspiracy unlawfully to intimidate, &c. The court gave no opinion as to the goodness of these counts, but recommended a *nol. pros.*, which was done. See

Hilton v. Echersley, 24 L. J. Q. B. 353.

⁴ *R. v. Spragg and another*, 2 Burr. 993. *R. v. Taylor and Towlin*, Godb. 444.

⁵ *R. v. Marcby and others*, 6 T. R. 119.

⁶ *R. v. Richardson*, 1 M. & Rob. 402.

⁷ *R. v. —*, 1 Chit. Rep. 698.

⁸ *R. v. Seward*, 3 Nev. & M. 557; 1 Ad. & El. 706; *ante*.

is of itself illegal. And, although it must, indeed, be proved that the marriage took place against the consent of the parties, yet that fact need not be averred, since the mainspring of the business is the combining with menace. The remainder of the transaction, material as it is, is only matter of evidence.¹ Again, if this confederacy be set on foot, as it commonly was, for the purpose of relieving the parish from the burden of maintaining, it must be averred that the woman was actually chargeable at the time of the marriage.² To say that she was a poor unmarried woman with child, is not equivalent to an averment that she was chargeable.³ And it would likewise be insufficient to allege in an indictment that the woman was merely an inhabitant of the indicting parish. It should be averred that she was last legally settled in the parish from whence she was removed by reason of her marriage.⁴

Upon the trial of an indictment which charged the defendants with conspiring to hinder the prosecutor from taking any apprentices, it turned out in evidence, that no objection had been made by the parties combining to the eight apprentices which the prosecutor already had in his employment, and it was objected, that this was an attempt to prevent more apprentices from being set to work, and not a union against all. But Wood, B., was of opinion that the indictment was valid, and well supported by the evidence, for the effect of the confederacy was to prevent any person from being taught and instructed, and the court consequently confirmed this ruling.⁵

So, where the indictment charged a conspiracy to prevent the workmen of J. G. from continuing to work in a certain colliery, it was held sufficient to prove that a section of the workmen were required by the remainder of the body to abandon the service of J. G.⁶ Had the indictment laid the offence with reference to all the workmen, it might still have been a question whether the conduct of the defendants had not a tendency to destroy the labour of the mine altogether, and so virtually to prevent all the workmen from serving the prosecutor.⁷

In setting forth a conspiracy to embezzle the goods of a bankrupt, it is not sufficient to say that a commission issued, under which the party was duly found and declared to be a bankrupt. The indictment must include the trading, the debt of the petitioning creditor, and the fact of the bankruptcy.⁸ If the overt act be charged to defraud J. G., who was entitled to a sum of money,

¹ *R. v. Parkhouse and another*, East, P. C. 462.

² See *R. v. Inhabitants of Holm*, 11 East, 381.

³ *R. v. Seward*, 3 Nev. & M. 557.

⁴ *R. v. Edwards and others*, 2 Str. 707.

⁵ *R. v. Ferguson and another*, 2 Stark. 489.

⁶ *R. v. Bykerdike*, 1 M. & Rob. 179.

⁷ S. C.

⁸ *R. v. Jones and others*, 1 Nev. & M. 78; S. C. 4 B. & Adol. 345.

and the jury find that J. G. was not entitled, the verdict of guilty cannot be supported.¹

Joinder.] Counts may be joined in an indictment for conspiracy which do not include a charge of conspiracy, although the judgment respecting each may be different. "Nothing is more familiar," said Lord Ellenborough, upon one occasion, "than such a practice."²

Evidence.] Although we do not purpose to enter particularly into the subject of evidence in discussing every offence known to the criminal law, yet, the points upon this head, both with reference to the witnesses required and the matters of the indictment, have been occasionally so much the subject of legal discussion, as to make it desirable that we should, for a moment, request the reader's attention to them.

It is enough to state in an indictment that the defendants combined to create discontent and disaffection amongst the Queen's subjects, to excite them to hatred of the government, and to stir up jealousies, &c., between different classes, and especially in Ireland. And it was held that it was immaterial to add these words, "to assume and usurp the prerogative of the crown in the establishment of courts for the administration of law."³ But in the same case a count stating that an unlawful assembly was held in order, through intimidation, to procure great changes in the government of the country, was held bad for uncertainty, and the following words were considered to make no difference: "and especially by the means aforesaid, to bring about and accomplish a dissolution of the legislative union now subsisting between Great Britain and Ireland." And the words "unlawfully, maliciously, and seditiously," were also held to make no difference.⁴ Indeed, if it were intended to give the word "intimidation" any effect, it should appear that fear was intended, and upon whom it was meant to operate. The word "intimidation" is not necessarily of bad import.⁵

Witnesses.] The law respecting husband and wife is not relaxed in the case of conspiracy. Where three persons were indicted for procuring the marriage of a ward in chancery, it was proposed to call the wife of one of them, not as a witness for her husband, but on behalf of the other defendant. Lord Ellenborough, however, held, that she was not admissible. The evidence must in some way tend to the prospect of an acquittal upon a joint charge in which her husband was implicated, and the rule is the same whether her evidence were to affect him either mediately or im-

¹ *R. v. Dean*, 4 Jur. 364.

² 3 M. & S. 550.

³ *O'Connell v. Reg.* (in error),
11 Cl. & Fin. 155.

⁴ *O'Connell v. Reg.* (in error),
11 Cl. & F. 155.

⁵ S. C.

mediately.¹ Nor can a defendant who suffers judgment by default be called.²

Three persons, Kroehl, Gibson, and Koech, were involved in a charge of conspiracy, but Koech only, who had no counsel, called a witness in his defence. The witness was examined as to a conversation which took place between himself and another of the defendants, Kroehl. It was proposed for the prosecution to cross-examine the party as to another conversation which had taken place between Kroehl and Koech, and which might affect Kroehl. And Abbott, J., held that this might be done, although it might be a matter for future consideration whether the counsel for the defendant thus affected by the cross-examination should subsequently address the jury upon the new matter. Several conversations, which bore upon the conduct of Kroehl, were then elicited, but the jury acquitted him and convicted the others.³ Upon a question whether an annuity had been paid, the defendant swore it had *not* been paid. The case was, that the annuity had been paid into the bankers', and as it was found, that B., the prosecutor, had paid money to the bankers by his clerk, it was proposed to ask the clerk,—“At the time you received the money from Mr. B. to pay into the bankers, what did he say about the money?” And the court held, that the question might be put, and that the answer was receivable in evidence against the defendant.⁴ If the counsel for the prosecution declare his intention to offer no evidence against certain defendants, he may apply for their acquittal, in order that he may call them as witnesses, and it is not competent to raise an objection against that course.⁵

Where bankruptcy was alleged as an allegation, it was held, that the subscribing witness to the assignment must be called.⁶

The usual evidence upon an indictment for conspiracy is to show the existence of the illegal combination, and then to connect the defendants with it.⁷ In the year 1792, a confederacy had been formed amongst the journeymen shoemakers for the purpose of raising their wages, and various arrangements were made from time to time for the purpose of furthering this design. It being proposed to bring this general evidence forward, in the first instance, to prove an indictment for a conspiracy to raise wages, the counsel for the defendants objected, that his clients must previously be made parties to the stated combination. But Lord Kenyon admitted the evidence, observing, that men might be implicated in such an association, after the lapse of years from the time of its establishment, and although they might reside at a

¹ *R. v. Locker and others*, 5 Esp. 107.

² *R. v. Lafone and others*, 5 Esp. 154.

³ *R. v. Kroehl and others*, 2 Stark. 343.

⁴ *R. v. Hall*, 8 C. & P. 358.

⁵ *R. v. Rowland and others*, Ry. & Moo. N. P. C. 401.

⁶ *R. v. Pope and others*, 5 C. & P. 208.

⁷ *The Queen's case*, 2 Brod. & B. 302.

great distance from the place where the general plan was carried on. And his lordship referred to the state trials of 1745, where it became necessary to go into evidence of what was going on in France, Manchester, Scotland, and Ireland, at the same time.¹ And a similar course has been pursued upon many trials for high treason, including those in 1796.² But a common design needs not to be proved in the first instance. The acts of each are evidence against himself, and himself alone, till a conspiracy is proved.³ And proof of the falsity of the charge needs not to be tendered, although the question of *bona* or *mala fides* may be left to the jury in the absence of such proof.⁴

Having thus laid before the jury the fact of the existence of an illegal confederation, it becomes the duty of those who conduct the prosecution, to affect the defendants with a guilty knowledge of it, and with acting in concert upon the terms of it. This is done by proving certain overt acts connected with the offence charged upon defendants, and by satisfying the jury that the defendants were in some way or other engaged in union with reference to those acts. And, as to the first point, several of these overt acts taken together, although of themselves insufficient to make out the charge, will furnish a body of evidence fit to be left to the jury, it is from collateral circumstances that the fact of conspiring may be collected.⁵

Certain defendants being accused of representing themselves as persons of property in order to defraud tradesmen, after having proved their false statement as to one tradesman, it was proposed to show that a similar representation had been made to another. Upon objection made, Lord Ellenborough admitted the evidence, laying it down, that cumulative instances were necessary to prove the offence. It was a conspiracy to carry on the business of common cheats, and the same evidence would be allowable in barratry, and even in high treason where the prisoner is charged with having written several traitorous letters, or with having attended at divers consults upon that subject.⁶

Handbills published by a defendant, constitute an overt act of combining, if the cognizance and assent of other defendants be proved.⁷

Having shown the respective overt acts, which are, of course, infinitely varied according to circumstances, the participation of at least two defendants in the fraud must be developed, and the guilty union of all those involved must be shown, in order to pro-

¹ *R. v. Hammond and another*,
² Esp. 719.

² Id. 720.

³ *R. v. Brittain*, 3 Cox, 76.

⁴ *R. v. Jacobs and others*, 1
Cox, 173. The defendant had preferred an indictment. The indictment was preferred on Nov. 22. The averment was that it was so

preferred on Nov. 1. This was immaterial, and at all events amendable.

⁵ *R. v. Parsons and others*, 1
Sir Wm. Bl. 392.

⁶ *R. v. Roberts and others*, 1
Campb. 399.

⁷ See *R. v. Murphy*, 8 C. & P.
297.

cure the conviction of all. Not that it is absolutely necessary for two defendants to be included in the indictment, for one of the parties to the fraud may have died,¹ or one co-conspirator may not be found, and then the indictment may charge A. B. with having conspired with one C. D., &c. Or, again, various persons to the jurors unknown may have been associated with A. B. in the fraud, and yet A. B. may be indicted, for that he, together with certain unknown persons, did certain acts. But, in general, more defendants than one are found to appear for the purpose of answering this charge.

The ordinary way of showing an illegal confederation amongst defendants is, in addition to any overt act of the transaction in question, to bring them as much together as possible. When the evil conduct, which is the matter of the charge, is brought forward in evidence, it tends considerably to a conviction, to show that all the defendants had a hand in advancing and encouraging the proceeding.

No clearer evidence of illegal union could well be produced. But the chief questions upon this head of proving combination have arisen where the defendants have not been much, if at all, together, and yet, where there has been such a communion amongst them, one with another, respectively, as to leave no doubt of their having been engaged in one common design. Two persons are discovered in the pursuit of the same object by the same means, and that more than once; the one accomplishes one portion of a plan, and the other brings it to a conclusion. It is for the jury to say, whether this is not proof of a conspiracy between the two individuals.² And, we have seen, that it is not necessary for all the conspirators to be acquainted with each other,³ so that such a mutual knowledge need not be proved.

Several persons belonging to one family were found in the employment of making cards, and were detected at the same time in giving money to the apprentices of the king's card-maker for the purpose of putting grease into the paste so as to spoil the cards. They were indicted for a conspiracy to ruin this card-maker, and, although one only was present at the time when the bribe was given, yet, as all had, in their respective turns, offered the money, it was held that they might be convicted without any proof of a previous communication with each other.⁴ The same point was decided upon the trial of a conspiracy for carrying off a young woman.⁵ It has even been held, that if a banker be cognizant of the fraudulent purpose to which a sum of money lodged at his house is to be applied, he may be included in an indictment for conspiracy.⁶ But it must in such a case appear clearly, that he was acquainted with the object of the conspiracy, and of the mode

¹ *R. v. Nicols*, 13 East, 412, n.

² *R. v. Murphy*, 8 C. & P. 297. 144.

See also *R. v. Shellard*, 9 C. & P. 277.

³ *Ante*.

⁴ *R. v. Cope and others*, 1 Str.

144.

⁵ *R. v. Lord Grey and others*, 9 St. Tr. 127.

⁶ 2 Campb. 233.

stated in the indictment by which it was to be carried into effect. Therefore, where the charge was for conspiring to obtain a situation for one H., upon payment for a certain sum, which was to be shared amongst all the defendants except the banker, it was held, that proof must be given of the banker's knowledge that each defendant was to have a portion of the amount, and as there was not any evidence to this effect with respect to one S. H., Lord Ellenborough ordered an acquittal of the banker.¹

In conspiracy, it is not necessary to prove an actual conspiracy, nor expressed malice: a conspiracy and malice may be inferred from the circumstances taken together.² And indeed, it has been solemnly decided, that if two persons associate to break the law, no act in pursuance of it needs to be done by the conspirators.³

However, not facts merely, but declarations made at any time or place in pursuance of the plan,⁴ by any one of the conspirators, constitute evidence against all. It was at one time contended, but unsuccessfully, that the rule was limited to acts done.⁵ And it may be noticed, in passing, that both acts and declarations of a co-conspirator are admissible, although he be not tried in company with his associates.⁶

The rule above stated, with respect to declarations, is quite in accordance with that adopted in cases of high treason. But if the declarations are detached, and not made in prosecution of the object of the conspiracy, the case becomes altered, and they cannot be allowed.⁷

Letters and documentary evidence are likewise admissible under the same qualifications, and it does not signify that the letters are not sent.⁸ So, where there was a scheme to accuse the prosecutor of forgery by means of imputing to him the fabrication of a cheque upon the bankers of one of the defendants, a letter written by another defendant, and containing the charge, was given in evidence, together with conversations referring to the cheque in question. However, in the same case it was deemed unnecessary to produce the cheque itself, although it was shown that such a document was in existence.⁹

So, again, the manuscript of a handbill tending to annoy an individual was admitted in evidence as having been published by order of a defendant, whilst, at the same time, it was held sufficient for a witness to state that he received a number of printed copies of that manuscript from the defendant, without producing those

¹ *R. v. Pollman and others*, 2 Campb. 229.

² *R. v. Curril and others*, Loft. 156.

³ *O'Connell v. Reg.* (in error), 11 Cl. & F. 155.

⁴ See East, P. C. 96.

⁵ *R. v. Salter and another*, 5 Esp. 125; S. P. *R. v. Bower*, cited,

Id. 127. S. P. by Buller, J., *R. v. Hardy*, cited, Id.

⁶ See 2 Stark. Ev. 411.

⁷ Id. 327.

⁸ 2 Stark. Ev. 326. It is the same rule as in cases of treason. See *R. v. Stone*, 6 T. R. 527. *R. v. Watson*, 2 Stark. 140.

⁹ *R. v. Ford and another*, 1 Nev. & M. 776.

copies.¹ Entries in a custom-house ledger, made by one of the defendants, respecting goods which had not paid duty, was held admissible as an act tending to show the object of the conspiracy.² But evidence of a memorandum made of the counterfoil of a cheque after the principal transaction was complete, was held inadmissible.³

When an instrument is brought forward in evidence as part of a fraud, it is observable that the absence of a stamp is quite immaterial.⁴ Whereas, if the instrument be introduced collaterally upon an indictment distinct from the offence, it cannot be received unless it be so stamped.⁵

It has been before remarked, that the success of the confederacy needs not to be proved. The bare attempt at fraud, or to carry an illegal design into execution, is sufficient.⁶ And if a count charges the conspiracy to have been effected by false pretences, it may be rejected as surplusage as to the false pretence if the conspiracy be proved.⁷

Nevertheless, as the acts of one defendant may, as we have shown, be given in evidence to promote the conviction of another, it is certainly competent for any defendant to produce proof of his having been made the dupe of a co-defendant. Thus, letters were received in evidence upon one occasion in order to satisfy the jury that this was the fact.⁸ In this case written correspondence between the parties had been admitted on behalf of the crown, and it was held, that all the correspondence should be laid before the jury, at the desire of one of the defendants, to show how he had been deceived by the other.⁹

It is no defence for a defendant to prove that the original meeting between him and the other defendants was innocent, if they afterwards ally themselves to the illegal object charged in the indictment.¹⁰ And the person who joins in a conspiracy already formed, cannot allege in excuse that fact, because if he comes into the plot, he is equally guilty with the original conspirators.¹¹ The record of acquittal of one defendant is evidence for another defendant subsequently tried.¹²

Trial.] Before the prosecutor proceeds to trial, it may not appear to be irrelevant to call upon him for some account of the charges upon which he means to rely at the hearing of the case, but this power of asking for particulars is confined within very narrow limits. Indeed, Abbott, C. J., observed, upon one oc-

¹ *R. v. Murphy*, 8 C. & P. 297.

² *R. v. Blake*, 6 Q. B. 126.

³ S. C.

⁴ *R. v. Fowle and another*, 4 C. & P. 592. The minute book of the court of quarter sessions is not sufficient to prove the finding of a bill.

⁵ *R. v. Smyth*, 5 C. & P. 201.

⁶ *Ante*.

⁷ *R. v. Yates and another*, 6 Cox, 441.

⁸ *R. v. Whitehead*, 1 C. & P. 67.

⁹ S. C.

¹⁰ *R. v. Lee*, 2 Stark. Ev. 324.

¹¹ *R. v. Murphy*, 8 C. & P. 297.

¹² *R. v. Tooke*, 1 Ch. Burn. 823.

casation, that the only case in which the court would order a particular to be delivered under an indictment for a misdemeanor, was that of barratry, or where a man was charged with being a barrator. "It appears to me," said the learned chief justice, "that the best course for the defendant in this case to take, is to apply to the prosecutor to give him some information as to the particulars upon which he means to rely in support of the indictment. If he refuses, then an application may be made to postpone the trial, in order that this question may be more maturely discussed. But whether discussed or not, the objection now suggested may be matter of very strong observation to the jury on the trial."¹ And the court declined to make a rule for the delivery of such a bill of particulars.² But, upon a subsequent occasion, the court, upon application, where the conspiracy was charged in a general form, ordered such information to be afforded by way of particulars as would be given by a special count. Although they still refrained from directing any statement as to the specific acts with which the defendants were charged, or the times and places where such acts were committed.³

If there be an indictment for felony, and another for conspiracy grounded upon the felony, an acquittal of the felony will induce the judge to direct an acquittal for the conspiracy, if the evidence be the same.⁴

Unlike to perjury, the crime of conspiracy is cognizable at quarter sessions, a conspiracy being a trespass, and tending to a breach of the peace.⁵

With regard to the county where the offence is to be tried, any one may be selected where an overt act of conspiracy has been attempted. Thus, where the indictment was found by a jury of Middlesex, but no proof of an actual conspiracy embracing all the several conspirators was offered in Middlesex, and where the individual actings of some of the conspirators were confined to other counties than Middlesex, the trial was still holden to be rightly had in the latter county upon proof of overt acts done by some of the conspirators there.⁶

So, again, certain persons had entered into a plan to fabricate false vouchers, in order to cheat the crown. One of the conspirators transmitted these fictitious documents to the commissioners of the navy of Middlesex, and this distinct overt act of conspiracy justified the trial in Middlesex.⁷

¹ 1 Chit. 699.

² *R. v. —*, Id. 698.

³ *R. v. Hamilton*, 7 C. & P. 448. *R. v. Probert and others*, Dears. 32, n. *R. v. Rycroft and others*, 6 Cox, 76.

⁴ *R. v. Maudsly and another*, 1 Lew. C. C. 51.

⁵ *R. v. Rispal*, 3 Burr. 1320.

⁶ *R. v. Bowes and others*, 4

East, 171, cited there; S. C. cited by counsel, *arg.*; 6 East, 590.

⁷ *R. v. Brisac and another*, 4 East, 164; S. C. mentioned by Abbott, *arg.*, 6 East, 590. Whether an indictment for conspiracy can be referred, *qy?* See *R. v. Hardy*, 19 L. J. Q. B. 196; 14 Q. B. 529. *Semble*, that if an acquittal be entered the matter may be referred, otherwise not.

Verdict.] A count charged one conspiracy to effect several illegal objects. It was held that the jury might find all or some of the defendants guilty of conspiring to effect one or more of the objects specified.¹ But there were mistakes in entering the following verdict in conspiracy. There were five defendants, and the charge of conspiracy was single. The verdict was, A. and B. guilty generally on counts 1, 2, and 3, except as to certain words in counts 1 and 2. C. and D. guilty on counts 1, 2, and 3, except as to the words, and another charge contained in each count. E., guilty on counts 1 and 2, and of part of count 3. A. B. C. and D., guilty on the 4th count. E. guilty of part of the 4th count. Here there was but one conspiracy, and the jury had found the defendants guilty of several conspiracies on each count. But a *nol. pros.* against E. would cure the findings on the 4th count.²

An indictment contained several counts, each of which charged a distinct conspiracy. The defendants pleaded Not guilty. One conspiracy only was proved, yet the jury were held competent to convict upon each count, and if the evidence proved the allegation in each, the verdict would be entered accordingly.³ A verdict was found upon an indictment charging the prisoners with conspiring with persons unknown; as, that A. had conspired with B. or C., (both being indicted by name,) "but the jury would not say which." The court held this verdict to be one of acquittal.⁴

A count stating a conspiracy to remove goods from vaults in the Custom House without paying the duties (the vaults being approved vaults), is good without showing how the vaults became approved.⁵ And the offence is conspiracy at common law, and is, therefore, not affected by the repeal of the Customs' Act, 3 & 4 Will. 4, c. 36, which was in force at the time of the conspiracy.⁶

Judgment.] The judgment upon a conviction for conspiracy is fine and imprisonment, together, it being a trespass, with sureties for the good behaviour. And a conspiracy to raise the rate of wages is punishable with hard labour, under 3 Geo. 4, c. 114, in addition to fine and imprisonment. But a question was made at one time how far it was competent for the court to pronounce judgment upon one person alone, the other, from various circumstances, being absent at the trial of the convicted conspirators. It was, however, soon determined, that this course might be pursued,⁷ even in a case where the other party might be shortly afterwards tried, and so, by possibility, a contrary verdict might be given, and this decision has been ever since abided by.

¹ *O'Connell v. Reg.* 11 Cl. & F. 155.

² S. C.

³ *R. v. Gompertz*, 11 Jur. 204; 9 Q. B. 824.

⁴ *R. v. Thompson and others*, 20 L. J. M. C. 183; 16 Q. B. 832.

⁵ 15 Jur. 654; 16 Q. B. 832.

⁶ 15 Jur. 654; 20 L. J. M. C. 683; 16 Q. B. 852.

⁷ Jenk. 27. See Id. 31, Bellewe, 108.

A defendant had been convicted of a conspiracy to cheat with false dice, and it was moved that judgment should not be entered till the others came in, for that, if the others were acquitted, no judgment could be given against him. But by Hale, C. J.,—True it is, that if one be acquitted the other cannot be found guilty;¹ yet, if one be found guilty, and the other come not in upon process, or die hanging the suit, judgment shall be upon the verdict against the other. However, the court gave the convicted defendant two or three days in order to bring in the other two, and ordered that the judgment should be stayed in the meanwhile.² James Stamp Sutton Cooke was indicted with three others for a conspiracy. One did not appear. A second, R. S. Cooke, pleaded in abatement. J. S. S. Cooke was put upon his trial with the fourth, who was acquitted. The person who pleaded in abatement was ordered to answer over, upon which he pleaded the general issue, and before his trial judgment was moved for against J. S. S. Cooke. It was then moved to stay the judgment against Cooke, for if the other party were acquitted, Cooke would be virtually acquitted,³ and the cases above cited were distinguished on the ground of the defendants not having pleaded on those occasions, whereas here, R. S. Cooke had pleaded Not guilty. But the court overruled the objection. When J. S. S. Cooke was convicted there was no plea of not guilty by R. S. Cooke upon the record, nor had judgment of *respondeat ouster* been given upon the demurrer. There might be a repugnancy upon the record if R. S. Cooke were to be acquitted, but the court would not presume that possible event against the verdict. The rule was discharged.⁴

A fortiori, then, one conspirator may be tried and convicted after the death of another, for there cannot then be any repugnancy, nor a possibility of contradictory verdicts. Niccolls and Bygrave were charged with conspiracy, but before the indictment could be preferred, Bygrave died, and an objection was taken, that one could not be convicted of conspiracy, but it was overruled upon the authority of *R. v. Kinnersley*,⁵ and judgment was given for the king.⁶ And it is no ground for a *venire de novo* by reason of a mis-trial, if the trial proceeds against both, although one be dead between the time of preparing the indictment and the trial, unless,

¹ *R. v. Grimes and another*, 3 Mod. 220.

² *R. v. Thody*, 1 Ventr. 234; S. P. *R. v. Horne*, cited, 1 Str. 195. A. and H. were charged in this case *cum multis aliis*, &c. The grand jury ignored the bill as to A., and the conviction of H. was held right, because he had been found guilty of conspiracy *cum multis aliis*. S. P. *R. v. Kinnersley and another*, Id. 193.

³ The verdict being "guilty of conspiracy with R. S. Cooke," (the other person who pleaded in abatement).

⁴ *R. v. Cooke and others*, 5 B. & C. 538; 7 D. & Ry. 673.

⁵ *R. v. Niccolls*, 2 Str. 1227.

⁶ S. C. 13 East, 412, n., and the same principle has been recognized in the case of a riot. *R. v. Scott and another*, 3 Burr. 1262.

indeed, the death be suggested upon the record.¹ A new trial will not be refused to one defendant if there be grounds for it, although the rest have been rightly convicted. Nevertheless, all the other defendants must also have a new trial.² Every count, therefore, is to be taken separately. Under an Excise Act (7 & 8 Geo. 4, c. 53, ss. 82, 84), where the crown neglected to appeal from the decision of the quarter sessions upon three counts on which the defendant had succeeded, but the defendant *himself* appealed against the fourth, and succeeded in the Court of Exchequer, it was held, that the crown could not open the case again upon the three counts for want of the appeal.³ The officer of excise had been offered to be bribed with a country bank note. Questions were made, whether it were necessary to state that the note was unsatisfied, whether the note was a security.⁴

By 14 & 15 Vict. c. 100, s. 29, hard labour is added in cases of conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to disturb, pervert or prevent, the course of public justice.

CHAPTER III.

EXTORTION.

Extortion implies a fraud. It imports a taking from a person who would not have given without reluctance. And, in a large sense, it means any oppression under colour of right;⁵ but it is often recognized in a more limited sense, as the taking of money by any officer, or person in authority, by colour of his office, either where none at all is due, or not so much is due, or before it is due. As where persons in power formerly attached the goods of strangers without jurisdiction, an act which by 3 Edw. 1, c. 35, was declared to be a misdemeanor.⁶ It is a rule, that, in extortion,

¹ *R. v. Kendrick*, 12 L. J. M. C. 165; 5 Q. B. 49; Dav. & M. 208.

² *R. v. Gompertz*, 9 Q. B. 824; 16 L. J. Q. B. 124.

³ *R. v. Gamble*, 16 Mees. & W. 384.

⁴ S. C. It depends on the wording of the statute whether the security needs to be stated in the conviction.

⁵ 1 Hawk. c. 68, s. 1.

⁶ See as to extortion by officers

of the forest, 7 Ric. 2, c. 4, by which any forest officer taking or imprisoning any man without due indictment, or being taken in the mainour, or trespassing in the forest, or constraining any man to make any obligation or ransom, was punishable by fine and ransom at the king's pleasure. Ecclesiastical officers are punishable for this offence at common law. *R. v. Smythe*, Palm. 318.

the threat must be such as a man of firm mind cannot be expected to resist. As, where the prosecutor, being first in custody, was told, that unless he would give a certain sum and his note, he should be sent to Newgate, imprisoned, and set in the pillory.¹ In this case, Holt, C. J., said, that every extortion was an actual trespass.² And Lord Ellenborough, in referring to this same law upon a subsequent occasion, observed, that, in *R. v. Woodward*, there was an actual duress, such as would have avoided a bond under similar circumstances;³ whilst, in delivering his judgment, the lord chief justice remarked, that the distinction lay very strongly between threats made when the party is in custody, and when he is at liberty. So that in the case at that moment before the court, the diversity was acknowledged and relied on. One Southerton had been convicted upon an information filed by the attorney-general, for extorting money under a threat of prosecuting certain medicine vendors for selling their wares without stamps. It was moved to arrest the judgment, inasmuch as the parties must have been cognizant of the law, and, consequently, that they must have been aware of the defendant's inability to institute or relinquish a prosecution. But the court referred to the general principle, whether a firm man must not be presumed to be in a condition to resist such a threat as the present, and after hearing the attorney-general at another day upon this point, they stopped the counsel for the defence, and arrested the judgment upon the suggestion which they themselves had previously thrown out.⁴ But it was added, that an indictment might have been sustained upon 18 El. c. 5, s. 4, an Act against compounding penal actions without leave of the court.⁵ And, by possibility, the charge might have been so laid as to raise the question, whether the defendant could not have been punished for an attempt to commit a statutable misdemeanor.⁶ And, lastly, it was said, that an attempt to stifle a public prosecution against the policy of a statute might have been a proper charge at common law against the defendant, had the indictment contained a statement that the persons threatened were actually guilty of the offence in question.⁷

However, to return to the offence itself: we have said, that any officer or person in authority, to which may be added, any one having a colour of right, is an individual capable of committing extortion. Thus, a ferryman who demands and takes more than his fare for a common passage boat is chargeable with this misdemeanor, for the necessity of the case evidently induces a payment upon compulsion.⁸ Certain justices of the peace, who, instead of taking the fee of 1s. allowed by 5 & 6 Edw. 6, c. 25, for granting licences to publicans, refused to issue such licences unless 10s. were paid upon each, were deemed guilty of extortion, and heavily

¹ *R. v. Woodward and others*, 11 Mod. 137; 6 East, 133. S. C. cited.

² 11 Mod. 137.

³ 6 East, 140.

⁴ *R. v. Southerton*, 6 East, 126.

⁵ *R. v. Southerton*, 6 East, 140.

⁶ See the same case.

⁷ Id. 142. By Lawrence, J. But the defendant was struck off the rolls of the court. Id. 143.

⁸ *R. v. Roberts*, 4 Mod. 101.

fined.¹ A churchwarden took a silver cup from a person whom he appointed pew-opener in the gallery of the church, and the court refused to quash an indictment for extortion, saying, that it must be tried whether the cup were corruptly taken, for, perhaps, the churchwarden might have accounted to the parish for it.² So, if a miller should take more than the toll warranted by the custom, he is indictable, especially if there were not any other mill in the neighbourhood where a person could legally grind his corn.³ So, if the lord of a market should occupy the ground with his stalls in such a manner as to compel the inhabitants to hire his stalls for want of room to stand and sell their wares, he is guilty of extortion. On the other hand, if he leave sufficient room, and the neighbours voluntarily hire the stalls, his conduct cannot be deemed to be extorsive.⁴ So, if the clerk of the king's market take extravagant fees from tradesmen, he is guilty of this offence.⁵

The chancellor and registrar of the Bishop of Salisbury forced one T. H. to prove a will in the bishop's court, well knowing that it had been previously proved in the prerogative court of Canterbury, and thus obtained 40s. from T. H. And this act was held to be an extortion by the Court of King's Bench.⁶

By 26 Hen. 8, c. 3, s. 20, any officer of the exchequer who shall take of any archbishop, bishop, &c. any reward as a bribe for making a quietus respecting the tenths, shall make fine to the king and lose his office.

A coroner was guilty of extortion who refused to hold an inquest until his fees had been paid.⁷ A counsellor, it seems, may be guilty of extortion.⁸

An under sheriff refused to execute a *fi. fa.* unless his shilling-pence were first paid; and the court said, that he might be indicted.⁹ And it was said to be extortion for a sheriff to take a bond for his fee before the suing out of execution.¹⁰ So, where a bailiff agreed to bail a person in consideration of so much money to be received from one of the sureties, it was held, that he could not recover in *assumpsit*. Both parties were in fault, but *in pari delicto, potior est conditio defendentis*.¹¹

¹ *R. v. Seymour and others*, 7 Mod. 382. See *R. v. Lloyd*, Cunn. Rep. 84, 133. *v. Neale and Rowse*, 3 Inst. 149; 13 Rep. 24.

² *R. v. Eyres*, 1 Sid. 307; S. C. 2 Keb. 100.

³ 1 Ld. Raym. 149.

⁴ *R. v. Burdett*, 1 Ld. Raym. 149.

⁵ *R. v. Refit*, 7 Mod. 220; S. C. Cunn. Rep. 36; S. C. 4 Barn. 436.

⁶ *R. v. Loggen and another*, 1 Str. 73; see 3 Leon. 268. The case of a commissary for extorting money for absolution; see also *R.*

⁷ 3 Inst. 149. But he is now paid by salary; and see 23 & 24 Vict. c. 116, s. 5.

⁸ Holt's Ca. 179.

⁹ Anon. 1 Salk. 330. S. P. *R. v. Hescott*, Id. The court said that the plaintiff might sue him for not doing his duty, or pay the fees, and then indict him for extortion.

¹⁰ Hutt. 53; Noy. Rep. 76.

¹¹ *Stotesbury v. Smith*, 2 Burr. 924.

An information was granted against the mayor of Wallingford taking more money for press warrants than was due.¹

The case above concerning bail leads us to illustrate the proposition, that, where a party is in custody, he is most especially within the protection of the law in respect of extortion. In the instances of the ferryman, the justices, the coroner, and so on, the individual from whom the money was demanded could not have derived a legal and necessary benefit unless he had submitted to the fraud, but the principle does not, as we have seen, extend to cases where a party has been threatened with a prosecution for an offence, and is not in custody. As soon, however, as the intended victim becomes under duress, the affair is immediately altered. The defendant in an action for *crim. con.* had a verdict against him for 200*l.* and wanting to get a release upon payment of a smaller sum, he got a warrant from a justice to apprehend the plaintiff for murder, and then having secured him, entered an arrest for 500*l.* at his own suit in order to extort the release. These facts appearing to the court, they made a rule for him to show cause why an attachment should not issue against him, and the constable, the bailiff, and the justices' clerk were included in the rule.² So, where a gaoler had obtained a note from his prisoner before he would return a *habeas corpus* directed to him, an attachment was ordered.³ And if more fees be taken than are really due, an indictment for extortion will lie under any circumstances, for this is an evident demand under colour of process.⁴ So a collector of taxes is answerable for taking a larger amount than he ought.⁵ And, moreover, by the stat. of Westminster 1 (3 Edw. 1, c. 26), no sheriff nor other minister of the king, whose office in any way concerns the administration or execution of jus-

¹ *R. v. Wing*, 1 Sess. C. 915.

² *Williams v. Lyons*, 8 Mod. 189. For it is no defence on the part of an agent that he has been employed by another. The collector of the post-horse duty demanded of the prosecutor 5*l.* for letting out certain horses without having paid the duty. A promissory note was thereupon given. The collector gave the note to his principal, and relied upon this fact as a defence. But it was held, that he could not avail himself of his principal's participation in his offence. *R. v. Higgins*, 4 C. & P. 247. There are no accessories in this offence, but he that is assisting

is as guilty as the extortioner. By Parker, C. J. 1 Str. 75.

³ *R. v. Colvin*, 8 Mod. 226. See Stark. P. C. 588, "It is a great misdemeanor." Per cur. *R. v. Johnson*, 11 Mod. 62. 1 Russ. C. & M. 145, citing Trem. P. C. 111. *R. v. Broughton*, 13 Rep. 127. But where a gaoler advanced money to a prisoner for his *habeas corpus*, the latter was remanded upon his refusal in court to repay the gaoler. Comb. 36.

⁴ See *R. v. Benson*, 1 Sid. 420. *R. v. Baines*, 2 Ld. Raym. 1265.

⁵ *R. v. Orm*, 1 Sess. C. 160; S. P. *R. v. Atkinson and another*, 3 Ld. Raym. 61; S. C. 11 Mod. 79.

tice, (a term which includes escheators, coroners, bailiffs, gaolers, and other inferior officers,) may take any reward excepting that which he is entitled to from the king.¹ No prescription can be set up in opposition to this statute, so that a claim of certain fees by prescription on the part of the clerk of the market for the examination of weights and measures was held to be merely void.² By 55 Geo. 3, c. 50, s. 9, any clerk of the court or of assize, &c. who shall exact any fee from prisoners charged with felony or misdemeanor after their acquittal, or discharge by proclamation, or against whom no such bill shall be found, in respect of the discharge of such prisoner, shall be guilty of a misdemeanor.³

The indictment against the clerk of assize states, that A., on, &c., then being [clerk of assize], certain fees [gratuity] from one B., to wit, &c., unlawfully did exact, he the said B., being then in prison, [state the circumstances,] against the form, &c.

Also, by 33 Geo. 3, c. 52, s. 62, to demand or receive any sum of money, or other valuable thing, as a gift or present, or under colour thereof, whether for the use of the party receiving it or under a pretence of its being for the use of the East India Company, or any person whatever, such demand being made by a British subject holding or exercising any office or employment under the king, or the company, in the East Indies, shall be deemed to be extortion, and a misdemeanor. The present so received is moreover to be forfeited, or the full value thereof, but the court may, if they should think fit, either order such present to be restored to the person who offered it, or may order it, or any part of it, or of any fine which they shall set upon the offender, to be paid to the prosecutor or informer.

Nevertheless there are some acts which, although they may seem very much to savour of disobedience to the statute of Westminster before mentioned, if not of extortion, have yet been held not to amount to that offence. Thus it has been said, that where a voluntary gift to an officer for his diligence and exertions is united with a custom in such cases, the acceptance of such a present on the part of the officer is not a misdemeanor.⁴ Much less can the taking of reasonable and allowed fees be construed into an offence.⁵ And certain payments, which are called perquisites of right, may also be taken. As the fee of 1s. from every prisoner who is acquitted, which the sheriff demands as his per-

¹ See 1 Russ. C. M. 144. *R. v. Mayor of Lynn*, 1 Leon. 295.

² 1 Hawk. c. 68, s. 2.

³ And punishable by fine and imprisonment, and incapacity to hold the office. See likewise as to justices' marshals taking more money from persons recovering seisin of land, or gaining their

suits, or from jurors, towns, &c., attached upon pleas of the crown, than they ought. 3 Edw. 1, c. 30. To be "grievously punished," *i. e.* fined and imprisoned.

⁴ 3 Bac. Abr. 108, tit. "Extortion."

⁵ Co. Litt. 368.

quisite.¹ And of the same nature was the fee of 1*d.* which the coroner used to claim from every visne when he came before the justices in eyre.²

It has not been unusual for the collector of a toll gate to demand more than is due from the person seeking to pass through it. And if he should act *bonâ fide*, or under a mistaken impression of right, a jury would rarely find him guilty of extortion. And if the right to pass be not clearly explained to the toll-gate keeper, he cannot be charged with extortion under any circumstances, because the taking of toll is not in itself a criminal act. Should an exemption, therefore, be the claim which the passenger conceives he has a right to insist upon, it must be notified to the collector of tolls. So that where the prosecutor was compelled to pay 3*d.* for carrying manure, and he remained silent upon the subject, Lord Ellenborough at once held, that an indictment for extortion could not be supported.³ But it should be remarked, that a collector may, under circumstances where the exemption has been duly notified, be convicted of *unlawfully* demanding toll, although the jury should expressly negative the extorsive character of the transaction.⁴ Indeed, it has not been very uncommon for parties to try the right to toll by preferring an indictment against the keeper of the gate.

An indictment for extortion will not lie for taking an excessive distress, nor will an indictment lie for accusing another of felony, and for robbery by such means;⁵ nor, of course, concerning private matters.⁶

Extortion—Gaolers.] By 55 Geo. 3, c. 50, s. 13, any gaoler exacting any fee or gratuity from any prisoner for or on account of the entrance, commitment, or discharge of such prisoner, or who shall detain him for nonpayment thereof, shall be rendered incapable of holding his office, be guilty of a misdemeanor, and punishable by fine and imprisonment.

The cause of the taking ought, therefore, to be mentioned, but if the objection should not be raised on demurrer, it will be too late after verdict to move upon this point, for it will stand on the record, that the defendant extorsively took more than was his due by colour of his office.⁷ Nor is the sum itself at all material in cases where no fee nor payment of any kind was due.⁸ And again, where it becomes necessary to name a sum, and to state that the defendant exceeded that amount in his demand, proof that he extorted 1*s.* is quite sufficient to satisfy a charge for taking twenty;⁹ and any number of acts may be charged in the same in-

¹ 1 Hawk. c. 68, s. 2.

² Id.

³ *R. v. Hamlyn*, 4 Campb. 379.

⁴ *R. v. Adams*, 6 M. & S. 52.

⁵ *R. v. Stonehouse*, 3 Salk. 188.

⁶ *R. v. Carre*, 2 Keb. 336.

⁷ See *R. v. Cover*, 1 Sid. 91. *R. v. Refit*, 7 Mod. 220.

⁸ 1 Str. 75.

⁹ *R. v. Burdett*, 1 Ld. Raym. 149; 6 T. R. 267.

dictment.¹ Nor, indeed, does it seem to be necessary, although it is usual, to aver that the defendant had no right to act in the manner stated in the count. As where there was an omission to allege that the defendant had no warrant to take the prosecutor to Newgate, the threat having been that the prosecutor should be so taken upon a warrant for perjury.² *A fortiori*, the offence imputed need not be negatived under such circumstances.³ But, on the other hand, where a fee was due, it must be stated in the indictment;⁴ and the offence must be sufficiently expressed. Where the defendant was charged with taking money by colour of his office *as* bailiff,⁵ without averring that he was the bailiff, or that he took more than was due to him, the court quashed the indictment.⁶ Therefore the sum must be stated where there exists a right to take certain monies.⁷ So, again, too general a charge will be insufficient; as, where the defendant had been acquitted upon every count excepting one which was general, and alleged that he had, under colour of his office, caused his agents to demand and receive of *several other persons several sums of money* for examining weights and measures, judgment was arrested for the generality of this charge.⁸ The taking, moreover, must be averred. An extorsive taking constitutes the offence, and not an illegal agreement to take; for a pardon after the agreement, and before the taking, does not pardon the extortion.⁹ And it is further to be remarked, that every taking is a separate offence, so that it is improper to heap together several acts of extortion in one count. A common ferryman was indicted for extorting, at certain times, from divers persons unknown, divers sums of money exceeding the ancient rate and price of passage, that is to say, twopence for carrying over a man and horse, &c. and judgment was stayed for the uncertainty.¹⁰

Joinder.] It has been determined, that where the defendants had no title to take any fees, it could not be an objection to say that they ought to have been separately indicted, or where they took a certain sum in gross and then parted it betwixt them, whilst, on the other hand, if the indictment were for taking more

¹ *R. v. Broughton*, Trem. P. C. 111.

² 11 Mod. 137.

³ *Id.*

⁴ *R. v. Lake*, 3 Leon. 268.

⁵ See *R. v. Gower*, 1 Keb. 487.

⁶ *R. v. Hill*, Comb. 64. Although, in general, they will put the defendant to demur in cases of extortion. *R. v. Wadsworth*, 5 Mod. 13.

⁷ *R. v. Tracey*, 6 Mod. 31, where a judge was charged with extorting money by force of a forged warrant, knowing it to be forged.

The jury having acquitted him of the forgery, but found him guilty of the rest, upon objection taken, that the forgery was the principal charge, the court quashed the indictment, but ordered the defendant to enter into a recognizance to appear to answer a fresh indictment.

⁸ *R. v. Robe*, 2 Str. 999.

⁹ 1 Ld. Raym. 149, by Holt, C. J.

¹⁰ *R. v. Roberts*, 4 Mod. 101; S. C. Carth. 226; S. C. 1 Show. 390. See 2 Burr. 984.

than was due, such an exception might, possibly, be warranted, because that which might be extortion in one would not necessarily amount to that offence in the other.¹ But, in general, two may be indicted for extortion.²

Trial and judgment.] The trial may be in any county, by virtue of 31 El. c. 5, s. 4.³

The sessions have jurisdiction over this misdemeanor, extortion being particularly mentioned in the commission.⁴

The judgment for extortion at common law is fine and imprisonment, together with an incapacity to hold the office in respect of which the exaction has taken place. As where any clerk of assize, clerk of the peace, &c., or their deputies, or other officers, shall exact any fees, upon their discharge, from prisoners charged with felony or misdemeanor, or with being accessory to felony, against whom no bill has been found, or who shall be acquitted, or discharged by proclamation.⁵ So, where any gaoler shall exact any fee or gratuity from any prisoner on account of his entrance, commitment, or discharge, or shall detain him in custody till such fee be paid, he is made liable to similar punishment.⁶ There is an old Act inflicting fine and ransom, and the loss of office at the king's pleasure, for extorsive conduct on the part of the admiral, or his officers, with respect to licences for passing out of the realm;⁷ and another which prescribes a fine to the king, together with loss of the office, against any officer of the exchequer who shall take any manner of reward or thing from any archbishop or bishop, or any other having charge of the collection and payment of tenths, for making their account or *quietus est* in the exchequer.⁸

By 3 Edw. 1, c. 26, any sheriff or king's officer who shall take any reward to do his office beyond his allowance, shall "yield twice as much,"⁹ and be punished at the king's will. By 1 Hen. 4, c. 11, any sheriff doing any extortion to the people, and being thereof attainted, shall likewise be punished at the king's will, and forfeit double the amount of his exaction.¹⁰ And if the sheriff do not lawfully acquit the king's debtors after payment, he shall be fined and pay thrice as much as he has received.¹¹ So, if the

¹ 1 Str. 75.

² *R. v. Atkinson and others*, 1 Salk. 382.

³ 2 Hawk. c. 26, s. 50; see also 1 Hawk. c. 68, in the notes at the end, where it seems as though Hawkins had doubted whether the trial could be had in any county.

⁴ 1 Str. 75; 3 Inst. 149, as to extortion by the clergy.

⁵ See 55 Geo. 3, c. 56, s. 9. Note, this Act does not extend to sheriffs.

⁶ 55 Geo. 3, c. 50, s. 13. Note, the Act does not extend to the King's Bench or Fleet prisons, nor to the Marshalsea and Palace courts.

⁷ 2 & 3 Edw. 6, c. 6.

⁸ *Ante*, p. 1075.

⁹ For which an action will lie. 3 Com. Dig. 323.

¹⁰ See note above.

¹¹ 31 Hen. 3, st. 4; 3 Edw. 1, c. 19.

sheriff do not let a party see the estreat sealed, and do not tot up that which is paid, he shall be fined, and pay treble damages to the party complaining thereof.¹ So, if the sheriff do not release a distress, if the debtor (*i. e.* probably the *king's debtor*) can find able and sufficient surety in respect of the same, he shall be grievously punished.²

By 7 & 8 Vict. c. 110, s. 2, extortion by the registrar, &c. under the Joint Stock Companies Registration Act, is made a misdemeanor. He is prohibited from either demanding or receiving any gratuity or reward beyond his fees.³

¹ 42 Edw. 3, c. 9.

² 28 Edw. 1, st. 3, c. 12. By fine and imprisonment.

³ This Act is, in a great measure, repealed. See 19 & 20 Vict. c. 47, s. 107; 20 & 21 Vict. c. 12, s. 23.

PART XI.

Of Indictable Offences against the Public Peace.

CHAPTER I.

OF UNLAWFUL ASSEMBLIES.

With respect to open demonstrations against the safety of the community, a riot, a rout, and an unlawful assembly, may each, according to their respective circumstances, become misdemeanors against the public safety. The riot, which consists in an assemblage with an unlawful intention and a perpetration of some overt act; the rout, which is the assembling with a wrong motive, but without carrying it into execution, and the unlawful meeting, simply considered, which is a gathering with or without an original intent to do evil,¹ but which may well be deemed illegal by reason of its formidable appearance, may certainly, if allowed to proceed too far, be not only subversive of the public peace of a district, but may likewise threaten the general safety. Still, inasmuch as these disturbances are in their beginnings of a private nature, (for if public and general, they would amount to high treason,) and as they do not, in the majority of cases, advance to a greater degree of annoyance than a temporary injury of the public peace, we will, with the exception of unlawful assemblies, postpone the consideration of them till the next section, which treats more particularly of misdemeanors against the peace. There are other offences, however, independently of riot, which threaten the safety of the community at large. A proposition to hold a con-

¹ Hawkins considers that the such meetings as may be likely to presence of an intention to do raise fears and jealousies. "For wrong, as stated in some defini- no one can foresee what may be tions of an unlawful assembly, is the event of such an assembly." too narrow a meaning, and that 1 Hawk. c. 65, s. 9; see also 3 the term should be extended to Stark. 103, 106; 5 C. & P. 154.

vention, a national convention, for example, is clearly illegal, for it is not possible to anticipate with certainty the peaceable result of such a design. And, therefore, where a meeting was called for the purpose of adopting preparatory measures for holding such a convention, it was held to be unlawful, and it was no good defence to allege, that the proclamation had not been read.¹ This was, in fact, an unlawful assembly with an original intention to do a wrongful act.²

There are, however, certain exceptions to the statutes which restrict these meetings—as in the case of election meetings and attendance on business in the case of holding meetings within a mile of Westminster Hall. There are also other exceptions to the general law of illegal meetings and confederacies, and disorderly houses of unlicensed lecturing. Freemasons' lodges—provided there be a certificate and registry of their being held as such—are excepted out of the 39 Geo. 3, c. 79.³ Unless, indeed, after complaint made upon oath that the meetings of any lodge are likely to be injurious to the public peace and good order, the justices at a general sessions shall order the discontinuance of such meetings, in which case the assembly will be deemed unlawful like the rest. Freemasons are likewise protected by 57 Geo. 3, c. 19, s. 26, provided that the regulations of 39 Geo. 3, c. 79, be complied with.

Meetings of Quakers, and of societies of a religious or charitable nature only, and where no other matter or business is discussed, are likewise excepted by this clause. And sect. 27 exempts these same meetings of Quakers, &c., from the provisions of 39 Geo. 3, c. 79, concerning divisions, or branch societies.

The exceptions as to lectures are those delivered in the universities by members, and such as are delivered in the halls of the inns of court by persons authorized, and payments to schoolmasters are not to be deemed payments for admission to lectures, within the Act.⁴

Lastly, with respect to unlawful oaths, the Act of 39 Geo. 3, c. 79, was declared not to extend to declarations approved by two justices, and registered with the clerk of the peace;⁵ but since the statute 5 & 6 Will. 4, c. 62, s. 13, which abolishes voluntary oaths before justices, it is doubtful whether these exceptions are now of much interest. Unlawful oaths, it may be remarked, are highly

¹ *R. v. Fursey*, 6 C. & P. 81.

² "All persons assembled to sow sedition, and bring into contempt the constitution, are in an unlawful assembly. All persons assembled in furtherance of this object are unlawfully assembled too." By Bayley, J., in *R. v. Hunt*, cited 3 Stark. 103; by Holroyd, J., in *Redford v. Birley and others*. See *R. v. Hunt*, 1 Ld.

Keny. 108; all persons countenancing a riot are liable to an information. Indeed, refusing to aid the king is a high misdemeanor. East, P. C. 80; 1 Hawk. c. 22, s. 2.

³ By sect. 5.

⁴ 39 Geo. 3, c. 79, s. 22.

⁵ Sect. 3, and also 57 Geo. 3, c. 19, s. 26.

improper at common law, and they are in that view also the subjects of misdemeanor.

Disturbances and seditious meetings, how suppressed.] It is important, in this place, to remark upon the mode of suppressing unlawful assemblies. And it is a good principle that, where the meeting assumes such a character as may fairly be said to raise a foundation for apprehension that the public safety will be endangered, it is not only lawful for any person (whether in an official or private capacity), but it is likewise his duty, to use the most prompt endeavours to suppress such an assembly. It would be natural and reasonable that, in the first instance, relief should be sought from the constituted authorities, and a private person might incur a legal hazard if he neglected to call in the officers of the law, where their aid could have been obtained without risking the main object of his exertions. But should there be no present help from the authorities, or should the occasion be urgent, there is no question but that a private individual, of his own act and deed, ought to counteract a dangerous rising to the utmost of his power. Thus it was held, that men may arm themselves to suppress riots, rebellions, or to resist enemies, and every justice of the peace, sheriff, and other minister, or other subject of the king, where such accident happens, may do it.¹ Whence Hawkins argues that they may arm, and likewise may make use of arms towards the advancement of their loyal design. These remarks are more particularly referrible to cases of treasonable and seditious meetings accompanied by force, or a well-grounded alarm that disturbances are imminent. Such assemblies, of course, "savour of rebellion, for suppressing whereof no remedies can be too sharp or severe."² Therefore, when the Pretender was proclaimed in the country during some races, upon which the better affected inhabitants of the neighbourhood forthwith interposed, and a conflict ensued; an information against the supposed loyalist rioters was refused with costs, although some of their party had in reality committed unwarrantable excesses, for here the safety of the commonwealth had come in question.³ Again, it may very safely be laid down that when the unlawful meeting proceeds to an act of felony, it may be suppressed by a private person forthwith, and with every degree of force within his reach. As if a number of persons were seen in the act of demolishing a house, or committing a robbery, here it is the duty of each man to interpose, taking, in the first place, the assistance of the authorities; but if the occasion be urgent, interfering in his own person to repress with reasonable force the illegal aggression.⁴ Nevertheless, it may be further alleged that there are grounds for supposing that

¹ *Case of Armes*, Poph. 121, 122; Kel. 76.

² 1 Hawk. c. 65, s. 11.

³ *R. v. Wigan, Inhab.*, 1 Sir Wm. Bl. 47.

⁴ See the observations of Heath, J., referring to the riots of 1780, 2 B. & P. 264.

a private person may quell a serious riot or affray, if the matter be of a very aggravated character, but as we are speaking here of violent suppressions by force of arms, it seems more prudent for such an individual to forbear from any uncommon exertion,¹ lest, "under the pretence of keeping the peace [he] cause a more enormous breach of it."² But every citizen may use a moderate degree of energy towards the allaying of a breach of the peace.

If parts of a speech be set out in an indictment as if they had been said continuously, whereas the speech was not so delivered, it was no variance, and it lay on the defendant to show the harmless character or inconsistency of the questions.³

Powers of magistrates.] The powers of a magistrate or peace officer are larger than those of a private person,⁴ and these officers need no particular commission for the purpose of putting down a rebellion.⁵ And as their authority is more extensive, so also is their responsibility. Perhaps they are more heavily answerable in a case of excess of their jurisdiction than others, but they are certainly more open to censure and punishment, where they neglect their duty, than the private man. Thus the lord mayor of London was convicted of neglect of duty for not repelling the outrages of the rioters in 1780.⁶ The mayor of Bristol was tried and acquitted upon an information charging him with having been guilty of a breach of duty by not suppressing the riots in that city.⁷ Indeed, if there be a reasonable ground for alarm, the magistrate must disperse the multitude, or he will be criminally answerable; and so much rests upon his discretion, that he may sometimes use force to break up an unlawful assembly, and the more especially if an immediate riot be reasonably expected to ensue.⁸ *A fortiori*, if the riot has commenced, the mode of proceeding is for the magistrates to assemble as quickly as possible, for the purpose of learning whether there exist proper grounds for an unusual interposition.⁹ If, after a due investigation, such apprehension would appear to be verified, it becomes necessary that special constables should be sworn in under the provisions of the statute of 1 & 2 Will. 4, c. 41. And if these guardians be insufficient, the aid of the military must be invoked, or, unquestionably, according to the discretion of the magistrate or magistrates, the military may be called in before the civil power.¹⁰ It seems to be

¹ A private person may stay persons engaged in mischief from executing their purpose, or may stop others whom he sees coming to join them. 1 Hawk. c. 65, s. 11. But it seems that unless it be in a case of actual rebellion or violent outrage, ought not to use an extraordinary degree of force.

² 1 Hawk. c. 65, s. 11.

³ *Re Crowe*, 3 Cox, 123.

⁴ 1 Hawk. c. 65, s. 11.

⁵ 2 And. 67.

⁶ *R. v. Kennett*, 5 C. & P. 282, n.

⁷ *R. v. Pinney*, 3 B. & Adol. 947.

⁸ *R. v. Neale and others*, 9 C. & P. 431.

⁹ See 3 Stark. 89.

¹⁰ See *Burdett v. Colman*, 14 East, 164; 3 Stark. 92.

prudent not to despise professional assistance, but the magistrate must not cling entirely to his legal adviser, for the best help of that kind will not be a defence against a criminal charge,¹ nor will mere honesty of intention operate as an excuse.² But the law, whilst it demands much at the hands of these officers, does not refuse them a full share of protection, and even of allowance, when the case presents on their part a decided and straightforward course of action. Therefore, if a party has done all which can be expected at the hands of a man of ordinary firmness, it is enough, and he becomes entitled to an acquittal, although his labours did not succeed in stemming the evil.³ And he is not bound to swear in special constables unless he is an eye-witness of the scene, or has information upon oath, upon which he may act,⁴ nor need he head the constables, nor go out with the soldiers,⁵ nor call out the *posse comitatus*,⁶ if he have given timely warning⁷ to the king's subjects of an approaching tumult.⁸

It may be readily collected from the above suggestions that if death ensue by reason of the firing of the soldiers, or the necessary force of the civil power, both the slayers and the magistrates are justified by law.

This power of overruling disturbances is vested in the justices by the common law. Moreover, by 34 Edw. 3, c. 1, justices may arrest, take, and chastise rioters according to their trespass and offence. This may be done by a single justice, who may authorize an arrest by a parole command.⁹ And by 13 Hen. 4, c. 7, the justices and the sheriff, or under sheriff, may come with the power of the county against rioters, and having found them, may record a conviction against them, in the same manner as is contained in the statute of forcible entries.¹⁰

¹ *R. v. Pinney*, 3 B. & Adol. 947.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ "By making an end of all the feudal tenures, we hardly know what the *posse comitatus* is, or how it is to be raised, supposing the sheriff wanted to raise it." 3 Stark. 105, per Holroyd, J.

⁷ Timely warnings are—personal application to the inhabitants—employing others to do the same—sending notices to the church, requesting the people to meet the magistrates at a time and place fixed—posting such notices.

⁸ 3 B. & Adol. *ut supra*.

⁹ 1 Russ. C. M. 287.

¹⁰ See *post*, Forcible Entry.

CHAPTER II.

SEDITIONOUS LIBELS AND SLANDER.

Seditious libels are also indirect means by which the general tranquillity is sometimes menaced. These publications may be against the monarch, or either house of parliament, or the constitution and government, or the administration of justice. And as it certainly tends to promote an unkindly feeling between two countries, the result of which might be hostile if the ruler of the one were to be at the mercy of a libeller in the other state, it is likewise a seditious act to utter such a publication with reference to a foreign potentate.¹ To write against the person or government of the king is, therefore, a libel; for by lessening him in the esteem of his subjects, such an act may weaken his government or raise jealousies between him and his people.² Thus falsely to assert that the monarch is insane is clearly libellous, and to add to the statement that it proceeds from authority is, if untrue, an aggravation of the offence, and the defendant must take upon himself the charge of proving that authority to the satisfaction of the jury.³ And slander to that effect would likewise be a high misdemeanor. And so again, all words tending to vilify the sovereign are of themselves punishable,⁴ although they be spoken of a dead monarch.⁵ *A fortiori*, if they were to go the length of denying his right to the crown even in common or unadvised discourse.⁶ And there is an old statute which punishes the tellers or publishers of false news or tales, "whereby discord, occasion of discord or slander, may grow between the king and his people, or the great men of the realm," with imprisonment until they shall

¹ See 7 & 8 Vict. c. 102.

² See *R. v. Pine*, Cro. Car. 117; *Id.* 126. *R. v. Lawrence*, 12 Mod. 311.

³ *R. v. Harvey and another*, 2 B. & C. 257. Supposing the matters of the libel to be untrue, and that the authority predicated were proved, the character of untruth only would belong to it, and not that of falsehood or criminal untruth. *Id.* 264, Bayley, J.

⁴ East, P. C. 119; as "Damn the Queen," *R. v. Smith*, Gilb. Rep. 57; defendant fined 30 marks. See also *R. v. Whitmore and another*, 1 Sir Wm. Bl. 37. Indeed, there is one case where it was held that a treatise on hereditary right constituted a libel, though it contained no reflection upon the existing government. *R. v. Bedford*, cited, 2 Str. 789.

⁵ *R. v. Tayler*, 2 Ld. Raym. 879.

⁶ East, P. C. 119.

bring into the court the first author of the tale.¹ These principles, however, do not extend so far as to shut out fair criticism upon the measures or policy of a sovereign. It may be competent for a writer or speaker to allege that the king has taken an erroneous view of a question, whether foreign or domestic, provided there be a careful abstinence from insinuating that the mistake has proceeded from partial or corrupt views, or with an intention to pursue or oppress any individual or class of men. Where the defendants were charged with a libel in the "*Morning Chronicle*," which contained some equivocal expressions, Lord Ellenborough thought it right to leave the matter to the jury in the light we have just mentioned, and they acquitted the defendants.² In this case also, it was permitted to the defendants to read extracts from another part of the same paper, where the monarch was made the subject of absolute praise, seeing that these extracts would show the intention and mind of the defendant with reference to the specific paragraphs presented to the jury.³ So again, the case of the seven bishops showed that a petition to the king, praying that he would not insist upon obedience to an order which parliament had frequently declared to be illegal,⁴ cannot be viewed in the light of a libel.⁵ A petition to either house of parliament, respectfully worded, comes within the same rule.

House of Commons.] Observations, again, calculated to bring the House of Commons into contempt, are libels, and "it seems," says Mr. Serjeant Russell, "rather to have been the inclination of parliament in modern times to direct prosecutions for such offences in the courts of common law, than to revive the exercise of their own extensive privileges."⁶ Upon one occasion the jury acquitted the defendant, who had written these words: "That the king's government might go on if the lords and commons were lopped off," on the ground of their being metaphorical expressions.⁷

Government and constitution.] The government and constitution are within the especial protection of the law, it being surmised, that any considerable revolution in the system so long recognized would highly endanger the public tranquillity. To endeavour to possess the people with an idea that the government is corruptly administered, as a government, is certainly a libellous attempt.⁸ So when Dr. Drake wrote, "that the late revolu-

¹ 3 Edw. 1, c. 34; 2 Ric. 2, st. 1, c. 5; 12 Ric. 2, c. 11. See *R. v. Earl of Northampton*, 12 Rep. 132.

² *R. v. Lambert and another*, 2 Campb. 398.

³ *Id.* 399, 400.

⁴ The dispensing power.

⁵ *Case of the Seven Bishops*, 12 St. Tr. 183.

⁶ 1 Russ. C. M. 236. See also *R. v. Rainer*, 2 Barnard, 293; *R. v. Owen*, *R. v. Stockdale*, *R. v. Reeves*, cited in 1 Russ. 236, n. (q.)

⁷ *R. v. Reeves*, Peake, Add. Ca. 84.

⁸ See *R. v. Tuchin*, Holt's Cases, 424.

tion was the destruction of the laws of England," the Court of King's Bench held the publication to be a libel.¹ So an address to the army may be so worded as to be of a pernicious character, and, in that light, a libel upon the government.² So where the defendant uttered these words, "the government consists of three estates, and if a rebellion should happen in the kingdom, unless it be a rebellion against the three estates, it is no rebellion," he was convicted upon an information and fined 1,000*l.*, it being his intention to connect the death of Charles I., and the persons who had adjudged the sentence upon that monarch, with such his discourse.³ So where a person delivered a paper after the sermon to the minister, requiring him to take notice that offences might be perpetrated without the control of the civil magistrates, it was held, that he had published a libel, although no magistrate in particular was mentioned, and it was considered no objection to allege the want of an averment stating that the magistrates had knowingly suffered those vices.⁴ A general dissatisfaction towards the government is proposed as the groundwork of these writings and speeches, a proceeding entirely apart from fair criticism and the due canvassing of political measures,—thus it is that such acts are deemed libellous. To use the language of Hawkins, such a libel has "a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition."⁵ So upon the prosecution of a defendant for libelling the Irish administration, and animadverting upon the public conduct and character of certain high officers in that country, Lord Ellenborough observed that "if a publication be calculated to alienate the affections of the people by bringing the government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law." And the lord chief justice cited *Tuchin's case* as removing all ambiguity from the question.⁶ So if the paper be calculated to excite tumult it is a libel.⁷ Whilst, on the other hand, if the act complained of, whether it be word or writing, be not in any manner of a seditious tendency, nor in any way calculated to excite sedition, but be merely a temperate and fair act, it cannot be called libellous.⁸ Fantastical prophecies upon arms for the purpose of creating insurrection are punishable: for a second offence, with imprisonment for life and the forfeiture of all goods and chattels, real and personal.⁹ And by 5 El. c. 15, s. 4,

¹ *R. v. Drake*, 11 Mod. 95; S. C. Holt's Cases, 350; but judgment was given for the defendant upon another ground. S. P. *R. v. Nutt*, 1 Russ. C. M. 234. *R. v. Shebbeare*, Holt on Libel, 89.

² See *R. v. Johnson*, 2 Show. 488.

³ *R. v. Harrington*, 1 Ventr. 324, 327.

⁴ 4 Bac. Abr. Libel (a) 2, p. 455.

⁵ 1 Hawk. P. C. C. 73, s. 7. See

also to the same effect, *R. v. Franchlin*, 9 St. Tr. 255; W. Kel. 76, 86.

⁶ *R. v. Cobbett*, Holt on Libel, 114.

⁷ Lofft. 776. *R. v. Collins*, 9 C. & P. 456. *R. v. Lovett*, Id. 462.

⁸ *R. v. Collins*, 9 C. & P. 456.

⁹ 5 El. c. 15, s. 3.

to publish the same by word or deed is made subject to a fine of 10*l.* and one year's imprisonment.

Administration of justice.] There may likewise be libels levelled against the proceedings of the laws as they are administered by his functionaries. An information was filed against the "Independent Whig" for arraigning the conduct of Le Blanc, J., and the jury, upon a trial for the murder of a seaman, which ended in the prisoner's acquittal. It was urged that every one had a right to canvass the proceedings of courts of justice, and that the article complained of was written in the exercise of that right. And Mr. Justice Grose, who tried the information, agreed that it was lawful with decency and candour to discuss the propriety of a verdict, or the decision of a judge, but he added that such an examination must be conducted with decency. Declamation and invective used, not with a view to elucidate the truth, but to injure the characters of individuals, and bring the administration of justice into hatred and contempt, could not be called fair criticism. The libel, so far from being thus carefully composed, was written in an abusive style, and the defendants were found guilty, and were sentenced to three years' imprisonment.¹ This jealousy with regard to the proceedings of courts has gone so far as to include an order made by a corporation and entered in their books within the class of offences above mentioned. So that where the corporation of Yarmouth made such an order and entry applauding one Watson, who had improperly prosecuted a person for perjury, and had in consequence been visited with heavy damages in an action (which action had been subsequently approved of by the Court of Common Pleas), the court held, that the defendants had thereby been guilty of a libel on the public justice of the kingdom, and made the rule for an information absolute. The facts of the corporation having sworn that they had no intention by their order to libel the person acquitted of perjury, and of the book being kept private as the property of the corporation, were deemed to make no difference.²

Foreign princes, ambassadors, &c.] One more species of political libel presents itself here—that which has for its object the calumny of foreign monarchs, or rulers, or their representatives, it being possible that a misunderstanding might arise between such potentates and our own sovereign in consequence of slanderous writings. Thus, an information was exhibited by the attorney-general against the defendant for libelling the French ambassador, the defendant having been himself plenipotentiary, and a conviction succeeded.³ So again, Peltier was tried and convicted for publishing a libel against Bonaparte, when first consul, the ten-

¹ *R. v. White and another*, 1 Campb. 359, n. ders against inferior magistrates, see *post*, sect. vii.

² *R. v. Watson and others*, 2 T. R. 199. As to libels and slan- ³ *R. v. D'Eon*, 1 Sir Wm. Bl. 510, 516.

dency of the writing being to suggest the propriety of assassinating him, and to interrupt the friendly relations between the two countries.¹

Judgment.] The judgment for these libels is fine and imprisonment at the discretion of the court, and all aiders and abettors are principals.

CHAPTER III.

OF RIOT.

A riot, or overt act of an assembly met for an illegal purpose and done in pursuance of that purpose, is one of the most serious disturbances of the public peace.² Three or more must be concerned in this outrage.³ Amongst whom the law will recognize women, but not infants under the age of discretion.⁴ After the age of fourteen years, however, infants may be convicted of riot as well as others.⁵

If speeches of a riotous character be made, the speakers are guilty, although they leave the place before the actual disturbance, provided it occur immediately.⁶

It will be observed also, that one of the incidents of riot is, that its commencement may most generally be traced to some supposed private wrong. As where one armed himself and his friends, in order to prevent an unlawful entry into his close.⁷ So where inhabitants met tumultuously to redress their grievance in being shut out from an accustomed right of common,⁸ or way, or water-course,⁹ or for the purpose of inflicting vengeance upon an ob-

¹ *R. v. Peltier*, Holt on Libel, 78.

² As if an officer should send for his soldiers to rescue him out of the hands of justice. *R. v. Capt. Waters*, 1 Freem. 359.

³ 2 Salk. 594; 1 Ld. Raym. 484.

⁴ 1 Hawk. c. 65, s. 14.

⁵ *R. v. Tanner and others*, 2 Ld. Raym. 1284; 1 Hale, 20.

⁶ *R. v. Sharpe*, 3 Cox, 288.

⁷ *R. v. Bp. of Bangor*, 1 Russ. C. M. 274.

⁸ 1 Hawk. c. 65, s. 6. As by pulling down fences erected by the lord of a manor. *R. v. Prynne*, 5 Mod. 459; Holt's Ca. 635. S. C. *R. v. Abraham and others*, Comb. 141, or a cottage built on the waste. *R. v. Hallingby and others*, Com. Rep. 93.

⁹ *R. v. Colson and others*, 3 Mod. 72. *R. v. Wyvill and others*, 7 Mod. 286.

noxious individual,¹ or where bail forcibly enter a man's house, in order to render him ; with other like causes of quarrel. And in furtherance of this illegal undertaking, some degree of violence must take place, either to the person of an individual, or to his possessions.² So that if people think fit to ride about in an unusual manner, armed, for instance, with weapons, they may be guilty of assembling unlawfully, but not of riot, unless they commit some injury.³ So, if there be a meeting for a legal recreation, as at a fair, market, church ale, &c. ; or for a lawful matter of business, as the election of a mayor,⁴ and a sudden dispute arise amongst themselves, which ends in a conflict, the parties may, indeed, be guilty of an affray,⁵ but not of riot, for here is an absence of any original intention, or of a subsequent agreement to disturb the peace ; we say, a subsequent agreement, because it may happen, that upon such an occasion, the persons falling out have previously formed themselves into parties, and with promises of mutual assistance in case of quarrel, have engaged in a fray : here their acts become those of rioters, because by entering into the new confederacy to break the peace, they may be said to have assembled together for that purpose from the time of the confederacy, just as though they had originally come together with an unlawful design.⁶ And so, if some sudden proposal be started at an innocent meeting, to which the parties consent and proceed to execute it, as, for example, to attack a stranger,⁷ it is no defence in case of an indictment for riot, to allege that the first assembly was legal, if the subsequent design should turn out not to be so, and it be executed with violence.⁸ So if a person were at a particular place lawfully,

¹ *R. v. Hughes and others*, M. & M. 178, n.

² 1 Hawk. c. 65, s. 4 ; 3 Inst. 176. Although it once appeared to Holt, J. C., that an assembly might meet together with such circumstances of terror as to be a riot. 2 Salk. 595. The chief justice called it a kind of assault upon the people. Id. And Mansfield, C. J., in *Clifford v. Brandon*, said, "it is not necessary to constitute this crime, that personal violence should have been committed, or that a house should have been pulled in pieces." "If people endeavour to effect an object by tumult and disorder, they are guilty of a riot." 2 Campb. 370. Lord Coke says, "one may commit a force," 3 Inst. 176. And there may, perhaps, be a misdemeanor in the nature of riot, as the master who exposes his helpless servant to

the inclemency of the weather, may be guilty of an offence in the nature of an assault. Perhaps the lord chief justice may be understood to say, that neither personal violence, nor utter destruction of property, would be necessary to constitute this crime. But the other position with regard to the endeavour to effect an object by tumult and disorder may be considered as open to some criticism.

³ *R. v. Pugh and others*, Holt's Ca. 635 ; 1 Hawk. c. 65, s. 4.

⁴ *R. v. Corporation of Gram-pound*, 2 Ld. Raym. 965 ; see also, *R. v. Sir R. Athyns and others*, 2 Show. 236.

⁵ *R. v. Ellis*, 2 Salk. 595 ; 1 Hawk. c. 65, s. 4.

⁶ 1 Hawk. c. 65, s. 3.

⁷ *R. v. Ellis*, 2 Salk. 595.

⁸ 1 Hawk. c. 65, s. 3.

and then joined an unlawful assembly just meeting on the same spot, it would not acquit him in an indictment for riot to say that he was not privy to the first design.¹

It has been said, indeed, that stage players may be indicted for a riot and illegal assembly,² especially if they cause an extraordinary concourse of people to witness their tricks.³ And it is likewise on record, that in the year 1797, an indictment for riot was drawn by an eminent pleader against certain persons, for kicking about a foot-ball in the town of Kingston,⁴ and thereby causing a common nuisance.⁵ And, certainly, if the design of creating terror were entertained by a number of persons, and the purpose carried into execution in a violent manner, as by kicking the ball against passengers, and thus assaulting the inhabitants, the indictment for a riot was doubtless well conceived. In this respect it is like a premeditated prize fight. Otherwise, assemblies, at wakes or festivals, or meetings for the exercise of common sports and diversions, as bull-baiting,⁶ wrestling, or the like, are said not to be riotous.⁷ And it is difficult to see how stage players can be guilty, at least in modern times, of such acts as will amount to a riot. So far from this, it is laid down, that an assembly of persons met together for the purpose of doing a thing prohibited by statute, is not riotous, if they carry their unlawful act into execution without force.⁸ And the same rule prevails with reference to an act which is forbidden by the common law; as if a party should gather together in order to carry off a piece of timber, to which "one of the company has a pretended right," and should take the wood without circumstances of terror or force.⁹ But these meetings may, nevertheless, be routs or unlawful assemblies, since no man has a right to gain his own by creating a disturbance, or congregating a multitude without the authority of law.¹⁰ To this, it needs hardly be added, that the officers of the law are not indictable for this offence, either in an attempt to preserve the peace, or to execute process.

¹ *R. v. Corporation of Gram-pound*, *Ld. Raym.* 965; 1 *Hawk.* c. 65, s. 3; *Anon.* 6 *Mod.* 43.

² *R. v. Sir A. Ashley*, 1 *Ro. Rep.* 109.

³ 19 *Vin. Abr.* Riot, A. 8 Marg.

⁴ First count; second count for a nuisance. It was done for the purpose of suppressing an ancient custom of kicking about foot-balls on Shrove Tuesday. 1 *Russ. C. & M.* 267, note (g).

⁵ 2 *Ch. Cr. L.* 494.

⁶ But if the bull-bait be only a colourable pretext for outrage, and violence be committed, it will amount to a riot. And if done under circumstances of terror to

the public, it will be an affray. See 5 & 6 *Will.* 4, c. 59, s. 3. Thus it is that a prize fight is a riot.

⁷ 1 *Hawk.* c. 65, s. 5.

⁸ *Id.*

⁹ *Id.* 6 *Mod.* 141, per cur. S. P. *Anon.* 12 *Mod.* 648. But as soon as terror or undue force is imported into the transaction, the offence of riot accrues, and in this sense the case in *Godbolt* must be understood. *Godb.* 438, and see *post.*

¹⁰ *R. v. Stroude*, 2 *Show.* 150; *Hob.* 92. Cutting down trees, *R. v. Harris*, *Holt's Ca.* 353. *R. v. Johnson and others*, 1 *Wils.* 325.

But in assembling a force to ensure the execution of process, they must be satisfied that there will be some resistance.¹ Sheriffs, justices, and constables, and under some emergencies a private person, may call together such an assemblage as will suppress a tumult, or hinder a breach of the peace.² The act of a justice in raising the *posse* under a just apprehension of force in making an entry into, or in the detainer of lands, is cited by Hawkins as an example.³ And the acts of private men, if done in defence of their rights, and without excess, may likewise be said to rest upon legal authority. As where one erected a weir across a navigable river, upon which several assembled with spades, and dug a trench in the land of the man who had made the weir, in order to turn the water, and the better to remove it. It was held, that the parties thus engaged were neither guilty of a forcible entry nor a riot.⁴ So in the case of commoners who abate enclosures.⁵ And of electors who meet to assert their rights.⁶ And likewise of the owner of a house, who arms himself and his friends for the purpose of defending the possession.⁷ For the law permits and authorizes individuals to abate a nuisance in an orderly manner, and with no greater force than may be necessary, and likewise allows them a fair latitude to defend their privileges. So it is again, if one has a right to corn, and he cuts it down without tumult.⁸

It is likewise a misdemeanor to incite persons to commit a riot.

*Indictment.*⁹ The indictment for a riot and assault usually states that A., B., and C., together with other evil-disposed persons¹⁰ unknown to the jurors, unlawfully and riotously assembled to disturb the peace; and it then goes on to describe the particular outrage complained of, as for instance, an assault upon D. in the prosecution of the riot. And it usually concludes with the allega-

¹ 1 Hawk. c. 65, s. 2.

² Id.

³ Id.

⁴ Dalt. 312. And it is said to be better to send one or two persons only to abate a nuisance, and only with proper tools. For any threatening words, (accompanied with action,) as, "they will do it though they die for it," may give the transaction the colour of riot. Id. citing the same books. Words, signs, or gestures, will give a new feature to the case. *A fortiori*, a badge, or ensign, for that would be evidence so far of a premeditated plan. 2 Campb. 370.

⁵ 11 Mod. 117; 1 Hawk. c. 65, s. 8.

⁶ 11 Mod. 117.

⁷ *R. v. Bishop of Bangor and others*, 1 Russ. C. M. 274.

⁸ *R. v. Huet and Overie*, Godb. 438.

⁹ Where several were indicted for a riot, it was allowed by the court that the greater number might enter into a rule to confess judgment, if their fellows were convicted, and so plead not guilty with that understanding, in order to save expense. The prosecutor would then try his indictment against two or three whom he could name. *Anon.* 3 Salk. 317. *R. v. Middlemore*, 6 Mod. 212. See Lofft. 44.

¹⁰ See Holt's Ca. 635.

tion that the defendants then and there did other wrongs against the peace, &c. An allegation of a riotous assembling, as to hinder the election of a mayor, without adding any mention of an unlawful purpose or act, is insufficient.¹ If it be intended to charge the defendants with a tumultuous riot, after stating the assembly, it is customary to add, that they made a great noise and disturbance, and continued to do so for an hour, to the great terror of all the king's subjects, &c. The latter words, or expressions denoting that the people were alarmed at the disturbance,² are indispensable to support this last indictment for a tumult. Twelve persons and upwards were indicted for a riot, but the count omitted to say that it took place under circumstances of terror to the king's liege subjects, and, on that account, it was held that the charge could not be sustained.³ So, where the defendant had cut down hedges in prosecution of a private claim, it was held, that they could not be convicted of riot for want of these words. But the charge against them for an unlawful assembly was deemed sufficient.⁴

It is, moreover, not advisable to leave out the word "riotously." It supplies, indeed, the place of "with force and arms."⁵ It will be remarked, that if the indictment were to state that the defendants had assembled to do a certain unlawful act, and instead of alleging that they came to disturb the peace, and actually did make a noise, &c., were to omit any explanation of the unlawful act, the charge would be insufficient for uncertainty.⁶ And the fact of their having cut down an oak riotously, although mentioned in the indictment, was held not to aid this omission, for this did not cure the defect with reference to the intention.⁷ So, if there be a charge against persons for a riot in endeavouring to gain possession of a house, the property of that house must clearly appear in the count. For otherwise it could not be known whether it belonged to the defendants themselves or not. And if they succeeded, they would not be guilty of an attempt to repossess themselves of their own, if they had carefully abstained from excess.⁸

The words, "with divers other persons to the jurors unknown," may become very material, because in charging A., B., and C. with a riot, if these words be left out, and C. be acquitted, two only remain responsible for an offence which requires the presence of three, and no judgment can be given against the two.⁹

¹ *R. v. Solely and others*, 11 Mod. 100. *R. v. Gulston and others*, 2 Ld. Raym. 1210. *R. v. North and others*, 1 Str. 140.

² *In terrorem populi*. See 3 Keb. 623.

³ *R. v. Hughes*, 4 C. & P. 373.

⁴ *R. v. Cox and others*, Id. 538.

⁵ *R. v. Myne and others*, 19 Vin. Ab. Riot (D. 11).

⁶ *R. v. Gulston and others*, ut supra.

⁷ Id.

⁸ *R. v. Soley and others*, 2 Salk. 594.

⁹ *R. v. Sadbury and others*, 1 Ld. Raym. 484; S. C. 12 Mod. 262.

Verdict.] A verdict therefore, of not guilty, against all excepting two, negatives the charge.¹ But where six persons had been indicted for a riot, and two were dead before the trial, and then the jury convicted two and acquitted two, the objection would not hold;² for, by Lord Mansfield, they must have been guilty together with those who had never been tried,³ and the jury must be presumed to have taken that matter into their consideration.

It is, moreover, worthy of consideration, that an acquittal of the riot is an acquittal of an assault and battery, if the latter be laid to have been done riotously.⁴ The more ordinary course is to add a second count for a common assault. And, clearly, if one be acquitted of riot, and erroneously found guilty of doing that which is a mere private injury, as breaking down a bank, the judgment must be arrested.⁵ However, where the indictment states that the defendants were riotously and routously assembled, it seems that although there should be an acquittal of the riot for want of the words, "terror to the people," there may, nevertheless, be a conviction for an unlawful assembly.⁶

Costs.] Costs are given by 7 Geo. 4, c. 64, s. 23.⁷

Judgment.] The judgment for a riot at common law is fine and imprisonment, with sureties of the peace if the court should think fit.⁸ And it would be a breach of the articles of the peace, and forfeiture of the recognizance, to make one of an assembly, which, by reason of numbers, the constable could not suppress.⁹ A distinction, however, was made by some old statutes between heinous and petty riots with reference to the punishment. Thus, by 2 Hen. 5, st. 1, c. 8, rioters attainted of great and heinous riots, shall have one whole year's imprisonment at the least, without bail or mainprise. And petty rioters¹⁰ shall have imprisonment, as best shall seem to the king or to his council. But the usual proceeding at common law is adopted at the present day, although the 3 Geo. 4, c. 114, which imposes hard labour, extends likewise to the riots mentioned by statute.

Information.] There are also proceedings in cases of riot, by information,¹¹ and in cases affecting the administration of justice,

¹ 1 Ld. Raym. 484; Poph. 202.

² *R. v. Scott and another*, 3 Burr. 1262; 2 Sir Wm. Bl. 291, 350; 2 Hawk. c. 47, s. 8.

³ 3 Burr. 1264.

⁴ *R. v. Heaps*, 2 Salk. 593; S. C. 1 Ld. Raym. 484. See *R. v. Hays and others*, 2 Sess. Ca. 98.

⁵ *R. v. Colson and others*, 3 Mod. 72.

⁶ *R. v. Cox and others*, 4 C. & P. 538.

⁷ See 14 & 15 Vict. c. 53, s. 1.

⁸ The Court of Queen's Bench will not interfere to reduce the amount of security which magistrates may have required for keeping the peace. *R. v. Holloway*, 2 D. P. C. 525. *R. v. Tregarthan*, 2 Nev. & M. 379.

⁹ *R. v. Blisset and another*, 1 Mod. 13.

¹⁰ See 17 Ric. 2, c. 8.

¹¹ See *R. v. Berchet and others*, 2 Salk. 594.

or upon the election of members of parliament, informations for riots will be granted.¹

Routs and unlawful assemblies.] The law of unlawful assemblies has already been fully treated of, and, with respect to routs, we have not much to say, for although there is a distinction between the rout and the riot, as we have pointed out in the section concerning public safety,² the offence is most generally combined with riot, and is rarely heard of at the present day as a separate misdemeanor. If persons, however, assemble tumultuously, and then proceed, ride, or go forth, or move by instigation of one or several—this is a rout, inasmuch as they move and proceed in rout³ and number.⁴ But where one or two alone create terror, they may be affrayers, but cannot be guilty of a rout.

Judgment.] The judgment for a riotous assembly at common law is fine and imprisonment, and surety of the peace may likewise be required from the defendants. All parties engaged are principals.

Rioters offending against proclamations.] By 1 Geo. 1, stat. 2, c. 5, s. 1,⁵ If twelve or more persons be assembled unlawfully and tumultuously, and, being commanded to disperse peaceably by one or more justices, by proclamation, unlawfully, &c., remain by the space of one hour afterwards, they shall be guilty of felony. The punishment is penal servitude for life, or not less than fifteen years, or imprisonment, with or without hard labour, not exceeding three years, with solitary confinement, not exceeding one month at one time, nor three months in one year. By sect. 3, persons removing after the hour may be seized and carried before a justice. And all persons endeavouring to apprehend them shall be free if death or harm ensue to the offenders. In considering the enactments against riotous persons not dispersing after proclamation, it is to be observed, that the meeting in question must be unlawful, riotous, and tumultuous. It is not, therefore, in the power of the magistrate absolutely to decide whether the assembly which engages his attention is one within the prohibition of the Riot Act or not, for at the trial of a person charged with an offence against 1 Geo. 1, it must be proved that the gathering was of an illegal character. There may be an unlawful assembly without the intervention of a magistrate and a proclamation, and such an as-

¹ *R. v. Kynaston and others*, 2 Barnard. 378. *R. v. Hunt and others*, 1 Ld. Keny. 108. And as to inquisitions by justices, now disused, see 13 Hen. 4, c. 7 (not repealed). *R. v. Ingram and others*, 2 Salk. 593. *R. v. Tempest and*

others, Tho. Raym. 386. *R. v. Pugh and others*, 6 Mod. 140.

² *Ante*.

³ *En route*.

⁴ 19 Vin. Ab. Riots (A. 2); and see 2 Hawk. c. 65, s. 8.

⁵ Sections 4 and 5 only are repealed.

sembling is a misdemeanor; such an assembly may frequently separate without doing any act of violence.¹ If they excite alarm, and cause an interference by the civil power, their neglect to disperse in an hour, will bring them within the provisions of the statute. If they commit acts of violence and destruction, their conduct is punishable under 7 & 8 Geo. 4, c. 30, s. 8, and 6 Vict. c. 10,² and if it be such as that there would be a riot if the purpose of the parties were to be carried into effect, it is a meeting within 1 Geo. 1.³ A person need not be present during the whole of an hour in order to come within the statute.⁴ It happens occasionally that the Riot Act is read more than once during the same tumult. The second reading, however, does not operate as a discharge from the warning of the first; therefore, when the defendant was proved to have been present at the first reading, it was held by Patteson, J., that the time for remaining could not be counted from the second and third readings, which subsequently took place, but that the proclamation affected him in the first instance.⁵

Indictment.] The indictment for these offences must conform carefully to the statute. Where it is intended to charge the fact of continuing after proclamation made, the proclamation itself must be regarded with attention. We subjoin it, as points have arisen upon it:—"Our sovereign lord the king chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the Act of King George, for preventing tumults and riotous assemblies. God save the king." The omission of "God save the king" in the indictment has been held fatal to a capital conviction upon this statute.⁶ Upon another occasion, the words, "the reign of," were added in the count, so that the proclamation seemed to have been "in the Act of the reign of King George," &c. This slight deviation was held to be a material variance;⁷ but it is, probably, no variance to say King George the First instead of King George. The precedents adopt that course. It is very common to conclude the indictment by saying, that the act of remaining took place, "to the great terror and disturbance of the peaceable subjects of our said lord the king," &c. And in misdemeanor this conclusion is necessary; but in an indictment under 1 Geo. 1, it has been held, that to omit the expressions, "*in terrorem populi*," is not material.⁸

¹ See 5 C. & P. 154.

² See 4 & 5 Vict. c. 56, s. 2.

³ *R. v. Woolcock*, 5 C. & P. 516.

⁴ *R. v. James*, 1 Russ. C. M. 277.

⁵ 5 C. & P. 516.

⁶ *R. v. Child*, 4 C. & P. 442.

⁷ *R. v. Woolcock and another*, 5 C. & P. 516.

⁸ *R. v. James*, 5 C. & P. 152. For the indictment, see Stark. Cr. Pl. 668.

CHAPTER IV.

OF AFFRAYS.

An affray may be said to be a public assault, as a private assault is one committed out of the hearing or seeing of any except the parties concerned;¹ and therefore as, in order to satisfy the meaning of a private assault, no blow need be actually inflicted, so a violent and menacing attitude may be, especially if accompanied by threatening words, an outrage upon the public, and so an affray. For no one knows how soon he may become the victim of such an illegal demonstration. And thus an affray may be the act of one individual, although the term is usually applied to the offence which two persons or parties of men commit by fighting in a public place.² Sir John Knight was charged with walking about the street armed with guns, &c., and although he was acquitted upon the information exhibited under the stat. 2 Edw. 3, c. 3, for going about armed, the chief justice said, that this was a great offence at the common law, and on the motion of the attorney-general, the defendant was bound to his good behaviour.³

This statute of 2 Edw. 3, c. 3, although not much heard of at the present day, is nevertheless still in force. It is commonly called the Statute of Northampton, and prohibits all persons except the king's servants in his presence, and persons executing his precepts, or themselves endeavouring to maintain the peace, from going armed, neither in fairs and markets, nor before the king's justices, &c., nor elsewhere, upon pain of forfeiting their armour, and of imprisonment at the king's pleasure.⁴ Various officers are then mentioned as having jurisdiction over this misdemeanor.

An affray, therefore, may, by law, be committed by one person. It is however, commonly the offence of two who fight together in a public spot, and is frequently a misdemeanor done by several wherein the absence of evil intention distinguishes it from a riot. Prize fights, consequently, are affrays. And all present at them are principal offenders.⁵ And, indeed, where the parties, as is very often the case, are the original promoters of the fight, they are guilty of riot, as well as an affray.⁶ And not only are the combatants guilty, together with their seconds, of the riot, but all persons countenancing and abetting the proceeding with a know-

¹ 1 Hawk. c. 63, s. 1.

² See 1 Russ. C. M. 291.

³ *R. v. Sir John Knight*, 3 Mod. 117.

⁴ See 1 Hawk. c. 63, s. 5. Case

of *Armes*, Poph. 121; Cro. El. 294.

⁵ *R. v. Perkins and others*, 4 C. & P. 537.

⁶ *R. v. Billingham and others*, 2 C. & P. 234.

ledge of the transaction must be taken to participate in the original design. Otherwise they would merely be guilty as principals in an affray, for every riot is a fray, although the converse is not the case.

Duels, likewise, are affrays, at all events, when they happen in a place of public resort, for they are in direct breach of the peace, and operate to the terror of the people, inasmuch as no one can clearly foresee to what result so illegal a demonstration may lead; and it can be no defence to allege a satisfaction of a private wrong in answer to the charge. But words alone will not amount to an affray,¹ although they very frequently furnish material evidence as to the character of a particular transaction. And a mere trespass can never be interpreted in such a light, unless such a degree of force be used as will swell it into a public offence; and then although the goods belong to the party taking them, he will be guilty of a breach of the peace;² and, perhaps, a forcible entry, according to the circumstances. An affray may be aggravated in consequence of the dignity of the place where it is committed. As where it happens in the palace yard near the courts of Westminster,³ or in the presence of any of the superior courts of justice.⁴ And, formerly, very severe penalties were enacted against such as should strike or even draw a weapon in any church or churchyard,⁵ but that statute is now no longer in force.⁶

The private person may seize affrayers and those who are coming to aid the disturbance upon his view, and may deliver them to the constable. And if this cannot be done without hurting the affrayer, the person, nevertheless, who interferes is justified in his violence;⁷ and if one of the parties engaged in a fray, or, *à fortiori*, if a stander-by, be dangerously wounded, the private man may justify a wounding in order to capture his assailant;⁸ and, indeed, he is punishable, if, being a looker on, he do not interfere, and the more especially if death should ensue.⁹

A constable, likewise, upon view, may take the affrayers into custody,¹⁰ and it is said, that he may receive offenders charged by others with a fray and arrested by them.¹¹ And he is bound, at his peril, to do this; and he may even break open doors to preserve the peace, or, upon fresh suit, to take affrayers who have fled into a house in order to escape justice.¹²

Thirdly, a justice of the peace may actively interfere to put down an affray within his view, but he cannot authorize the arrest of any one without a warrant for such an offence committed out of his view. As soon as the offender is brought before him, he can compel him to find sureties to keep the peace.¹³ And

¹ 1 Hawk. c. 63, s. 2.

² Anon. 3 Slak. 187.

³ 1 Hawk. c. 21, s. 6.

⁴ Id. s. 10.

⁵ 5 & 6 Edw. 6, c. 4, s. 3.

⁶ Repealed by 9 Geo. 4, c. 31.

⁷ 1 Hawk. c. 63, s. 11.

⁸ 1 Hawk. c. 63, s. 12.

⁹ *R. v. Wilburn*, Noy. Rep. 50, by Popham, C. J.

¹⁰ 1 Hawk. c. 63, ss. 14, 15.

¹¹ Id. s. 17.

¹² Id. s. 16.

¹³ Id. s. 18; see also s. 19.

if a dangerous wound be inflicted, it is customary for the justice to remand the accused until the fate of the wounded person be known.

Indictment.] The indictment for an affray states, that the defendant or defendants, being unlawfully assembled and arrayed in a warlike manner, did make an affray in a public street to the great terror and disturbance of the king's subjects; and in contempt of, and against the peace of the king, &c.

Judgment.] The judgment is fine and imprisonment for an affray at common law, and the defendant may be called upon to find security for keeping the peace. It may be added, that the aggravated misdemeanor of making an affray in the palace yard, or in an inferior court of justice, is punishable with fine and imprisonment,¹ but not with the loss of the right hand.²

CHAPTER V.

OF CHALLENGES, AND PROVOCATIONS TO CHALLENGE.

Challenges, and provocations to challenge.] Although not amounting to an affray, a challenge to fight, or a provocation to send such a message, is a very high misdemeanor; and persons who were found guilty of this offence have always been severely punished—as, by a fine of 100*l.*, a month's imprisonment, and the finding surety of the peace for seven years, together with a public recantation of their act.³

So, by a fine of 100*l.*, imprisonment for a calendar month, and security to keep the peace for three years;⁴ and the latter was contemplated by the court as a lenient sentence, in consequence of much provocation which the defendant had encountered. For it should be noticed, that circumstances of provocation, although proper topics for a mitigation of punishment, yet afford no defence to an information, as, in case of death, they would be quite inoperative as an answer to an indictment for murder.⁵ Even the threat of being posted for a coward, however irritating, will make no difference.⁶

¹ In the first case, the imprisonment to be at the king's pleasure.

1 Hawk. c. 21, s. 6.

² Id.

³ *R. v. Darcy and another*, 1 Sid. 186.

⁴ *R. v. Rice*, 3 East, 581.

⁵ See S. C.

⁶ *R. v. Taverner*, 1 Ro. Rep. 360; 1 Hale P. C. 452. Great alterations have happened since those days, and now the poster would be considered as a person quite out of date.

The challenge may be by words or by letter, or by dispersing letters or papers containing reflections upon character, and especially if they insinuate a desire to fight.¹ These last publications are libellous letters, and the indictment may be for sending such a letter with intent to provoke a challenge.²

But it is said, that words of abuse will not amount to a challenge,³ although, of course, if the words themselves import such a provocation to a breach of the peace, the case will be different. And where the words are put in writing,⁴ accompanied with an intimation that further proceedings are expected, the court will conclude that a breach of the peace was intended. For an endeavour to provoke a challenge is as much a misdemeanor as the sending of the challenge. The defendant, speaking of an election business, wrote to the prosecutor and used these terms, "that he had behaved like a blackguard;" "I expect to hear from you on this subject," he continued, "and will punctually attend to any appointment you may think proper to make." Upon this an indictment was preferred, the first count of which stated, that the defendant, intending to provoke the prosecutor to fight a duel, sent him a challenge contained in a letter. The second count alleged a like intention, by writing a letter containing malicious and provoking matter. The third count alleged generally a provocation to challenge, without stating the letter. The fourth count alleged the endeavour to stir up a duel as before, and set forth the letter. The verdict was guilty on the fourth count only, and it was moved to arrest the judgment, because the last count did not charge the commission of any misdemeanor, but only an ineffectual provocation to another to commit one, being at most an endeavour only to do that which tended to a breach of the peace. But the court discharged the rule which had been obtained for this purpose, observing, that whether the letter in question were considered as an attempt to procure another to commit a misdemeanor, by a provocation intentionally addressed to that immediate purpose, or as a direct provocation to a challenge, it was in either of these points of view a competent subject of criminal prosecution, so as to sustain the indictment founded thereupon. And the act of sending a challenge being in itself unlawful, the law infers the evil intent, and the allegation of intent need not be further proved by the prosecutor than through the medium of the letter carrying the challenge.⁵

Proceedings.] The proceedings against a defendant for this offence may be by indicting him. But informations are often

¹ *Lord Darcy v. Markham*, Hob. 120. *R. v. Hicks*, Id. 215.

² *R. v. Williams*, 2 Campb. 506. The defendant put the letter into the post in Westminster, addressed to a person in the city of London, and it was held that he might well be indicted in Middlesex.

³ *R. v. King*, 3 Inst. 180. *R. v. Langley*, 2 Lord Raym. 1029; 2 Salk. 697.

⁴ 2 Salk. 697; 2 Lord Raym. 1031, per Powell, J.

⁵ *R. v. Philipps*, 6 East, 464.

resorted to upon these occasions, and the Court of King's Bench is not backward to grant them upon proper affidavits. Still, that court will not be anxious to assist the original sender of the challenge who turns round upon his antagonist, and applies for an information against him for accepting the challenge. Letters having passed between two persons, the one made an application to the court for an information, but upon hearing the affidavits, it was the opinion of the judges, that the applicant himself had been the first challenger, and they said they would have granted cross-informations upon such letters as were produced, but, on the whole they would not give the extraordinary remedy of an information to a man who was evidently the aggressor.¹ Lord Ellenborough mentions a possible contingency, wherein the sending of a provocatory letter may be innocent and even meritorious—as to incite a person known to harbour latent purposes of a malicious and dangerous kind against the writer to send a challenge. Here the object would be to obtain surety of the peace against the dreaded individual; and the noble judge considered that the end could have been justified.² But it would lie on the prosecutor clearly to make out his surmises.³

The court exercise some jealousy respecting informations, notwithstanding their readiness to grant them when the case is properly made out. They consider themselves in the light of a grand jury upon the hearing of an application of this kind. So that where P. applied for such a proceeding against a defendant, supported by an affidavit that the challenge was delivered to the prosecutor by one H., the defendant's acting clerk, the court denied the rule, for the clerk had refused to make his affidavit, and thus a link was wanting to connect the defendant with the transaction. But, they added, that the prosecutor might prefer a bill of indictment against the defendant, and thus procure a *subpœna* to take H. before the grand jury, in order to get his evidence, which would be to the effect of the defendant having desired him to deliver the hostile message.⁴ Again, it was stated upon affidavit, that A. had intimated his intention, after the settlement of accounts between himself and the prosecutor, to require an apology, or the satisfaction usual amongst gentlemen, from the latter, for certain offensive expressions contained in a letter from the prosecutor to A. C., a relation of A., settled the account; and having said that he had come in consequence of the letter in his hand, delivered a hostile message from A. The court granted the rule upon this against C., but refused it against A., the affidavit being deemed insufficient to connect A. with the challenge.⁵ In setting forth

¹ *R. v. Hankey*, 1 Burr. 316. Upon one occasion the court granted an information upon the production of copies only of the letters containing the challenge, such copies being verified. *R. v. Chappel*, 1 Burr. 402.

² 6 East, 475.

³ *Id.*

⁴ *R. v. Willett*, 6 T. R. 294.

⁵ *R. v. Younghusband*, 4 Nev. & M. 850.

the charge, if a statute be mis-recited, the variance will be fatal, although the challenging is an offence at common law.¹

Judgment.] The judgment for these offences of challenging or endeavouring to provoke a hostile meeting, or accepting a challenge, is fine and imprisonment, and surety of the peace, if the court should think fit.²

CHAPTER VI.

OF FORCIBLE ENTRY AND DETAINER.

Forcible entry.] A forcible entry is where a man, considering that he has a title to lands, tenements, or goods, strives to repossess himself of them with force by entering upon the place which he looks upon as his own property, or the house where he expects to find his goods. And a forcible detainer is the case of a man who, having obtained such possession peaceably, employs an illegal force to retain the hold he has acquired. Care, however, must be taken to distinguish between a trespass and a forcible outrage. And much stress has been laid upon the circumstance of making the attack upon a dwelling house, in which case the court will conclude in favour of the prosecutor, because a man's house is his castle. But where the case amounts to a civil injury only, as where trespass or trover can be maintained in respect of it, and there are no aggravating incidents of force, no indictment for such an entry can be maintained. As where the defendant was charged with unlawfully entering a yard, digging the ground, and erecting a shed, and expelling the owner; the court, after much argument, quashed the indictment, being of opinion that the fact did not appear upon the face of the count to be an offence.³ And several cases⁴ were mentioned in the course of the discussion which served to confirm the distinction taken by the judges. On the next day after the determination in *R. v. Storr*, an indictment for pulling off the thatch of a dwelling house was quashed, for—*per cur.*—this is only pulling off the thatch.⁵

¹ *R. v. Dove*, Comb. 477.

Fry, shortly mentioned, Id. 1703.

² *R. v. Newdigate*, Comb. 10, fined 1000 marks, and to find surety for the good behaviour for three years.

See also Id. 1702. The case of *R. v. Dyer*, 6 Mod. 96, seems to be overruled by these cases. See 8 T. R. 360.

³ *R. v. Storr*, 3 Burr. 1699.

⁵ *R. v. Atkins*, 3 Burr. 1706.

⁴ As *R. v. Wightwick*, *R. v. Gillett*, Id. 1707.

So for entering a close.¹ So where the indictment charged the defendant with having with force and arms unlawfully, forcibly, and injuriously seized, taken, and carried away a paper writing, purporting to be a warrant to apprehend the defendant for forgery. *Perryn, B.*, held, that the conviction could not be supported, being only a private trespass, in which neither the king nor the public appeared to have any interest.²

At common law, a person who had no right to lands nor goods was answerable for a breach of the peace in attempting to possess himself of that which was not his own; and if he made an entry into a house for that purpose, he was clearly guilty of a forcible entry. But if one had a right to lands or to goods, and then with violence dispossessed the wrong-doer, it seems that he was guiltless at common law of the offence now under our consideration.³ Nevertheless there are precedents at common law of indictments for a forcible entry,⁴ and the distinction might be very well supported by restraining the prohibition of the common law to entries into a dwelling house,⁵ which has always been considered highly illegal. But it may also be worthy of notice in a more general point of view, that is to say, with reference to the degree of force employed. And thus any degree of force would suffice to establish the case at common law as to the dwelling house, but in closes, or upon the repossession of goods, it might have been necessary to show some circumstances of terror, or, at all events, an excess of force beyond that which the occasion would seem to call for. Thus, *Jopson* and others were charged with unlawfully assembling to disturb the peace of the king, and being so assembled, with force and arms unlawfully breaking and entering a mine of lead, and unlawfully taking away 60 lbs. weight of that material; and the court refused to quash this indictment, observing that it appeared to be good;⁶ not, perhaps, entirely, because an unlawful assembly was partly charged in the count,⁷ but likewise because there was a far greater manifestation of power than could be necessary in order to redress the wrong which had been done, supposing the object of the defendants to have been lawful. Indeed, it is said in *Wilson*, that the court conceived the case to have been one which would have justified the introduction of the word "riot" into the indictment.⁸ Whence it may be concluded, that at common law, if there were no excess, an entry to recover goods, or into land, might be justified if such entry were helped by a lawful title, but not into a dwelling house, whatever the amount of force might be. And it is also added by *Hawkins*, that even now, notwithstanding the statutes, such an entry may

¹ *R. v. Blake and fifteen others*, 3 Burr. 1731.

² *R. v. Gardiner*, 1 Russ. C. M. 53, at Sarum, 1780.

³ 1 Hawk. c. 64.

⁴ See 3 Burr. 1700, 1732, and the opinion of *Wilmot, J.*, Id. 1732.

⁵ *R. v. Bathurst*, Say. Rep. 225; 8 T. R. 358.

⁶ *R. v. Jopson and others*, Say. Rep. 27; S. C. 1 Wils. 325.

⁷ See Say. Rep. 27, by *Lee, C. J.*

⁸ 1 Wils. 325.

take place with reference to *goods*,¹ a proposition to which we will take leave to apply likewise the distinction just above suggested as to excessive force. And in confirmation of this principle as to the dwelling house, a very late decision appears to have recognized the position that the premises need not consist of a *dwelling house* in order to warrant an indictment for a forcible entry at common law, if the entry be made "with force and arms, and with a strong hand."²

The forbearance of the common law, however, led to frequent dispossessions of property by means of feigned titles, so that it became expedient for the legislature to interfere, and forbid all forcible proceedings to recover lands in respect of which parties might assume a right, whether they should be, in reality, the rightful owners or otherwise; and thus, in effect, to carry out the principle mentioned by Lord Kenyon, that "no one shall with force and violence assert his own title."³

The first statute is 5 Ric. 2, c. 8. And also the king defendeth that none from henceforth make any entry into any lands and tenements but in case where entry is given by the law, and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner; and if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will.

This Act of 5 Ric. 2 was sufficient to repress the entry *cum manu forti*, but it gave the injured party neither damages nor costs, nor even restitution of his property, nor did it provide for the case of one who forcibly detained after having violently entered. The indictment or action was the whole remedy open to the disseised person.⁴ The statute 15 Ric. 2, c. 2, then passed, giving certain powers to justices of the peace respecting forcible entries. By that Act, at all times that such forcible entry shall be made, and complaint thereof cometh to the justices of peace, or to any of them, the same justices or justice shall take sufficient power of the country and go to the place where such force is made, and if they find any that hold such place forcibly after such entry made, they shall be taken and put in the next gaol, there to abide convict by the record of the same justices or justice until they have made fine and ransom to the king, and all the people of the county, as well the sheriffs as other, shall be attendant upon the same justices to go and assist the same justices to arrest such offenders, upon pain of imprisonment and to make fine to the king, and in the same manner it shall be done of them that make such forcible entries in the benefices or offices of holy church.

¹ 1 Hawk. c. 64, s. 1; and as to an action for forcible entry, it is said, that if the defendant make a title which is found for him, he shall be dismissed without any inquiry as to the force. Id. s. 3. But the doctrine of Hawkins was re-

ferred to by Lord Kenyon, in *R. v. Wilson*, with some degree of doubt.

² *R. v. Newlands*, 4 Jur. 322.

³ 8 T. R. 361. See 13 Vin. Ab. (A. 1.)

⁴ 1 Hawk. c. 64, s. 7.

The next Act is 4 Hen. 4, c. 8, and by that it appears that forcible entries still continued, especially by the powerful, who disseised their weaker neighbours; and, accordingly, a special assize was given for tenements of any value, without suing to the king. But if the disseisor were attainted of a disseisin, he should then have one year's imprisonment, and yield to the party grieved his double damages, and if convicted of carrying away goods and chattels, should pay damages to the party grieved. Nevertheless, Mr. Serjeant Hawkins points out several defects which still existed. If the entry were peaceful, and the detainer wrongful, the statute, which only extended to a forcible entry and forcible detainer, did not apply; and, secondly, if the offenders were removed before the coming of the justices, the justices had no jurisdiction. Thirdly, no power of restitution was as yet awarded; and fourthly, if the sheriff did not obey the precept of the justices, he was not liable to any forfeiture.¹ Therefore, by 8 Hen. 6, c. 9, reciting 15 Ric. 2, c. 2, (and it did not extend to entries in tenements in peaceable manner, and after holden with force, nor to cases of departure before the arrival of the justices, &c.,) it was ordained, that from henceforth, where any doth make any forcible entry in lands and tenements, or other possessions, or them hold forcibly² after complaint thereof made within the same county where such entry is made to the justices of peace, or to one of them, by the party grieved, the justices or justice so warned within a convenient time shall cause, or one of them shall cause, the said statute duly to be executed, and that at the costs of the party so grieved.

The Act then goes on to establish the jurisdiction of the justices, notwithstanding the previous departure of the trespassers, and enables them to make restitution of the premises, and it then imposes a penalty on the sheriff for neglect of duty. By sect. 6, writs of assize and actions are given to the injured parties, and the jurisdiction of justices is extended to mayors and magistrates of cities, &c., having franchise.³

Provided by sect. 7, that they which keep their possessions with force in any lands and tenements whereof they or their ancestors, or they whose estate they have in such lands and tenements, have continued their possessions in the same by three years or more, be not endamaged by force of this statute.

This proviso by 31 El. c. 11, may be alleged for stay of restitution until that be tried, if the other will deny or traverse the

¹ 1 Hawk. c. 64, s. 9.

² Both entry and detainer are punishable, although the statute be in the disjunctive. Mar. 8, pl. 12,

³ The Act gives treble damages. but as it only applies to persons having the freehold, termors who sue under the statute of James I. cannot have treble damages and treble costs. *Cole and ux. v. Eagle*

and others, 8 B. & C. 409. But in matters connected with the freehold, not only the costs assessed by the jury, but those *de incremento* likewise, shall be trebled, and the party may be fined, though fined before upon an indictment for the same offence. *Rollston v. Chambers*, 1 Leon. 282.

same, and if the verdict be unfavourable to the persons indicted, they shall pay costs and damages to the party disseised.

It is worthy of remark, that there must be both forcible entry and forcible detainer to justify a conviction under 5 Ric. 2, and 8 Hen. 6.¹

Entry.—Nature of the force.] Several questions have arisen in order to the due exposition of these Acts. But many of the decisions are equally applicable to indictments at common law and by statute, and it may, therefore, be not inconvenient to blend them together, taking care to specify particularly those which rest upon the legislative provisions alone. The nature of the force, whether towards the entry or upon the detainer, is a very material question. At common law, the evidence must be such as to create a public breach of the peace, at least where any property except a dwelling house is invaded. But it would seem, that a less amount of force would satisfy the statutes, although Lord Kenyon has observed that the point has not been anywhere decided.² The probability is, that circumstances of terror are necessary to support the indictment at common law, and of such a public nature as would support a charge of riot, but that under the statutes it would merely suffice to prove such force as might require an individual to find surety of the peace. Therefore, if a man be beaten in order to gain his expulsion from the lands, the force is evidently sufficient.³ So if the doors of a house be broken, or other violence committed, it will be an entry within the statutes.⁴ And it would be no defence for A. to affirm that he did nothing more than break the door, for that two or three hours afterwards the actual entry into the house was made by B., his companion, peaceably, and without a weapon.⁵ And by Yelverton, J., the putting back of the bolt with his hand, or drawing up of the latch, is such an entry, to which the court agreed.⁶ However, this latter opinion must be understood of an entry accompanied by terror, as with a strong hand, a multitude of people, &c., and not as of itself, without further violence or alarm. It would be a mere trespass.⁷ And it has been holden, that to enter by the window, or to open a door with a key, without more, would not be forcible.⁸ And it is particularly to be remarked, that these acts of breaking, &c., are not in any manner qualified by the absence of the party from his house, and so it was held where armed men introduced themselves into a dwelling at a time when no one was there.⁹ Although if a man were entirely to abandon his possession of land, taking with him his children and

¹ *Atwood v. Jolliffe*, 3 New. S. C. 116.

² 8 T. R. 360.

³ 1 Hawk. c. 64, s. 26.

⁴ *Id.*

⁵ *Beade v. Orme*, Noy. 136.

⁶ *Id.* 137; S. P. Mo. 656.

⁷ See 1 Hawk. c. 64, ss. 25, 26.

⁸ 2 Ro. Rep. 2. So breaking a pane of glass and entering. *R. v. Smyth and others*, 1 M. & Rob. 155.

⁹ *Pollard v. Moreton*, Mo. 656.

servants, and merely leaving his cattle, an entry under such circumstances would hardly be deemed forcible.¹

These cases of assault and violence to the premises are instances of actual force. And not much unlike them is the entry mentioned by Hawkins, where one laid hold of the proprietor when he was from home, and then sent persons to take quiet possession of the dwelling. This was held not to be a forcible entry, but the learned serjeant is of opinion that it clearly was, for the act was done with an immediate intent to enter, and whether the force be upon or off the land, it seems equally within the statute.² But there are many circumstances which operate upon the mind so as to induce an individual to give up his possession. These may amount to forcible entries without striking a blow or breaking a lock. As if a man should use considerable menace, either by speech or behaviour, and especially if he be weaponed,³ or accompanied by a number of attendants, or should threaten to kill, maim, or beat the person in possession, or say that he will keep his hold of the property in spite of all men.⁴

This is a show of force which compels the proprietor to withdraw his men from his close, in order to avert the apparent consequences.⁵ And it would not serve as a defence to an indictment upon 5 Ric. 2, c. 8, or 15 Ric. 2, c. 2, to say that the party never quitted his possession,⁶ if the claim were made with the violence above mentioned, because those acts treat the forcible entry itself as a misdemeanor. And if after a peaceable entry, the aggressor were forcibly to carry off a man's goods, this also might be a forcible act against the statutes, though not at common law.⁷ And so if one entered peaceably into a close, and then terrified the owner by threats so as to effect his expulsion, the entry would be construed to be forcible.⁸ But a mere threat to spoil goods, or destroy cattle, or do any damage which is not personal, is not a force at common law, nor under the statutes.⁹

So if A. under a colour of a title, go over the land attended, or without attendants, armed or unarmed, in his way to church or market, but without making any claim, he is not within these provisions of the law.

Detainer. — Nature of the force.] The landlord is, in the eye of the law, the legal possessor of the property withheld; and, therefore, it is not surprising to find, that a termor who holds his pre-

¹ 3 Bac. Abr. Forcible Entry, (B.) This means a total, not a temporary abandonment, such, probably as would negative a charge of burglary in a dwelling house.

² 1 Hawk. c. 64, s. 26.

³ And the weapons may be seized for the king's use, and the party imprisoned for that alone. 2 Edw. 3, c. 3; 1 Hawk. c. 64, s. 5.

⁴ 1 Hawk. c. 64, s. 27.

⁵ *Milner v. Maclean*, 2 C. & P. 17.

⁶ 1 Hawk. c. 64, s. 21.

⁷ 1 Hawk. c. 64, s. 26.

⁸ See Bac. Abr. For. En. (B.) Lamb. Eir. 134.

⁹ 1 Hawk. c. 64, s. 28.

mises with weapons and force against his landlord, is guilty of a detainer. As where a tenant kept possession of land, against Sir George Snigge,¹ his landlord, with a drum, guns, and halberts. Here he was deemed to have the possession of his lessor, the term being expired, and was fined 500*l.* in the star chamber for the offence.²

It may, indeed, be assumed as a general principle, that the "same circumstances of violence and terror which will make an entry forcible, will make a detainer forcible also."³ So that if one should keep an unusual number of people in his house, or unusual weapons, or threaten to do some bodily hurt to the former possessor if he dare return, the person so conducting himself is certainly guilty of a forcible detainer.⁴ So it is, if one should place men at a distance from the house, in order to assault any one who might attempt to re-enter, or forestall the way of the dis-seisee with force so that he dares not enter, or should shut his doors against a justice coming to view the force, and distinctly refuse to let him come in.⁵ So if a lessee should keep arms in his house to oppose the lessor in re-entering, though no entry be attempted, or if a lessee at will should employ a force to detain, or a mortgagor after forfeiture of the mortgage; or a lessee should forcibly resist a distress for rent, or forestall or refuse it, the same law will prevail.⁶ But a bare refusal to leave a house, or continuing therein in spite of the owner, without circumstances of terror, can hardly be called a detainer of this description, for want of sufficient force.⁷

Other entries not forcible.] There are some few circumstances, however, connected with this subject, which do not so much refer to the amount of force as to the lawfulness of the entry itself. As if one went to distrain for rent, and expecting resistance, should take others with him for the sake not of violence, but of protection. Here an act which might, under some circumstances, be deemed a forcible entry, would be justified perhaps by the occasion. But an excess of authority, or even making the distress forcibly, would create the misdemeanor.⁸ So, if a landlord should break the door of his late tenant, after the expiration of the term, when no one is within, and thus resume possession, this is not a forcible entry;⁹ but he may not, under such circumstances, dispossess the tenant by force, whilst the latter is in the house or on the premises.¹⁰

¹ A baron of the exchequer.

² *Snigge v. Shirton*, Cro. Jac. 99.

³ 1 Hawk. c. 64, s. 30.

⁴ Id., "though no attempt be made to re-enter."

⁵ Id. Lamb. 136, 137.

⁶ 4 Com. Dig. F. Det. (B. 1.)

⁷ 3 Hawk. c. 64, s. 30.

⁸ 3 Bac. Ab. F. En. (B.)

⁹ *Turner v. Meymott*, 1 Bing. 158. Acc. *Taunton v. Costar*, 7 T. R. 431. But see *Newton v. Harland*, 1 Man. & Gr. 644.

¹⁰ 7 T. R. 432, by Lord Kenyon.

Other detainers not forcible.] So upon the subject of detainers, we have seen, that a bare refusal to leave the premises, or even a dwelling house, cannot be called a forcible detainer, for the principal ingredient is wanting.¹ So, we have likewise set out in a former page² the proviso in 8 Hen. 6, c. 9, which averts the penalty due for a forcible detainer, if the disseisor remain in possession for three years.³ So a mere denial of possession, even by tenant at will, is no such detainer; nor is the act of shutting the door against the re-entry such a force as will amount to that offence.⁴ So, if the entry were not merely peaceful, but lawful, the detainer cannot be forcible.⁵

Who may be guilty of these offences.] Two questions present themselves to us after the discussion of the point of force—first, as to the parties who may be guilty of these offences, and next, the kind of property, as well as the nature of the possession, which may be the subjects of them. And this first head is not offered for the purpose of mentioning the ordinary cases of infancy or insanity, although an infant arrived at years of discretion may certainly be convicted of a forcible entry, nor with reference to principal and accessory, but in respect of several relations which persons bear to each other, and to the public, as baron and feme, joint tenant, the real owner of the inheritance, &c. And as to the owner, it is quite agreed that if A. give the bare custody of his house to B., he cannot be called a forcible disseisor if he eject B. upon his refusal to surrender possession, let the force needful for that object be never so great.⁶ So A. cannot be guilty of a forcible entry or detainer, by keeping out a commoner from A.'s own land.⁷

But it is not so well settled, that tenant at will can be so far identified with tenant by sufferance in these respects, as to make him liable to be so amoved by the landlord with impunity.⁸ But if the possession be once “clearly and absolutely” gained by the intruder, the landlord himself must then forbear, according to law, to enter by force, even although he might have held the property in question for twenty years.⁹ Whilst the disseisor, in his turn, if he should remain for twenty years in possession, would still be affected by a defeasible title, and his continuing in possession would amount in judgment of law to a new entry.¹⁰

Joint tenant.] Secondly, a joint tenant may be said to offend

¹ *Supra.*

² *Ante*, p. 230.

³ See 11 Mod. 43; 7 Mod. 138.

⁴ 4 Com. Dig. F. Det. (B.)

⁵ *R. v. Oakley*, 1 Nev. & M. 58; 4 B. & Adol. 307. *R. v. Wilson*, 5 Nev. & M. 164.

⁶ *Dame Russell v. Countess de Nottingham*, 1 Hawk. c. 64, s. 32; Mo. 786. Indictment for a riot.

⁷ *R. v. Sydnham and Parr*, Cro. Car. 486.

⁸ See *post* in this section.

⁹ Dy. 141.

¹⁰ *Delaber v. Lyster*, 1 Hawk. c. 64, ss. 23, 34, 53. He must apply to a justice who will remove the force, and commit the offender. 1 Hawk. c. 64, ss. 17, 18.

against the purport of these statutes, when he ejects his companion. For notwithstanding his being seised *per my et per tout*, so that he cannot be punished by an action of trespass at common law, yet it is said that such his lawfulness of entry by no means excuses the violence, or lessens the injury done to his companion.¹ He thus comes within the equity of these provisions, and is guilty not only of a forcible detainer if he hold possession, but of the entry itself. And thus Jones, J., held, upon an exception to an indictment, that if a man were tenant in common with the king, a stranger could enter *vi et armis* into a moiety.² And although, upon another occasion, the same judge doubted as to parceners, Doderidge, J., put the case of the half before division as being in effect of one thing only, and not separated from the whole as after a division, and he mentioned joint tenants and tenants in common as examples. And the court held generally, that there might well be an entry into the moiety of a manor.³ And upon a more modern occasion, it was held for clear law, that one joint tenant might indict his fellow for a forcible entry.⁴

Feme covert.] A *feme covert* may be guilty within the intention of the statutes, in respect of such violence as may be done by herself, but not of others by her command, inasmuch as she is deemed by law incompetent to enforce such command, and it is therefore void.⁵

Infant.] And the like observations will apply to an infant arrived at years of discretion.⁶ And the *feme covert* may suffer imprisonment for such her offence, but not so the infant by virtue of the statutes, because he shall not be subject to corporal punishment by force of the general words of any statute wherein he is not expressly named.⁷

But at common law both *feme* and *infant* may be guilty of a forcible entry and detainer, as it should seem, and the *infant* be punished with imprisonment as well as the wife. Ann Smyth and others were charged with a forcible entry into a dwelling house, which was her husband's. There was a count on the statute and one at common law; and by Lord Tenterden, "although a wife certainly cannot commit a trespass on the property of her husband, I am by no means satisfied, that if she comes with strong hand, she may not be indictable for a forcible entry, which proceeds on a breach of the public peace." "There must be actual force, or such show of force as may prevent resistance." The defendants were acquitted.⁸

¹ 1 Hawk. c. 64, s. 33.

² Palm. 419.

³ *R. v. Beverley*, Latch. 224.

⁴ *R. v. Marrow*, Ca. Temp. H. 174.

⁵ 1 Hawk. c. 64; s. 35; see also Co. Litt. 357 (b).

⁶ 1 Hawk. *ut supra*.

⁷ See 1 Hale, 21; 1 Hawk. *ut supra*.

⁸ *R. v. Smyth and others*, 1 Moo. & Rob. 155; 5 C. & P. 201. As to the count at common law, see 8 T. R. 364, by Lord Kenyon; and note of the editors, 1 M. & Rob. 159.

One individual.] A riot must be by three, and as affray is commonly understood to be with two,¹ but a forcible entry may well be by one. As if A. should arm himself, and invade the dwelling of a lone woman, and so eject her under circumstances of terror; for here is a combination of violence and a breach of the peace. And so likewise might be the detainer. The misdemeanors, to use the words of Hawkins, "may be committed by a single person, as well as by twenty."²

Nature of the property, and possession, which may respectively be the subjects of these offences.] Secondly, we have to advert for a moment to the nature of the property which may be the subject of these misdemeanors, and likewise to the quality of estate which may be affected by them. And first, as under 15 Ric. 2, the justices may convict upon view, it follows that there cannot be a forcible detainer of any tenement, wherein there cannot be a precedent forcible entry, for the justices have no power over any detainer which does not follow the entry.³

Property.] Hence it is, that a way is not the subject of an offence within these statutes; for a way is but an easement,⁴ and as there can be no entry, there cannot be a detainer. But it might be a forcible entry as against the lord of the manor, or other individual in whom the freehold reposes during the servitude of the road, for the owner of the property need not be present at the time of the disseisin. So in the case of a common, which is not an easement but a profit *à prendre in alieno solo*, there might, by possibility, be a forcible entry as regards the lord of the manor, but not so in respect of the commoner, for he has no interest in the soil beyond the depasturing or turves.⁵ And if it be said, that the disseisin of a common is punishable, this must be understood of a detainer at common law which is cognizable by the assizes as a public breach of the peace and without restitution.⁶ So an office seems not to be within these laws as to the entry, though it may be as to the detainer at common law.⁷ But tithes and rent rest upon a different foundation. They issue out of the realty, and so savour thereof, as to be in this respect of the nature of land. And thus an indictment lies both at common law and by the statutes, for a forcible disturbance of rent, and likewise under the statutes, with reference to tithes.⁸

The words "offices of the church," are to be found in 15 Ric. 2.

¹ Although one only may commit the offence.

² 1 Hawk. c. 64, s. 29.

³ Id. s. 31.

⁴ *R. v. Holmes*, 1 Mod. 73.

⁵ See 1 Hawk. c. 64, s. 31.

⁶ See Cro. Car. 486; 1 Hawk. *ut supra*.

⁷ See *R. v. Lady Russell*, Cro. Jac. 17; 1 Hawk. *ut supra*.

⁸ See 1 Hawk. c. 64, s. 31; Cro. Car. 201. *Anon.* 13 Vin. Ab. For. En. c. 4.

Hence churches and vicarage houses are within the laws of forcible entry.¹ There may be a forcible entry into a close.²

Possession.] Clearly he who is seised of the freehold is within the protection of these statutes, and of the common law, and if the title be stated, it needs not to be proved.³ And so is a tenant for years. And a copyhold tenant. But these last-mentioned tenants for years, and by copy, were not within the Acts we have hitherto set out, as to the restitution of their possession.⁴ It is true, that if their lord or lessor were disseised, as well as themselves,⁵ the court would award them restitution, but not so, if they were put out by their own landlord,⁶ or, indeed any other, for such a tenant had no freehold.⁷ Therefore, by 21 Jac. 1, c. 15, tenants for years, and by copy of court roll, guardians by knight's service, tenants by elegit,⁸ statute merchant and staple—of lands or tenements, were included within the provisions of those statutes, which enabled judges and justices to award restitution, and accordingly, copyholders were recognized without further scruple.⁹

But tenant by the verge, tenant at will, and tenant by sufferance, are not mentioned in this Act of James. And although Hawkins points out that tenant by the verge would be within the meaning, if not the words of the statute, seeing that he has no other evidence of his title than the copy of court roll;¹⁰ yet Jones and Whitlock, JJ., had previously holden, that tenant by the verge was not within 21 Jac. 1, c. 15, and they would not allow the Act to be taken in an equitable view.¹¹ The judges above mentioned, indeed, looked upon this tenant as a tenant at will, and it is not settled whether such a person would be considered to be within the equity of these Acts. However, the justices may remove the force, and commit the offender in the case of tenant by the verge.¹²

With regard to tenant at will, Morton, J., in the reign of Car. 2, cited an opinion, that both he and tenant at sufferance were within the law of these misdemeanors.¹³ But the court denied that, and Kelyng, C. J., had previously remarked, that no force could be on a tenant at will, but "it must be for years, or a freehold."¹⁴ Hawkins, however, subjoins a *quære* to this with respect

¹ *R. v. March and others*, 1 Sid. 101; *R. v. Larking and others*, 1 Lev. 90, as to the church. *R. v. Baude*, as to the vicarage house.

² *R. v. Nicholls*, 2 Ld. Ken. 512.

³ *R. v. Child and others*, 2 Cox, 102.

⁴ 13 Vin. Ab. F. En. (D. 1.) Sav. 68.

As where A. caused himself to be disseised in order to rid himself of B. his customary tenant, who had committed a forfeiture. Restitution was awarded to B., for there

was an expulsion in this case. *R. v. Sir A. Nowell*, Yelv. 81.

⁶ 1 Hawk. c. 64, s. 15.

⁷ Id.

⁸ See Sav. 68.

⁹ *R. v. Plowden and others*, Poph. 205. *R. v. Hardy*, Tho. Raym. 67.

¹⁰ 1 Hawk. c. 64, s. 17.

¹¹ *R. v. Stacy*, Latch. 182.

¹² 1 Hawk. c. 64, s. 18.

¹³ *R. v. Westly and another*, 2 Keb. 495.

¹⁴ Id. See also *R. v. Dorny*, 1 Salk. 260.

to the landlord,¹ and, possibly, the courts, which of late years have preferred to liken the tenant at will more to a yearly tenant than one at sufferance, might be disposed to extend the protection of the statutes as far as they could, without breaking in upon the statute of James, or the rules of the common law. But tenant at sufferance is universally excluded from these considerations. It is said to have been frequently so adjudged.² So where the objection was that the estate did not appear, it was added, that if the party were tenant at sufferance, the indictment would not lie.³

Proceedings.—Restitution—Re-restitution.] We have now discussed the questions of entry and detainer, and the nature of the force required; we have mentioned the persons who may commit the misdemeanors under consideration, and the property as well as the possession in respect of which they may happen, and we now proceed to the method which the common law and statutes have ordained for the punishment and redress of the grievances. In other words, the remedies by view or inquisition, by indictment or information, by action, and subsequently, by restitution, are the next subjects to which we direct the reader's attention.

View.—Judgment.] The most limited of these remedies is that by record of view.

By 15 Ric. 2, c. 2, justices, or one justice,⁴ upon complaint made of a forcible entry, may take sufficient power of the county, and go to the place where the force is, and having found the offenders in the act of a forcible detainer, may commit⁵ them to the next gaol, convict by the record⁶ of the same justices or justice, until they make fine and ransom, and the people of the county and the sheriff shall assist, on pain of imprisonment and fine.

The fine, however, must be set by the justices.

Where parties were committed until they should pay their fine, but no sum was fixed, the conviction was, of course, quashed.⁷ Whilst, on the other hand, if a fine be set, the judgment must be, that the defendant be committed till the fine be paid.⁸ The like

¹ 1 Hawk. c. 64, s. 32.

² *R. v. Depuke*, 11 Mod. 273.

³ *R. v. Dorny*, 12 Mod. 417; see also 1 Hawk. c. 64, s. 34.

⁴ 1 Hawk. c. 64, s. 7.

⁵ This means "must," and it should be done *eo instante*; *Anon.* 11 Mod. 52; and if they neglect, neither the sessions nor the Court of Queen's Bench can do so; *Mo.* 848.

⁶ Which is not traversable on

view. And justices have no concern with the possession. *R. v. Brown*, 12 Mod. 516; 1 Hawk. c. 64, s. 8.

⁷ 2 Ld. Raym. 1514. *R. v. Ellwell and others*, 3 Ld. Raym. 360; *R. v. Layton*, 1 Salk. 450. See *R. v. Layton*, 1 Salk. 353.

⁸ *R. v. Hord*, Say. 176; conviction quashed. See also 12 Mod. 495.

remedy was ordained by the same statute against forcible entries into benefices, or offices of holy church.

The subsequent statutes, 8 Hen. 6, c. 9, and 21 Jac. 1, c. 15, although they give more extensive remedies, do not take away, or abridge the proceeding by view; yet considerable care should be taken by magistrates before they pronounce their judgment in a case of this nature. If they were to see, as it were, inopinate, a forcible entry into premises, they might convict at once, perhaps, at the instance of the complainant, without further evidence. But such a singular occurrence of events is almost impossible, and it therefore becomes the duty of justices to hear evidence. For otherwise it is very truly questioned how, in the case of a forcible detainer, to which their conviction upon view must alone relate, for the reason above given, they can come to a right conclusion, unless they have testimony to satisfy them that the entry was unlawful. And thus it was, that a conviction under 8 Hen. 6, stating an information and complaint of an unlawful ejection, and forcible detainer, where the justices recorded their view of the forcible detainer, was held invalid, inasmuch as there was no evidence that the entry had been unlawful.¹ For there cannot be a forcible detainer without such an illegal entry.² The conviction, however, ought to show, as it seems, that the defendant was summoned, or that he had an opportunity of defending himself.³ And, although it may not be necessary to set forth the particular facts presented to the view of the justices,⁴ such facts as will warrant the conviction, or the unlawful detainer, ought probably to appear.⁵

Should the defendant, upon a conviction upon view, be disposed to make a defence to the charge, he is allowed a traverse in the nature of an appeal, and the matter is then tried.

The defendant must have legal notice of a charge of this nature. Therefore, when a conviction stated that the justices had convicted A. upon view, and then alleged that complaint was made of a forcible entry by A. upon which evidence upon oath was received against A. &c., but failed to say that A. had been summoned, the conviction was held bad, and it was considered insufficient to say, that A. had had notice of the complaint, that A. received the notice, but that he said nothing; A. should have been summoned.⁶

Inquisition.—Judgment.] Another remedy is provided by 8 Hen. 6, c. 9. For the same justice or justices who might take the view may, by that act, have authority to inquire, by the people of

¹ *R. v. Wilson*, 5 Nev. & M. 164.

² *R. v. Oakley*, 1 Nev. & M. 58; S. C. 4 B. & Adol. 307.

³ *Semble*, per Lord Denman, C.J., 3 Ad. & El. 826; 1 Hawk. c. 64, s. 60; 11 Mod. 42.

⁴ *R. v. Wilson*, 3 Nev. & M. 753.

⁵ 3 Ad. & El. 825, per Lord Denman.

⁶ *Atwood v. Jolliffe*, 3 New. S. C. 116.

the same county,¹ of such as make forcible entries, and also of those who hold the same with force. This inquiry may take place in some good town next to the tenements so entered, or in some other convenient place, at the discretion of the justices. "And if it be found, that any doth contrary to this statute, then the justices or justice shall cause to reseise the lands and tenements, and shall put the party in full possession as before."

Thus, under 8 Hen. 6, although the entry were peaceable, the justices are empowered to inquire concerning the forcible detainer. And the Act, moreover, enables them to take an inquisition whether the intruders be "present, or else departed before the coming of the justices or justice;" and the power of restitution is added, with enactments making it compulsory on the sheriff to obey the precepts of the justices.

Much care is necessary in taking an inquisition, and it should be observed, that if a conviction be held invalid, an inquisition founded upon it will likewise fail. But the court will not quash an inquisition, because of the illegality of a conviction, without hearing the objections respectively applicable to each, for the one might be dependent on the other.² An inquisition, however, which stated an unlawful entry and detainer, but omitted to add that any complaint had been made by the prosecutor, or by what authority the jury had been summoned, was held, of itself, to be void.³ In this case, a traverse had been tendered to the magistrates upon conviction, and they had summoned a jury to try the alleged force, who pronounced a verdict of guilty, and the justices then ordered restitution. A return was made of the conviction and inquisition into the Court of King's Bench, when both were quashed. So, again, an inquisition was quashed, for want of stating the nature of the estate possessed by the party deforced.⁴

So where no mention was made of the place from whence the jury had come, and it was not even stated that they were of the county, the inquisition was quashed;⁵ but not where the inquisition omitted to say that they were "then and there" sworn.⁶ It needs scarcely be added, that no restitution will be made till the traverse be tried,⁷ and that the defendant ought to have an opportunity of answering the charge, so that an award of restitution cannot be legally made in his absence.⁸

But this proceeding by inquisition, like that upon view, is not of common occurrence, so that it may pass on to the most ordinary

¹ The jury should come from the neighbourhood. *R. v. Crofts*, 2 Ld. Raym. 926.

² *R. v. Wilson*, 3 Ad. & El. 817; 2 Nev. & M. 635, 852.

³ Id.

⁴ *R. v. Bowser*, 8 Dowl. P. C. 128.

⁵ *R. v. Crofts*, 2 Ld. Raym. 926.

⁶ *R. v. Waite*, 4 Mod. 248. A

jurat saying "sworn and charged upon oath," without the words "*to inquire* for the body in the county," has been held good. *R. v. Watton*, 6 Mod. 95; *R. v. Hayes*, 1 Show. 272.

⁷ 1 Hawk. c. 64, s. 58.

⁸ Id. s. 60.

course of redress under these circumstances,—by indictment at the sessions.

The most usual remedy, then, which is adopted with regard to this class of misdemeanors, is by indictment; and this may be either at common law,¹ or by statute. At common law, however, such a measure of violence must appear upon the face of the record as will amount to a public breach of the peace, so that where no such breach was alleged, nor riot, nor unlawful assembly, it was held that the charge could not be sustained, that the number of the defendants said to have been engaged in the transaction made no difference, and that the words “force and arms” were insufficient to denote the evidence presumed by the law.²

A forcible detainer after a quiet entry would likewise seem to be a misdemeanor at common law, if it be such as to cause a public breach of the peace.³

Judgment at common law.] The judgment for these misdemeanors at common law is fine and imprisonment.

The statutes, however, are for the most part resorted to when it is proposed to indict for these respective offences, because a writ of restitution is given by one of them—the 8 Hen. 6, c. 9. And although the stat. 5 Ric. 2, c. 8, has no mention of this restitution of reseisin, an indictment may still be framed upon its provisions, because the stat. 8 Hen. 6 will provide for the subsequent restitution, if the expulsion be duly alleged. If it were desired to proceed for a forcible entry and detainer, the stat. 15 Ric. 2, c. 2, would certainly apply; but the latter Act yields in usefulness to the 8 Hen. 6, c. 9, which embraces a detainer after a peaceful entry. If, therefore, the entry be forcible, and the possession withheld, the indictment would probably be drawn under 5 Ric. 2, c. 8, and if the entry were not forcible, but there should, nevertheless, be a detainer, the count would rest upon 8 Hen. 6, c. 9. It will be remembered also, that if the forcible entry or detainer be made by three or more, an indictment for a riot may be sustained against the offenders. But it may be remarked, that an indictment for forcible entry quashed will not survive as an indictment for riot.⁴

Indictment at common law.] An indictment at common law for the misdemeanor under consideration commonly states that A. and B., with others, with force and arms, and with a strong hand, unlawfully did enter⁵ into the premises in question, which premises were at the time⁶ in the peaceable possession of C., and

¹ *R. v. Bathurst*, Say. Rep. 225; *R. v. Blake and others*, 3 Burr. 1731; *Id.* 1732, per Wilmot, J. *R. v. Wilson and others*, 8 T. R. 357.

² *R. v. Blake and others*, 3 Burr. 1732.

³ See as to the count at common law, *post*.

⁴ *R. v. Eden*, Cro. El. 697.

⁵ Restitution was awarded by the opinion of three judges against Doderidge, J., where the detainer was stated to be forcible, but the entry was alleged singly, without saying whether forcible or otherwise. *Earl of Salisbury v. Sir A. Ashley*, Palm. 194.

⁶ See *R. v. Hobson*, Hetl. 73.

that the same persons in a like violent manner expelled and put out C. from his possession, and that C. has been kept out of possession by the defendants, and still is so kept out, to the great damage of C., &c.

An indictment on 5 Ric. 2 is not dissimilar from that at common law, but it seems that a less amount of violence than an actual breach of the peace will be sufficient to maintain it, and the conclusion is, of course, against the form of the statute.¹ But the count, upon 8 Hen. 6, c. 9,² which is the most to be recommended, affirms that the defendants unlawfully, with a strong hand, and *without judgment recovered*, did disseise the owner of the premises, and did keep him out,³ until the taking of the inquisition, &c. And if it be intended to charge a forcible detainer only, the unlawful entry should be alleged, together with the expulsion, and afterwards, that the defendants, with force and arms, and with a strong hand, did keep out C., &c. And lastly, if the provisions of 21 Jac. 1, c. 15, regarding lessees for years or copyholders ousted by their lessor or lord, be made available, care must be taken to insert a proper description of the premises. In taking up the several phrases of these indictments as they meet the eye, it may be remarked, that although at common law such a force ought to be shown as will amount to a breach of the peace, the words "with a strong hand" will be sufficient to make out a charge, either at common law, or upon the statutes. Thus where the defendants were indicted for entering into a certain mill, "with force and arms, unlawfully, and with a strong hand," a demurrer was put in on the ground that a private trespass, and not a public breach of the peace, had been alleged, but the court were clearly of opinion that the words "*manu forti*" meant a higher degree of force than "*vi et armis*;" that they imported something criminal, and that a breach of the peace was manifestly implied by them. Judgment for the crown was accordingly given upon those counts which contained such words, and for the defendants upon two counts, where "*manu forti*" did not appear.⁴ And the same words will, of course, be enough to satisfy a count upon the statutes which contemplate a less degree of force than an actual violation of the peace. But the omission of "*manu forti*" would be highly unsafe in an indictment upon the statutes, even though other words of strong import should be used to express the same meaning. For if a prosecutor be content with alleging force and arms without

¹ It need not be shown that the justices before whom the indictment was taken had authority to hear felonies and trespasses. Palm. 277; 1 Hawk. c. 64, s. 36. See also *R. v. Simmons and others*, Al. 49.

² It is better not to recite the statute. See *R. v. Farnam*, 2 Leon. 186.

³ See Jenk. 118.

⁴ *R. v. Wilson and others*, 8 T.

Rep. 357. See *R. v. Baude*, Cro. Jac. 41, which was referred to by Lawrence, J., in *R. v. Wilson*, 8 T. R. 362, for the purpose of showing that "*manu forti*" was sufficient in an indictment upon 8 Hen. 6, c. 9, because numerous objections were made to the indictment upon that occasion, and yet not one as to the degree of force.

more, he does no more than complain of a civil trespass, and his count will be quashed.¹ And the only exception to the rule is the case of forcible entry into a dwelling house, "for a dwelling house is of great regard in the eye of the common law." So that where the defendant was indicted for that he unlawfully and injuriously, with force and arms, did enter into the dwelling house of the prosecutor, the count was held good, and judgment was given for the king.² And this case has been adverted to as recognizing a sound distinction.³ The place where the force happened must be described with certainty.⁴

The next matter worthy of importance is the statement of the premises in question,⁵ and of the possession which has been interrupted. The prosecutor, therefore, alleges that he was seised⁶ in his demesne as of fee, or of a freehold then being in the tenure and occupation of one C., or of a certain messuage for a certain term of years,⁷ whereof — years were then to come, and are still unexpired,⁸ &c. For want of setting forth the nature of the estate, indictments have been frequently quashed,⁹ and the reasons assigned are, that the defendant may know the special charge against him, and that the court may know whether any one of the statutes relative to forcible entries extends to the estate from which the expulsion was.¹⁰ And thus "tenement" is too uncertain.¹¹ And again, the prosecutor might be but tenant at will, and so not within the Acts.¹² And although an indictment upon 8 Hen. 6 was once held good by Doderidge and Chamberlain, JJ., which did not express the nature of the property,¹³ yet it may be said upon that, that the words of the charge were that the owner was seised and possessed until the parties indicted disseised him, and the court said, that these terms implied a frank tenement.¹⁴ And, *à fortiori*, where mention of seisin was altogether left out, the indictment was

¹ *R. v. Storr*, 3 Burr. 1698; *S. P. R. v. Atkins*, Id. 1703; *R. v. Gillett*, Id.; *R. v. Blake*, Id. 1731; *R. v. Lock*, 1 Freem. 523; *R. v. Deacon and others*, Ry. & Moo. N. P. C. 27. See also *Sty.* 135. *R. v. Harris*, 11 Mod. 113; *R. v. Baker and others*, Id. 235; 1 Hawk. c. 64, s. 44. From whence it seems that *R. v. Dyer*, 6 Mod. 96, where the court refused to quash an indictment upon 5 Ric. 2, which wanted these words, is of doubtful authority.

² *R. v. Bathurst*, Say. Rep. 225.

³ 3 Burr. 1732; 8 T. R. 362.

⁴ *R. v. Banks*, 1 Sess. Ca. 357.

⁵ See *R. v. Farnam*, 2 Leon. [186.

⁶ Seised or possessed where not fatal to the charge. *R. v. Ellis*, Cro. Jac. 634.

⁷ The words "of years" should

be carefully preserved. *R. v. Johnson*, 1 Freem. 524.

⁸ Or of a copyhold, describing it. The term must be described as still enduring. *R. v. Benson and others*, 1 Keb. 901.

⁹ See several authorities to this effect, in 1 Hawk. c. 64, s. 37; 3 Bulst. 71.

¹⁰ 1 Ventr. 89; Anon. Id. 306. *R. v. Wannop*, Say. Rep. 142; 1 Hawk. c. 64, s. 38.

¹¹ Ro. Rep. 46. So a "rood of land," 1 Bulst. 201.

¹² *R. v. March and others*, 1 Sid. 101. *R. v. Griffith and others*, 3 Salk. 169. *R. v. Depuke*, 11 Mod. 273. *R. v. Dorny*, 1 Salk. 260.

¹³ *R. v. Emmot and others*, Palm. 277.

¹⁴ Id.

held bad.¹ But where the nature of the premises appears on the record, together with an averment of seisin, the court will award restitution, although the seisin be not very technically expressed. As where the defendants were charged with entering into a mesuage of W. P., he the said W. P. being then and there also seised thereof, the court in this case awarded restitution, notwithstanding the objection that W. P. might have been seised *pur autre vie*, and that he ought to have been mentioned as being seised *as of fee* or *of freehold*. For the rule of law is, that a life in being shall be presumed to continue until the contrary be shown, and as no averment could have been placed on the record which would show the existence of *cestui que vie* when the writ was prayed, the general statement of seisin must, of course, embrace all circumstances.² However, as a description of the premises is essential for the purpose of obtaining restitution,³ it may be doubted whether the authority of the case in *Palmer* can go, at all events, further than to warrant the mere conviction of the parties for the forcible entry, without the restoring remedy. But seisin, or possession, being duly alleged, the particular estate or title need not be set out,⁴ and it is not necessary to add, that the prosecutor continued seised.⁵ And the number of acres, or whether they were arable, meadow, or pasture, need not be stated.⁶

So, under 21 Jac. 1, c. 15, accuracy is required in describing the estate. For where the lease was for so many years, if J. S. should so long live, and the indictment omitted to aver the existence of the life, Roll, C. J. ordered that it should be quashed for that error.⁷ So to say—possessed of a certain term, without adding—of years;⁸ or to say, “disseised,” for that cannot be of a term or a copyhold.⁹ The course is to say, that the tenant of the

¹ *R. v. Taylor*, 7 Mod. 123. It does not seem absolutely necessary to raise seisin if possession of the freehold be stated, because the injury is to the possession; but in *R. v. Taylor* neither seisin nor possession was alleged. See Stark. Cr. Pl. 445, note (z).

² *R. v. Hoare and others*, 6 M. & S. 266. See likewise to the same effect, *R. v. Lloyd and others*, Caldec. 415, where freehold was alleged, but not proved: yet upon the proof of force and possession, the judgment was sustained. 1 Hawk. c. 64, s. 38.

³ Stark. Cr. Pl. 445, note (u).

⁴ 1 Hawk. c. 64, s. 38. See Sty. 147.

⁵ *R. v. Dillon and others*, 2 Ch. Rep. 314.

⁶ *R. v. Ashpernon*, 2 Leon. 184. It was also objected, that the time

of the unlawful assembly only, and not that of the entry, was alleged, but the court said they would intend that both happened at the same time.

⁷ *R. v. Bray*, Sty. 147.

⁸ *R. v. Holmes*, 1 Mod. 73; 1 Ventr. 306; 1 Hawk. c. 64, s. 38.

⁹ *R. v. Hardy*, 1 Hawk. c. 64, s. 39; Thos. Raym. 67. A house taken by a woman who lives apart from her husband is rightly described as the husband's house. It was clearly so held by Lord Tenterden, where the husband had entered for the purpose of restoring possession to the owner, and the wife then entered, as it was alleged, with strong hand, to regain her possession. *R. v. Smyth and others*, 1 Moo. & Rob. 155; 5 C. & P. 203.

freehold was ousted, and then that the lessee for years was expelled.¹ It is, moreover, proper to show that the place was the freehold of the party ejected at the time of the force, so that the word "then" must be made use of, and "being the freehold of E. F.," without more, is insufficient.² Although to allege that the *locus in quo* was "then and yet" the freehold of E. F. cannot be permitted, inasmuch as it would be inconsistent with that part of the count which states that the wrong-doer still keeps the party out.³

Having sufficiently asserted the entry,⁴ and the nature of the possession invaded, it is indispensable to mention the expulsion.⁵ There must, in other words, be an allegation of seisin and disseisin⁶ where the prosecutor has been removed from his freehold. And the conclusion of a disseisin cannot be a matter of inference.⁷ Where, indeed, the ejectment complained of is of a tenant for years, or of a copyholder, seisin cannot be stated, because a copyholder has no freehold, and the distinction between this case and indictments⁸ for expulsion from freehold has been more than once recognized. And it is also unwise to aver too much, for where it was said that the possession of A. B., a *farmer*, was entered upon, and that R. F. was disseised, the indictment was held faulty, for want of saying that A. B., the farmer, had been likewise disseised. Had the pleader foreborne to call A. B. farmer, the case had been otherwise, because no title would have been found in any other but in him who was found to be disseised, but finding the woman to be a farmer (an estate known and certain) it became necessary to show her expulsion.⁹ And as the word "then" has been shown to be of importance in stating the possession of the freehold, it must also be employed in setting out the expulsion.¹⁰ Lastly, the continuance of the disseisin must be expressly averred, because it would be a repugnancy to award restitution to one who never was in possession, and in vain to award it to one who does not appear to have lost it.¹¹

¹ *R. v. Waite*, 4 Mod. 248.

² *R. v. Poynts*, Cro. Jac. 214. *R. v. Bridge*, Id. 639, where "*adhuc*" seems to be wrongly put for "*ad tunc*;" S. P. *R. v. Wogan*, Comb. 288. *R. v. Fenton and others*, Yelv. 27.

³ *R. v. Hayes*, 1 Show. 272; 1 Hawk. c. 64, s. 39.

⁴ See 1 Hawk. c. 64, s. 40.

⁵ Id. c. 64, s. 41. "Then and there" are not indispensable in stating the expulsion, nor an identity of place, because both these circumstances must follow upon the entry and disseisin. Id. s. 42.

⁶ The word "disseise" includes

an unlawful expulsion. *Andrews v. Lord Cromwell*, Cro. Jac. 31. *R. v. Watts*, Noy. Rep. 125; 1 Hawk. c. 64, s. 43. *Wroth v. Capel*, 3 Leon. 102. See *R. v. Lord Cromwell*, Yelv. 15.

⁷ *R. v. Dorny*, 1 Salk. 260. *R. v. Griffith and others*, 3 Salk. 169. *R. v. Taylor*, 7 Mod. 123.

⁸ Poph. 205.

⁹ *Freiston v. Shillito*, Yelv. 165. See Godb. 45.

¹⁰ *R. v. Baude*, Cro. Jac. 41.

¹¹ 1 Hawk. c. 64, s. 41. See Say. Rep. 225. Ry. & Moo. N. P. C. 27.

Where there is no doubt as to the entry, but it is questionable whether the detainer can be proved, or *vice versâ*, the indictment may be drawn accordingly.¹ But if both entry and detainer be alleged, and the jury omit to find as to one, the court will hold the entire charge ill laid. As where the jury found the detainer only, it was moved that a peaceable entry ought in such a case to have been found likewise, and the court were of that opinion, and awarded re-restitution of the property which had been restored.² Whereas if no mention at all had been made of the entry, it would have been sufficient.³ So where the jury gave a verdict as to both points, and found the detainer peaceable, the court referred to *Ford's case* as making the distinction, and held the indictment good.⁴ However, it seems that the grand jury cannot make a division of this nature, because they ought to find the truth or falsehood of the whole of the bill, and therefore, where they found a peaceable entry and forcible detainer, a restitution awarded thereupon by justices was set aside.⁵

Pleas.] In answer to this charge of forcible entry and detainer, it is, of course, competent to plead not guilty, which puts the violence in issue,⁶ but the provisions of 31 El. c. 11, already adverted to in a former page, must be pleaded.⁷ By that Act, there is to be no restitution if the person indicted has had the occupation, or been in quiet possession of the premises, for three whole years next before the day of the indictment. And the plea need not set forth the title or estate, for the materiality of the issue is in the possession.⁸ This allegation so pleaded operates (like a general traverse of the force) in stay of the restitution,⁹ and is capable of being denied or traversed by the prosecutor, and so brought to trial. Indeed, if the justices should refuse to accept the traverse thus tendered, the court will award re-restitution upon a writ of *certiorari*.¹⁰ Defendants, however, should be well assured before they avail themselves of this plea, under 31 El. c. 11, inasmuch as they cannot place not guilty and the possession for three years upon the same record. The statute, it may be naturally concluded, was not intended to protect the tenant from holding out against his landlord, for the possession of the former is that of the lessor.¹¹

¹ See *Andrews v. Lord Cromwell*, Cro. Jac. 31; Stark, Cr. Pl. 445, note (t).

² *R. v. Ford*, Cro. Jac. 151.

³ *R. v. Sir W. Fitzwilliam*, Id. 49; S. C. Cro. El. 915; S. C. Yelv. 32.

⁴ *R. v. Sadler*, 1 Sid. 99.

⁵ *R. v. Serjant*, 1 Sid. 414; S. C. 1 Ventr. 23. See further, 2 Bulst. 121, 258.

⁶ And the plea must be in writing; 1 Hawk. c. 64, s. 58.

⁷ 1 Salk. 553.

⁸ 1 Hawk. c. 64, s. 56.

⁹ *R. v. Harris*, 1 Salk. 260; S. C. 1 Ld. Raym. 440. *R. v. Burgess*, 1 Keb. 538, 343. See Dy. 122 (6); 1 Ventr. 264. *R. v. Winter*, 2 Salk. 588. Id. citing *R. v. Sir R. Bray*.

¹⁰ *R. v. Stacey and others*, 1 Sid. 287. *R. v. Bengough*, 3 Salk. 170.

¹¹ See Godb. 45.

The Act contemplated cases where the estate should be continued, and a termor who kept out the reversioner with weapons was held clearly guilty of a forcible detainer.¹ The plea should be tendered immediately, whether it be of not guilty, or under 31 El. And upon one occasion, where the time for pleading was discussed in the Court of King's Bench, the rule was, that unless the defendant should plead or demur within two days, and if he plead, to take notice of trial within term, then let restitution be awarded.²

Restitution.] Where the indictment or inquisition is proceeded with upon the statute of 8 Hen. 6, c. 9,³ we have seen that restitution may be awarded.⁴ And it is observable that the possession of visible and corporeal tenements only are contemplated by the statute, so that rent⁵ or common is not within its provision. And the reason is, because there cannot be disseisin of such property; such things being mere creatures of the law, and always deemed to be in the possession of those whom the law adjudges to have a right to such possession.⁶ But the persons who disturb incorporeal rights may be punished under 15 Ric. 2, c. 2,⁷ or may be sued by action for the damage caused by the interruption. And tithes have been held subjects for restitution. Further, it is not competent to re-

¹ *Snigge v. Shirton*, Cro. Jac. 199.

² *R. v. Marrow*, Ca. Temp. Hardw. 174. It may be noticed here, that the person ejected cannot be a witness to prove the case which he prosecutes. It was so held upon an indictment under 21 Jac. 1, c. 15, where Vaughan, B., permitted the tenant for years and his wife to give evidence. Their evidence was material, and a verdict of guilty ensued. The court observed, that both husband and wife were interested in the event, because a conviction would entitle them to a judgment of restitution; and the public would sustain no injury, because the remedy by indictment at common law still remained. The rule for a new trial was accordingly made absolute. *R. v. Williams*, 9 B. & C. 549; 4 M. & Ry. 471. The same point was ruled by Little-dale, J., where the wife of the prosecutor of an indictment on 21 Jac. 1, c. 15, was called as a witness, and objected to on the ground of her husband's interest. *R. v. Beavan and others*, Ry. & M., N. P. C. 242. The statute 31 E. 1. gives costs

against defendants who plead the possession of three years unsuccessfully in express terms. *R. v. Good-enough*, 2 Ld. Raym. 1036.

³ As to termors and copyholders, see 21 Jac. c. 15. That lessee for years should sue in the name of the reversioner for restitution, and lessee for years of a copyholder by licence in the name of the lord, see *R. v. Sir M. Arundell*, 13 Vin. Ab. 387. Restitution is made to him in reversion, and not to the lessee for years, for he who is disseised may be restored, and then the lessee may re-enter. *R. v. Sover*, 1 Leon. 327.

⁴ The judge of assize will sometimes award restitution if a bill of indictment be found, *R. v. Hake*, 4 M. & Ry. 483, n., but it lies in his discretion to do so. *R. v. Harland and others*, 8 Ad. & El. 826; 1 Per. & D. 93; 2 Moo. & Rob. 141.

⁵ But *semble*, that rent is within these statutes. See *ante*.

⁶ 1 Hawk. c. 64, s. 45. See *Co. Litt.* 323.

⁷ 1 Hawk. *ut supra*.

store premises to any one who was not in the actual possession of them, so that a mere seisin in law would not afford a ground for the remedy.¹ And Mr. Serjeant Hawkins is of opinion, that if a disseisee were to re-enter peaceably upon the disseisor, he might be found guilty of a forcible detainer, and so that the disseisor might have restitution, although it might be said, that the latter had, in judgment of law, no possession at all.² Nor again can restitution be awarded against any one who had been three years in possession of a lawful estate. This provision was introduced by 31 El. c. 11, for the purpose of quieting the enjoyment of property held for so long a time. So that if A. being entitled to a certain messuage were to enter upon his rightful possession, whether peaceably or otherwise, and were to continue for three years unmolested, he could not be amoved by virtue of 8 Hen. 6, c. 9, or 21 Jac. 1, c. 15.³ But if A. were wrongfully to gain access to this messuage, and thus were to acquire the character of the disseisor, he could not then plead the statute of Eliz. in bar of restitution as against the disseisee, because he would not have, as against the latter, the groundwork of a legal estate. The maxim "*In pari delicto, potior est conditio possidentis*," might indeed protect him against the intrusion of a stranger whom he might have disseised and kept out for three years, but the disseisee with a lawful title, and with or without laches as to his right of entry, was considered to have a sufficient claim to restitution, notwithstanding the 31 El. c. 11.⁴ And it has already been shown, that the possession of land under a lease for more than three years, will not make the tenant guiltless of a detainer after the expiration of the term.⁵ And even if a man be restored to premises, having been three years in possession, he cannot until three years more have elapsed, be able to justify a forcible detainer.⁶ Again, there will be not any restitution if the complainant has permitted a long season to elapse before he has applied for redress. Three years after a conviction before justices of the peace have been considered too long a period.⁷ Indeed, the meaning of the Act being to afford a present remedy,⁸ restitution ought to be awarded immediately, and therefore it is that a private justice may put the statute in execution without delaying the restitution till the quarter sessions.⁹ And the court upon this occasion gave judgment for re-restitution.¹⁰ A traverse of the force operates likewise as a *supersedeas* to the restitution.¹¹

¹ 1 Hawk. c. 64, s. 46.

² Id. s. 47.

³ And a plea of possession for three years will postpone restitution until the matter be tried. *R. v. Ellis*, 1 Freem. 377.

⁴ See 1 Hawk. c. 64, s. 54. See also ss. 55 and 57.

⁵ *Snigge v. Shirton*, Cro. Jac. 199.

⁶ 1 Hawk. c. 64, s. 53. See *R. v. Weshbourne*, 4 Leon. 49.

⁷ *R. v. Harris*, 12 Mod. 268.

⁸ *R. v. Harnisse*, 5 Mod. 443.

⁹ *R. v. Ellis*, 1 Freem. 377.

¹⁰ *R. v. Harris*, 3 Salk. 313; Carth. 496; where the time is said to have been two years and a half.

¹¹ *R. v. Winter*, 2 Salk. 587. See, however, Dy. 122.

Mandamus.] The court will not grant a *mandamus* to justices under 5 Ric. 2, sess. 1, c. 8.¹

Restitution, by what justices.] It seems to be a good principle that this restitution² cannot take place by any authority except that of the justices before whom the inquest has been found.³ And thus it is that justices of gaol delivery cannot grant such a writ unless where the indictment has been found before them, although they may inquire concerning the forcible entry, and fine the offenders.⁴ And the jurisdiction of the quarter sessions is acknowledged, because as the justices have power to reseise, they may as well exercise that right in court as out of it.⁵ But the superior Court of King's Bench is an exception to the rule, because the judges there must have a right of putting into execution the remedy which the writ of *certiorari* removes from the inferior tribunal.⁶ Although that court will not reverse the decree of a judge at the assizes refusing to award restitution after an indictment for a forcible entry had been found by the grand jury; nor will they enter into the question whether the judge has decided rightly or not.⁷

Certiorari.] And, therefore, we come to the change of jurisdiction which is effected in the manner just related. This proceeding, whether a traverse of the force or a three years' possession be the point at issue, retards the restitution till the truth of the plea be inquired into. And as we have seen that the defendant must not linger in his pleading, although the writ of *certiorari* has issued from the prosecutor,⁸ so he must hasten to trial, or abide the

¹ *Ex parte Davy*, 6 Jur. 949.

² The justice or justices may execute the writ in person, or direct the sheriff to do it, and the Court of King's Bench would at once issue a mandate to the sheriff for that purpose. And it is said, that the sheriff or justices may break open doors for this purpose. See 1 Russ. C. M. 294. And we have seen that the sheriff is bound by the statute to obey the orders thus imposed on him by the justices. Indeed, he may be amerced if he return that he could not make restitution by reason of resistance. 1 Hawk. c. 64, s. 52. It is a misdemeanor (15 Ric. 2, c. 2, punishable by fine and imprisonment) in the proper officer if he be not attendant upon such justices in their procedure.

³ Jenk. 221; Dy. 187.

⁴ See Sav. 68; 1 Hawk. c. 64, s. 51. See also Holt's Ca. 402.

⁵ 1 Russ. C. M. 314.

⁶ 1 Hawk. c. 64, s. 51. A pardon of the force would likewise bar restitution, but the crown would not, probably, interfere in that manner at the present day, unless under very especial circumstances. See *R. v. Fawcett*, 1 Hawk. c. 64, s. 64; Yelv. 99. But the pardon would not bar a restitution by action. *R. v. Fawcett*, Noy. Rep. 119.

⁷ *R. v. Harland*, 1 Per. & Dav. 93; 8 Ad. & El. 826; 2 Moo. & Rob. 141.

⁸ *Ante*.

alternative of a restitution.¹ And it is a great misdemeanor in justices to proceed to restore after the writ delivered. As where there was an indictment and *certiorari*, and then a second indictment and another *certiorari* before restitution executed. But restitution was made notwithstanding, the justices not having granted their *supersedeas*. The court reprimanded the justices to whom the writ of *certiorari* was delivered, and set aside the restitution.² But the justices are not in contempt if they proceed without notice of such a writ.³ And if there be a new forcible detainer pending the *certiorari*, the justices may record the force.⁴ It is no ground for arresting the writ that the jury have found a part of the indictment to be false, if they have also found so much true as will warrant the restitution. As where upon an indictment for a forcible entry and detainer, the jury found the entry peaceful and the detainer forcible.⁵

This writ of *certiorari* may be had in respect of all proceedings, from the indictment or inquisition to the conviction and award of restitution.⁶ If the justices, however, do not return the information and evidence touching the entry upon a writ requiring them to return *all* the proceedings, the court will not grant a *mandamus* to compel them, especially if there be no affidavit showing that the evidence had been received.⁷

There shall be a second writ of restitution without a fresh inquiry, if the first be defeated by fresh force immediately after its execution, but this second writ must be applied for within a reasonable time.⁸ There can be no view without consent in criminal prosecutions.⁹

Re-restitution.] If, after the award of restitution, justices should come to the conclusion that their judgment has proceeded upon wrong grounds, or if the Court of King's Bench should be of opinion upon a *certiorari*, that the conviction of the justices should be quashed, the premises restored must again change hands. In the first case, this new process is called a *supersedeas*, and may be carried into execution by two or even one of those who have awarded the restitution,¹⁰ and when ordered by the Court of King's Bench it is called re-restitution.¹¹ The party accused of the forcible entry and detainer then becomes the possessor of the property to which he has laid claim. If a justice neglect to hold his

¹ *R. v. Marrow*, Ca. Temp. Hardw. 174.

² *R. v. Fitzwilliam*, Yelv. 32; 1 Hawk. c. 64, s. 62. *R. v. Spelman*, 1 Keb. 93.

³ 1 Hawk. *ut supra*. See 1 Keb. 93, where the court suspended a writ of restitution till the case had been tried.

⁴ *R. v. Kneller*, 1 Salk. 151.

⁵ *R. v. Sadler*, 1 Sid. 97, 99; 1 Hawk. c. 64, s. 59.

⁶ See also 5 & 6 Will. 4, c. 33, as to the writ of *certiorari*.

⁷ *R. v. Wilson*, 1 Ad. & El. 627.

⁸ *R. v. Harris*, 1 Ld. Raym. 482.

⁹ *R. v. Redman*, 1 Ld. Keny. 384, moved by defendant.

¹⁰ 1 Hawk. c. 64, s. 61.

¹¹ See 1 Hawk. c. 64, s. 63.

inquest, or if he do not certify his restitution, the Court of King's Bench will inquire and award re-restitution.¹ At one time it seems that it was discretionary with the judges to send out this second writ. They were accustomed to decide according to all the circumstances of the case, whether the defendant appeared to have some right to the tenements in question which he had lost by the restitution granted to the prosecutor, and when the affirmative occurred, a second restitution was the usual consequence.² Thus it was said that although the defendant is not entitled *ex merito justitiæ* to re-restitution when an inquisition of a forcible entry is quashed, it is nevertheless usual to give it under such circumstances.³ And the same thing has been affirmed regarding the quashing of an indictment, or a verdict for the defendant upon a traverse.⁴ And Holt, C. J., took a distinction upon one occasion between cases where the first destitution appears to the court to have been just, and where tortious. That learned judge observed, that upon the quashing of an inquisition, the re-restitution was discretionary if the restitution appeared to have been just, but that if the prosecutor had been wrongfully put into possession by the justices, that the court were then bound to reinstate the defendant.⁵ And this holding obtained where it appeared to the court that a stranger had recovered possession of the same land in the lord's court. The traverse being found for the defendant, and it being the opinion of the judges that he had been unjustly amoved by the prosecutor's suit of restitution, they awarded him re-restitution.⁶ But in later cases the Court of King's Bench has felt itself under an obligation to award the return of the premises to the defendant after conviction quashed, and so it was held, even where an affidavit was made that the title of the party, who was a lessee, had expired since the conviction.⁷ And again, in a very modern case, where both the inquisition and conviction were quashed, the court considered that they must give re-restitution as a consequence of quashing the conviction without inquiring into the legal or equitable claims of the respective parties.⁸ And Lord Denman, C. J., after referring to the supposed discretion above mentioned, observed, that it would be highly inconvenient if the question of title were to be inquired into upon affidavit.⁹ Perhaps, however, a case of fraud might operate with the court. As where the lessor of premises arrested his lessee, and then forcibly entered the mesuage upon a pretence of forfeiture. The inquisition being quashed, the lessor prayed re-restitution, but the motion was denied, because here was a fair title standing out which ought not to be set aside by sinister means.¹⁰

¹ *R. v. Lady Lovelace*, Comb. 260, 262.

² 1 Hawk. c. 64, s. 65.

³ Comb. 328.

⁴ 1 Hawk. c. 64, s. 65.

⁵ 1 Ld. Raym. 483.

⁶ 1 Hawk. c. 64, s. 66.

⁷ *R. v. Jones*, Str. 474. See also *R. v. Ford and others*, Yelv. 99.

⁸ *R. v. Wilson*, 3 Ad. & El. 817.

⁹ Id. 837.

¹⁰ *R. v. Toslin and others*, 2 Salk. 517. "Otherwise had no title appeared." S. C.

Judgment under the statutes.] It may be just remarked, that in addition to the restitution, the judgment under the statutes 5 Ric. 2, and 15 Ric. 2, is imprisonment and ransom at the king's will, which will is not extrajudicial, but such as declared by the judges, his representatives.¹

It is said, that as far as the fine is concerned, the conviction cannot be quashed upon motion, if the fine be set, but that it is otherwise if the justices omit to fine,² but the authority of this case may be questioned, for there seems to be no good reason for departing from the usual rule with reference to convictions, where the *certiorari* is not taken away; and that rule would enable the defendant to remove a conviction under 5 Ric. 2, or 15 Ric. 2, into the King's Bench for the purpose of quashing it.

Writ of error.] The defendant may however resort to his writ of error if he should see fit.³

CHAPTER VII.

OF LIBEL AND SLANDER.

In treating of libel and slander, we will consider, first, what is, if published, a libel. Secondly, what shall be said to constitute the offence—as publication, evil intention, &c. Thirdly, what shall be called an indictable slander; and, fourthly, what are the usual defences which have been resorted to in these cases.

What a libel.] Libels are writings whose tendency is to produce a disturbance of the public peace. And there is in the nature of such writings a union of private injury to the party libelled or to his representatives with a public wrong, so that whilst the offence redounds to the general inconvenience, the ingredient of ill-will is likewise discovered in the composition which is the subject of complaint. Libels are recognized as against the Christian religion,—(and it will be remembered that he who speaks evil of Christianity maligns also the Divine Being, who is the author of that creed)—against morals,—which are founded upon the law of God—against the monarch—the two houses of parliament—the constitution generally—the government for the time being—the magistracy and the administration of justice, (for he who libels the executive reflects upon the officers of justice)—against foreign potentates

¹ 4 Com. 121. See also *R. v. Challoner*, 1 Keb. 585.

² *R. v. Layton*, 2 Salk. 450.

³ See 2 Salk. Id.

and ambassadors, and persons of distinction abroad—and, lastly, against individuals. All libels concerning these persons, or matters, have a tendency, directly or indirectly, to disturb public tranquillity, and each of them, again, is more or less tainted with malice or ill-will towards the person or thing libelled.

Libels against foreign persons and governments, and individuals, will form the subjects of this division.

Libels against individuals.] The libel may consist in defamation, expressed either in printing or writing, signs or pictures; and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule.¹ Thus, it appears, that not only are the characters of the living the subjects of libel, but those also of the dead. For the publication is calculated to provoke a breach of the public peace. “It stirs up others of the same family, blood, or society, to revenge,² by provoking them to vindicate the memory of the deceased, and to wipe off that stain which the reflections on the ancestor may cast upon them.”³ As where the defendant, in giving an account of Sir C. Nicoll’s death, stated, that “he could not be called a friend to his country, for he changed his principles for a red riband, and voted for that pernicious project, the excise.” This Lord Kenyon conceived to be a libel, being done with a view to vilify the memory of the deceased, and to injure his posterity.⁴ But there must be a tendency of this nature, and it must be so laid in the indictment, or judgment will be arrested.⁵ To confine ourselves then to libels upon the living, it may be remarked, that a direct calumny is, of course, a ground for indictment. As to write of a man that he has the itch.⁶ So where it was stated in a ludicrous paragraph, that a nobleman had married an actress, and appeared with her at the theatre.⁷ So to impute a want of courage to an officer in the navy is a libel, or to designate him as a man of an incendiary disposition.⁸ So to write of a man as having been guilty of hypocrisy and falsehood.⁹ So to impute to a Protestant bishop an attempt to convert Catholic priests.¹⁰ So to write ill things of a person who had been unsuccessful in a lawsuit.¹¹ The mayor of Northampton sent to Lord Halifax a licence to keep a public house, and this act was deemed libellous towards a person of quality.¹² So it is libellous to impute criminal conduct to any one,¹³

¹ 1 Hawk. c. 73, ss. 1, 2.

² *Case de libellis famosis*, 5 Rep. 125.

³ 4 T. R. 128, by Lord Kenyon, and see 1 Hawk. 73, s. 3; 4 Taunt. 364, Mansfield, C. J.

⁴ *R. v. Critchley*, 4 T. R. 128, 129, cited. *R. v. Walter*, 3 Esp. 21.

⁵ *R. v. Topham*, 4 T. R. 126.

⁶ 2 Wils. 403.

⁷ *R. v. Kinnersley*, 1 Sir Wm. Bl. 294.

⁸ *R. v. Smollet*, Holt on Libel, 224; 1 Sir Wm. Bl. 269.

⁹ 4 Taunt. 355. See also *R. v. Sir B. Hicks*, Poph. 139; Hob. 215.

¹⁰ 5 Bing. 17.

¹¹ 2 Barnard. 84. See 2 B. & Ald. 685.

¹² *R. v. Mayor of Northampton*, 1 Str. 422.

¹³ *R. v. Benfield and another*, 2 Barr. 980.

as that he has insulted persons in a scandalous and barefaced manner.¹ So to publish anything in derogation of a man in his trade or business.² As that an apothecary had counterfeited a physician and had taken fees,³ or that the prosecutor had been guilty of cheating.⁴ So where the defendant wrote to the mayor of Richmond, concerning the town clerk, that his consummate malice and wickedness against the defendant and his family would make him do anything ever so vile.⁵ So where persons in general are advised to be cautious of the plaintiff, a gunsmith, since he never made the experiment he proposed, except out of a leathern gun, (thereby intimating that the plaintiff had been guilty of a falsehood), the court held the advertisement to be a libel.⁶ So where the printer of a newspaper represented the bishop of Kerry to be a bankrupt, the court granted an information.⁷ So where the defendant employed a man to carry about a placard containing the words, "Beware of mock auctions, of swindlers, and pickpockets," the court granted an information at the instance of the owner of the auction room, being satisfied that the auctions were properly conducted, and that the plaintiff could not have an impartial trial by indictment.⁸

College of Physicians.] Another breach of public order may be said to exist in contemptuous conduct to persons in official situations. As, where the defendant was charged with using abusive language to the president and censors of the college of physicians, and likewise with writing libellous letters, together with other enormities. He was found guilty upon an information for these offences.⁹

Every individual affected by a libel need not be mentioned. As in a case where certain trustees of a parish prosecuted the defendants for libel, it was held sufficient to specify some of the parties.¹⁰

¹ *Clement v. Chives*, 9 B. & C. 172; S. C. 4 Man. & Ry. 127.

² *R. v. Pownell*, W. Kel. 58. Rule to show cause why an information should not go for writing a letter, and designating the complainant as a scoundrel in the execution of his office.

³ *R. v. —* cited, Andr. 229.

⁴ *R. v. Saunders*, Tho. Raym. 201.

⁵ *R. v. Waite*, 1 Wils. 22.

⁶ 2 Str. 898.

⁷ *R. v. —*, Hil. 1812, 1 Russ. C. M. 241.

⁸ *Ex parte Genese*, Collyer's Stat. 365, n.

⁹ *R. v. Campbell*, 1 Campb. 91. In this case, it was averred that the court to whom the contempt was

offered, consisted of certain members of the college, and a byelaw was given in evidence showing that such members were sufficient for the holding of a court; and it was averred that the quorum were present. Lord Ellenborough held this proof sufficient, although it was objected that other members might assist at the court, and that it was not certain that the presence of these particular members was necessary for the formation of a court. As to the offence of practising without a certificate from the apothecaries' company, see 55 Geo. 3, c. 194. *R. v. Clapham*, 4 C. & P. 29.

¹⁰ *R. v. Griffin and others*, 2 Barnard. 368.

And it is even enough to mention one person belonging to a company, (as an East India director,) in order to warrant an information.¹ So where it was imputed to the clergy at Durham, that through their agency none of the bells of the churches there tolled upon the occasion of the death of Queen Caroline, the court made the rule for an information absolute, although it was urged that this was the application of an unknown private prosecutor, and there was no affidavit that the publication was untrue.² Indeed, the rule goes further, and will not permit a body of men to be libelled as a nation. For where an account of the Jews was printed tending to make people believe them so barbarous as to burn a woman and her child, because it was begot by a Christian, an information was granted by the court.³ But where a writing inveighs against mankind in general, or against a body to whose detriment no particular prejudice can reasonably arise, or against a class at large, as men of the gown, it is not a libel.⁴ And if the indictment state the libel to have been published to the disparagement of certain liege subjects, &c., to the jurors unknown, judgment will be arrested, for the jurors not knowing the persons who are affected by the libel, it cannot be said to be prejudicial to any one in particular,⁵ although as soon as the general criticism comes to touch upon *character*, it becomes open to the charge of libel.⁶ So if an advertisement be published in a newspaper *bonâ fide*, and for the purpose of obtaining information, it is not a libel, although it convey an imputation injurious to an individual.⁷ A printer cannot be convicted of a libel for publishing a writing at the request of a husband for the purpose of reclaiming his wife.⁸ And that is not a libel which is not so without the help of an innuendo.⁹

But this rule concerning unpleasant imputations is not to be carried so far as to fetter society in the exercise of that rightful freedom which enables men to sift the character of their fellows without malice. And, therefore, where a paper was exhibited at a club-room, stating that the plaintiffs were excluded from the room as persons whom the proprietors and annual subscribers did not think it proper to associate with, the court gave judgment for the defendants upon demurrer. For here was no impeachment of the plaintiffs' moral character, nor any imputation beyond the fact of the defendants not deeming the plaintiffs proper persons for their society.¹⁰ So where a person was expelled from a Quaker's

¹ *R. v. Jenour*, 7 Mod. 400.
"Whereas an East India director has raised the price of green tea to an extravagant rate," &c. See also *R. v. Knut*, 2 Barnard. 114.

² *R. v. Williams*, 5 B. & Ald. 595; 1 D. & Ry. 197.

³ *R. v. Osbourne*. The *Jews'* case cited; 2 Barnard. 138, 166. See also 2 Swanst. 503, n.

⁴ *R. v. Alme and another*, 3 Salk. 224.

⁵ *R. v. Orme and another*, 1 Ld. Raym. 486.

⁶ *R. v. Gathercole*, 2 Lew. 237.

⁷ *Delany v. Jones*, 4 Esp. 191.

⁸ *R. v. Masters*, Say. Rep. 122.

⁹ *R. v. Alderton*, Id. 280.

¹⁰ 1 Price, 11; 5 Esp. 109.

meeting, the reason being assigned in writing in the books of the society, it was held that no libel had been thereby published.¹

Again, if a fair comment be made upon a place of public amusement, it is no libel. Or upon a literary work,² provided that the writer do not step out of his way to defame or vilify the author's character, in which case the ordinary doctrine of libel will apply.³ Nor is it libellous to criticise a painting, although the word "daub" be used, if the comment be made with honesty and without malice.⁴ Nor is matter of history published without slanderous intention a libel, as where, in ancient times, a clergyman represented one G. as a perjured person, who had great plagues, and who was killed by the hand of God; whereas, in truth, G. had never been plagued, and was himself present at the sermon.⁵ Again, the interests of society are so united as to make it of importance, that the due temperate investigation of a fact should not be deemed libellous. And therefore an advertisement inserted *bonâ fide* by the defendant respecting the plaintiff, in order to discover if he had another wife living when he married, was held by Lord Ellenborough to be no libel, and the more especially as the publication was at the instigation of the plaintiff's wife.⁶ So a confidential communication, respecting the character of a servant is not a libel,⁷ unless it be tinged with malice.⁸ Nor such a communication to parties, charging the plaintiff, a solicitor, with mismanagement of the concern intrusted to him.⁹ Subject to the same rule are explanations, when made *bonâ fide*, of an event which has taken place, or of a charge made against a person. As where a paper praying for redress, and containing an imputation of fraud against a captain, was directed to certain officers: it was held, that as there was no intention to asperse the prosecutor, the representation of an injury, drawn up in a proper way, could not afford grounds for a charge of libel.¹⁰ So if A. make an affidavit, and B. deny it by affidavit, saying that A. has sworn falsely against him, the said B., it is not a libel, for there must of necessity be a contradiction.¹¹ So where a person wrote a volume which had for its object the redress of grievances at Greenwich Hospital, the defendant was held dispunishable, although there were sharp reflections in the book upon some public officers, and upon Lord Sandwich in particular.¹² And letters sent to a father respecting the faults of his children, or expostulations in private letters to a

¹ *R. v. Hart*, 1 Sir Wm. Bl. 386.

² See 1 Campb. 355; *M. & M.* 74.

³ 7 C. & P. 621.

⁴ *Thompson v. Shackell*, Moo. & M. 187.

⁵ Cro. Jac. 91.

⁶ 4 Esp. 191. See *R. v. Elms*, Andr. 229, cited; 4 Bing. 162.

⁷ 1 T. R. 110; Bull, N. P. 8; and see 5 Esp. 13.

⁸ 3 B. & P. 587.

⁹ 1 Camp. 267. See 2 Stark. 297.

¹⁰ *R. v. Bayley*, 5 B. & Ald. 647; 5 B. & Ald. 642.

¹¹ 2 Burr. 807.

¹² *R. v. Baillie*, Holt on Libel, 173.

friend concerning vices, are not libels.¹ It must, however, be always understood, that such communications or letters as the foregoing must not contain abusive or provoking language, for that at once creates a tendency to disturb the public peace; and, moreover, it is apt to induce the party to disclose it to his friends, and thus produces, to use the words of Lord Bacon, a compulsory publication, for which the defendant must answer.²

Again, no presentment of a grand jury can be a libel, nor articles of the peace exhibited before a justice, for it would be a great discouragement to suitors to subject them to public prosecutions in respect of their applications to a court of justice.³ Nor an affidavit exhibited in a court of justice by a defendant in his own excuse.⁴ So where the president of a court martial in delivering a judgment of acquittal, declared that the prosecutor, in falsely calumniating the accused, had been guilty of conduct highly injurious to the service, Mansfield, C. J., at once nonsuited the plaintiff, and his lordship's direction was held right.⁵ Again, the publication of proceedings in our courts of justice is, in the main, allowable. But the account given must be fair and honest, and if the writer should think fit to add or prefix to the statement any comment or expression of his own, he must do so at his peril. Therefore where the defendant thought fit to head his relation of an action with these words, "shameful conduct of an attorney," it was held, that his pleas of justification were insufficient, because he had not confined himself to that which actually passed in court, and judgment was given for the plaintiff *non obstante veredicto*.⁶ So where false copies of a prohibition to the bishop of Chester was dispersed throughout the kingdom by one W., a churchwarden, the court held the act in question to be a most seditious libel.⁷ But the rule goes yet further. We have seen⁸ that a defendant was convicted of publishing a blasphemous libel, although she only professed to give an account of her husband's defence to an information for a similar offence. Whence the principle may be obtained, that if any publication of the proceedings of courts of justice be wantonly made, so as to produce an injury to the morals of others, or a disturbance of the public peace, it must be considered as a libel. And the same doctrine will apply to the case of defamatory matter unnecessarily published with reference to particular individuals. It is true, that some doubt at one time existed, whether the fact of the proceedings in question having actually happened in court, were not of itself a sufficient defence,⁹ but this point has been since canvassed. Lord

¹ See 2 Brownl. 151.

² Poph. 140; *R. v. Summers and another*, 1 Lev. 139; see 12 Rep. 35.

³ 1 Hawk. c. 73, s. 8.

⁴ *R. v. Lediard*, Say. Rep. 112.

⁵ 2 New Rep. 341.

⁶ 3 B. & Ald. 702.

⁷ 2 Mod. 119; 8 T. R. 297; S. P. 3 B. & C. 556; 6 Bingh. 213.

⁸ *Ante*.

⁹ See 1 B. & P. 525; 8 T. R. 298; 4 B. & A. 605; 3 B. & C. 582.

Ellenborough and Grose, J., declared upon one occasion, that the common notion of publishing everything which might transpire in a court of justice must be taken with some grains of allowance.¹ "It often happens," said Lord Ellenborough, "that circumstances necessary for the sake of public justice to be disclosed by a witness in a judicial inquiry are very distressing to the feelings of individuals on whom they reflect; and if such circumstances were afterwards wantonly published, I should hesitate to say that such unnecessary publication was not libellous, merely because the matter had been given in evidence in a court of justice."² And Bayley, J., subsequently said in another case, "It has been argued, that the proceedings of courts of justice are open to publication. Against that, as an unqualified proposition, I enter my protest."³ The learned judge then put the question of blasphemous matter, the reiteration of which might be injurious to the public mind. The case of Mary Carlile followed this direction, where a criminal information was granted against the defendant for publishing, amongst other things, her husband's defence.⁴ And by Abbott, C. J., "there can be no doubt in the mind of the court, or of any person acquainted with the law of the country, that, if in the course of a trial it becomes necessary for the purpose of justice that matters of a defamatory nature should be publicly read, it does not, therefore, follow, that it is competent to any person under the pretence of publishing that trial, to re-utter that defamatory matter."⁵ These observations of the chief justice seem to be general, and calculated to embrace not only blasphemous publications, but any writing whose tendency is unnecessarily injurious or defamatory. It should seem likewise that a want of jurisdiction in a particular court will not make an absolutely groundless prosecution the less a libel, although there have been opinions to the contrary.⁶ *Ex parte* proceedings, *a fortiori*, must not be unadvisedly published. As where the printers of the "Sussex Journal" published the evidence connected with a transaction between an excise officer and a smuggler, previous to the trial of the former for murder in shooting the smuggler. The attorney-general having filed an information against the printers, Heath, J., refused to allow their counsel to urge this kind of publication as a defence, for it was *ex parte*, and made by the prosecutor only. And the learned judge held, that the mere publication of *ex parte* evidence, before a trial, was of itself highly criminal.⁷ "The necessary tendency of such a libel is to traduce and defame

¹ 7 East, 503.

² Id.

³ 1 M. & S. 281; S. P. by Tindal, C. J.; 6 Bingham, 213.

⁴ *R. v. Carlile*, 3 B. & Ald. 167.

⁵ 3 B. & Ald. 168.

⁶ 1 Hawk. c. 73, s. 8.

⁷ *R. v. Lee and another*, 5 Esp.

123; S. P. *R. v. Fisher and others*, 2 Campb. 563. And if the matters complained of be not brought before the magistrate in his judicial character, there is still greater reason for calling the publication a libel. 3 B. & C. 24; see 7 East, 493; 4 B. & Ald. 605.

the prosecutor,¹ and to prejudice him in the minds of his countrymen, and to cause it to be believed that he is guilty of the [crime]² laid to his charge, and to deprive him of the benefit of an impartial trial."³ So an extrajudicial affidavit must not be promulgated without due consideration, and the magistrate's clerk who writes out the affidavit will be answerable for the consequences.⁴ So again, a scandalous affidavit, containing imputations upon an individual, or a scandalous petition to the House of Lords, ought not to be published, seeing that they tend to a breach of the public peace.⁵ But simply to state the charge, and the result of the examination, as that the justice directed the defendant to enter into recognizances, is not libellous; for here there is no statement of evidence, nor any comment, but merely the history of the proceedings.⁶ So, again, during a trial, if the judge think fit to interdict the publication of evidence, the defendant may be fined for a contempt of court,⁷ and there can be but little doubt that such publications would be libellous, if they contained reflections upon an individual. So where the defendant published certain evidence given during the sitting of a coroner's jury, together with comments unfavourable to the accused parties, the court did not hesitate to make the rule for a criminal information absolute.⁸ One judge fined the defendant during his defence for disrespectful observations concerning the Christian religion and other indecorous behaviour. The court unanimously upheld the right to fine.⁹

We now come to a very important class of privileged publications, which are those connected with the houses of parliament. But the right of free publication of these proceedings by order of the house in cases where their publicity would have the effect of throwing discredit upon an individual, seems to have been allowed on some occasions, although questioned at other times. In the days of James II., indeed, a former speaker of the House of Commons was compelled to pay no less a sum than 10,000*l.* for publishing Dangerfield's Narrative.¹⁰ But this decision was commented upon by some modern judges with great severity,¹¹ and its authority was at an end. And it had been held previously that the printing of a false and scandalous petition to the House of Commons, which reflected upon the character of an individual, and delivering copies of it to the members of the committee, was

¹ Of the indictment for libel.

² An assault.

³ 2 Campb. 571, by Lord Ellenborough.

⁴ 3 Campb. 212, by Wood, B.; see 8 C. & P. 444. But voluntary affidavits are now forbidden in most cases, by 5 & 6 Will. 4, c. 62, s. 13.

⁵ *R. v. Salisbury*, 1 Ld. Raym. 341.

⁶ 3 B. & C. 556.

⁷ *R. v. Clement*, 4 B. & Ald. 218.

⁸ *R. v. Fleet*, 1 B. & Ald. 379.

⁹ *R. v. Dawson*, 4 B. & Ald. 329. Best, J.: The fines were heavy. It is not desirable to fine if it can be avoided.

¹⁰ *R. v. Williams*, 2 Show. 471; S. C. Comb. 18.

¹¹ By Lord Kenyon, 8 T. R. 296; and Grose, J. Id. 297.

not the subject of the action of libel, though had the delivery been to others than members it would have been otherwise.¹ During the time of Lord Kenyon, the question was again raised, upon the application of Horne Tooke for an information against the defendant, who had published a report of the committee of secrecy of the House of Commons, which contained imputations upon Tooke's character. And although it was attempted to be argued that the House of Commons had no authority to order such a publication as the present, the judges discharged the rule, without calling upon the counsel against it.² Then followed some observations of Lord Ellenborough, in *R. v. Creevey*, where the lord chief justice remarked that he was not prepared to say that to circulate a copy of that which was prepared for the use of members was legitimate, and that it could not be made the ground of prosecution if it contained matter of injurious tendency to the character of an individual.³

The learning, however, upon this point was exhausted in the famous case of *Stockdale v. Hansard*. There the defendant pleaded that the defamatory matter charged was part of a document which had been laid before the house by their order, and had thus become part of the proceedings of the house, and which was subsequently printed and published by the defendant under the like order. He likewise stated a resolution of the house, that the power of publishing any of its proceedings which it might deem necessary or conducive to the public interest, was an essential incident to the constitutional functions of parliament, and to the commons in particular. But the court gave judgment for the plaintiff upon demurrer, and they deemed themselves quite competent to determine whether the plea could be supported by virtue of the privileges claimed.⁴ And now, by 3 Vict. c. 9, s. 1, any defendant in any civil or criminal proceeding in respect of any report, paper, votes, or proceedings of either house of parliament, as such house of parliament may deem fit or necessary to be published, and so published by such defendant, or his servant, under the authority of parliament, may bring before the court where such proceeding has been commenced, or before any judge of the same court, (if one of the superior courts at Westminster,) first giving twenty-four hours' notice to the prosecutor or plaintiff, a certificate under the hand of the lord chancellor, or lord keeper, or the speaker of the House of Lords, or the clerk of the parliaments, or the speaker of the House of Commons, or clerk of the same house, stating that such report, or other proceeding, was published by the defendant, or his servant, by order or under the authority of the House of Lords or Commons, together with an affidavit verifying such certificate, upon which the proceedings shall be forthwith stayed, and every writ and process determined. The 2nd section affords the like protection to the

¹ *Lake v. King*, 1 Saund. 131.

² *R. v. Wright*, 8 T. R. 293.

³ 1 M. & S. 278.

⁴ 9 Ad. & El. 1; 2 Per. & D. 1.

publication of a *copy* published in like manner. The 3rd section enables any person to give in evidence under the general issue such report, &c., in answer to any proceeding for publishing an extract from, or abstract of, such report, and to show that such extract or abstract was published *bonâ fide* and without malice; and if such shall be the opinion of the jury, a verdict of not guilty shall be entered for the defendant. The 4th section contains a proviso, that nothing in the Act contained shall be construed, directly or indirectly, by implication or otherwise, to affect the privileges of parliament in any manner whatsoever. This statute, however, it will be observed, does not authorize a publication of reports or papers independently of the authority of parliament. And, therefore, a person who ventures upon the publication of proceedings without such order will do so at his peril; and if he spread abroad defamatory matter, or remarks calculated to prejudice an individual, he will stand in jeopardy of a prosecution for libel.

By the same rule, a member of the house cannot publish his own speeches without risk, if he have reflected upon character in his address, although within the walls of the house he is protected by his privilege, subject to the rules of that assembly. And thus it was held that Mr. Creevey, who was found guilty upon an indictment for libel for publishing a speech delivered in the House of Commons, and reflecting upon the prosecutor as an informer, could not justify this act, nor mitigate it upon the pleas of having given a correct account and of having done so in consequence of an incorrect statement in his speech in other newspapers. He was subsequently fined 100*l*.¹ The same doctrine attaches to a speech delivered in the House of Lords. Lord Abingdon sent the copy of a speech he made in that house to several of the public papers, and had it printed at his own expense. That speech reflected very much upon the professional character of an attorney, and an information being filed against that nobleman for a libel, he was convicted, and sentenced to fine and imprisonment, and no attempt seems to have been made to disturb the verdict.²

Libels against foreigners of distinction.] There does not appear to be any authority for saying that a writing which reflects upon a private individual, being a foreigner, and residing in a foreign country, is a libel punishable by our law. But the principle seems to be, that if persons abroad were liable to be libelled here with impunity, the pacific relations which should exist between neighbouring states would be in danger of interruption. And Lord Ellenborough laid it down generally, that independently of the consideration above mentioned, to vilify and defame foreigners of distinction must be held libellous.³ Thus, again, to represent a foreign potentate as a tyrant is within the rule just suggested.⁴

¹ *R. v. Creevey*, 1 M. & S. 273.

³ *R. v. Peltier*, Holt on Lib. 78.

² *R. v. Lord Abingdon*, 1 Esp. 226.

⁴ *R. v. Vint*, 1801; 1 Russ. C. M. 246.

So a writing imputing ignorance to the French ambassador at the British court, and with having used arts to prejudice the interests of the defendant at Versailles, was deemed libellous, and the defendant was convicted.¹ And, again, where the Queen of France was represented as the leader of a faction, and other severe reflections were passed upon her conduct, the court held that the writer was guilty of libel.²

Mode of publication.] The manner of preparing the libel for publication has likewise occasionally come into question, as well as the matter. As if one should copy out a libel, being neither the contriver nor the composer, such a person is guilty equally with the original maker.³ And a sign or picture has even been deemed as offensive a libel as though the abuse had been in writing.⁴ Or a type or figure.⁵ Or the expression of a name by one or two letters, so that no one can mistake the person meant.⁶

So an allegory, a publication in hieroglyphics, a rebus or anagram, may be libellous, and the court shall be allowed to judge of the meaning of such writings as well as other persons.⁷ And words shall be taken not in too lenient a sense, but in that meaning which properly belongs to them, and which they were intended to convey.⁸

But the principal topic of discussion has been whether merely writing a paper which, if published, would be a libel, is of itself a libellous act. And it certainly appears to have been the inclination of the mind of Abbott, C. J., when giving judgment in *R. v. Burdett*, that it would be so.⁹ The point, indeed, came in question upon that occasion, and was fully discussed, but it became unnecessary to decide it. Holroyd, J., forbore from expressing any opinion upon this difficult question.¹⁰ And Bayley, J., likewise concluded his judgment by carefully abstaining from saying more than that he should be prepared to give his opinion whenever such an exigency shall arise.¹¹ It is not, however, to be supposed that the matter had not undergone much previous discussion. A case is cited by Lord Coke, where a party was convicted of making a libel in writing, and in the same place the expressions "a

¹ *R. v. D'Eon*, 1 Sir Wm. Bl. 510.

² *R. v. Lord G. Gordon*, Holt, Libel, 77.

³ 2 Salk. 417, 419; 4 B. & Ald. 656.

⁴ See 1 Hawk. c. 73, s. 2; 2 Campb. 511. If a picture be referred to in the letter-press, the printer is liable, though another hand than that of the printer composed the picture. 7 C. & P. 369.

⁵ By Lord Ellenborough, Holt on Lib. 114.

⁶ *R. v. Hurt*, 1 Hawk. c. 73, s. 5. And an affidavit of some friend should state that he has read the libel, and understands and believes it to mean the party.

⁷ Holt on Lib. 235, 236.

⁸ See 5 East, 463.

⁹ 4 B. & Ald. 159.

¹⁰ Id. 135.

¹¹ Id. 158; see 3 B. & Ald. 717; 4 B. & Ald. 95, where the arguments are collected.

libeller, *or* publisher of a libel," are to be found,¹ as though a plain distinction might be made between the two; and another case is likewise mentioned in 3 Inst.,² where a party confessed to the writing, and not to the publishing, and judgment was given against him. Then, again, it was said that the contriver, the procurer, and the malicious publisher were respectively guilty of libel,³ whence it might seem that the writer would be guilty of writing as a distinct offence.⁴

The next case is where a clergyman at Bristol was charged with composing, making, writing, and publishing a libel. The jury acquitted him of the publishing, and found a special verdict, stating that he was the writer, and that a person unknown both to him and to the jury dictated the libel while the clergyman wrote: the court held him to be guilty of libel. They said that he who dictated could not be indicted for making the libel, because he did not write it, so that if the defendant could not be punished, the crime would be without punishment.⁵ In another report of the same case, it is said that the making of a libel is an offence, though it be never published, but it was adjourned, and no judgment appears to have been given.⁶ Very speedily after this the case came again to be considered. The defendant being charged with this misdemeanor, the jury found him guilty of writing and collecting libels, and not guilty as to the residue of the indictment, which would include publishing. And it was moved to arrest the judgment, because the jury had found the defendant guilty of that which was rather a folly than a crime. But the court thought otherwise, and the defendant was fined.⁷ So where it was shown that the manuscript of a libel was in the handwriting of the defendant, and the printing and the publication were proved, but it did not appear that the defendant directed the publication, Littledale, J., left the matter with the jury, upon the authority of *R. v. Beare*, and *Lamb's case*, and a verdict of guilty was pronounced.⁸ Again, where the defendant, a printer's servant, assisted in composing a libel for the press, by preparing the type for printing, Raymond, C. J., directed an acquittal as to the publication, and advised the jury to convict the defendant of the printing if they believed the evidence; and he was accordingly found guilty and punished.⁹ And another case was cited by Holroyd, J., in *R. v. Burdett*, as being to the same effect.¹⁰

Then, on the other hand, it has been said, that *R. v. Pain* is of doubtful authority, no judgment having been pronounced.¹¹ And *R. v. Beare* has likewise been arraigned as contrary to the opinions of eminent judges, and the current of subsequent de-

¹ 3 Inst. 174.

² Id.

³ *R. v. Lamb*, 9 Rep. 59.

⁴ See also S. C. Mo. 813.

⁵ *R. v. Paine*, Carth. 405.

⁶ 5 Mod. 163.

⁷ *R. v. Bear*, Carth. 407; cited by Abbott, C. J.; 3 B. & Ald. 719.

⁸ *R. v. Lovett*, 9 C. & P. 462.

⁹ *R. v. Knell*, 1 Barnard. 305.

¹⁰ 4 B. & Ald. 136.

¹¹ Id. 100.

cisions,¹ and the reasoning of the judges in that case has been said to be very unsatisfactory.² The opinion of Lord Camden has been cited as adverse to *Beare's case*, in his judgment given in *Entick v. Carrington*.³ And the silence of Comyns, C.B., who must have been fully aware of the case of *R. v. Beare*, has been relied upon as showing that he did not adopt the doctrine, that bare writing, without publication, is a crime.⁴ *R. v. Knell* has been said to fail in the proof required from it, because in that case the libel had been published afterwards, though not by the defendant, and perhaps the printer might have been considered in the light of an accessory to the publication.⁵ The opinion of Hawkins, in his definition of libel, has also been mentioned as unfavourable to the doctrine now under discussion.⁶ And Blackstone's sentiments have been referred to as hostile to this same doctrine.⁷

It is not very easy to predict the issue of a trial upon this point, although there is reason to believe that the inclination of the judges in *R. v. Burdett* was in favour of the decision in *R. v. Beare*, and therefore, friendly to the doctrine that writing without publication is a libel.⁸

Clearly, however, the clerk who draws an indictment, or the student who takes notes in court, cannot be drawn into jeopardy.⁹

However, the mere possession of a libel is not, under many circumstances, an offence. As if one should take a copy of the libel in order to ground ulterior proceedings. So where the defendant's lodgings were searched by virtue of an information, and two libels were found there, the opinion of the court was, that the defendant had not committed the crime charged against him, which was, that he had caused to be framed, printed, and published a scandalous libel. For the possession of a libel, and the non-delivery of it to a magistrate, were only punishable in the star chamber, unless there were a malicious publication, although in the case before us the defendant had not given any account of the libel.¹⁰

Possession, however, of a known libel is evidence of its being published by some one.¹¹ And, therefore, if a letter be written by A. to B. containing scandalous matter, A. is clearly a publisher of the libel.¹² So a count stating the possession of an obscene libel with intent to publish it was held bad.¹³

What shall be said to constitute the offence.] To read a libel is not a publication, nor to hear it read, nor to laugh at it when read,

¹ 3 B. & Ald. 719.

² Id. 720.

³ Id. 727, citing 19 St. T. 1072 (Howell).

⁴ Id.

⁵ Id. 728.

⁶ Id. 730, citing 1 Hawk. c. 73, s. 1.

⁷ 3 B. & Ald. 731.

⁸ See likewise *R. v. Fitton and another*, 2 Keb. 502.

⁹ 3 Campb. 212, Wood, B.; 2 Salk. 417, Holt, C. J.

¹⁰ Anon. 1 Ventr. 18. See 12 Mod. 220.

¹¹ 1 Hawk. c. 73, s. 13.

¹² 12 Rep. 35.

¹³ *R. v. Rosenstein*, 2 C. & P. 414.

but if the hearer or reader should repeat it in the hearing of others, or should read it aloud to others with a knowledge of its libellous character, he then becomes guilty of an unlawful publication. "For every one who shall be convicted ought to be contriver, procurer, or publisher, knowing it to be a libel."¹ Hawkins, however, doubts whether the repetition of a libel in merriment is not a publication, on the ground that jests are not to be endured, and that the injury to the reputation of the party grieved is in no way lessened by the merriment of him who makes so light of it.² And if the defendant be proved to have lent or shown the writing to another, he is guilty,³ unless he have done so by mistake.⁴ So if he publicly commend it.⁵ And it seems that there must be an openness or publicity in the transaction, which will not be satisfied by a private reading in the presence of a friend, although that is certainly a communication of the libel from A. to B.⁶ The plaintiff was made the subject of a caricature, and the evidence was that a witness went to the defendant's house to see the picture, when the defendant pointed out the figure of the plaintiff, together with that of other persons ridiculed. Lord Ellenborough held that this was not a publication.⁷ But where a libellous picture was publicly exhibited, Lord Ellenborough admitted the declarations of spectators with reference to particular figures to prove the resemblances of these figures to the parties libelled.⁸

Another ingredient necessary to constitute the offence of libel is the evil intention of the party. This is usually a matter of inference drawn from the libel itself.⁹ If in a public controversy where both parties publish matters concerning each other, one gets beyond the other in severity, saying, as to his opponent, that malice "overcame his sense of truth and honesty," the question of malice arises. Still these expressions, however rash, were only natural; they lost the malicious taint, and were privileged.¹⁰ And it is observable that the law will imply malice when the libel is without excuse. As where the defendant wrote, "It is with the deepest concern we have to state that the malady under which His Majesty labours is of an alarming description. *It is from authority we speak.*" The jury asked whether malicious intention was necessary to constitute a libel, and were answered by Abbott, C. J., that a man must be intended to do what his act is calculated to effect, upon which they pronounced a verdict of guilty, and the court upheld this ruling of the judge.¹¹

¹ *R. v. Lamb*, 9 Rep. 59. See 5 Mod. 165; 1 Hawk. c. 73, s. 13.

² 1 Hawk. c. 73, s. 14.

³ 1 Russ. C. M. 249.

⁴ 5 Mod. 167.

⁵ *R. v. Eades*, 2 Show. 468.

⁶ See 5 Mod. 165, in marg.

⁷ 3 Campb. 323.

⁸ 2 Campb. 512.

⁹ See in *R. v. Woodfall*, 5 Burr. 2667. *R. v. Topham*, 4 T. R. 126. *R. v. Burdett*, 4 B. & Ald. 95.

¹⁰ *Hibbs v. Wilkinson*, 1 Fost. & F. 608, Erle, J.

¹¹ *R. v. Harvey and another*, 2 B. & C. 257; S. C. 3 D. & Ry. 464. See 5 M. & Ry. 251.

Slander.] Next as to indictable slander.¹ It has been laid down that an action for slander may be maintained when the words impute to a man a crime for which he is punishable by law.² As that he has an infectious disorder; or when they speak offensively of him in his office, profession or business.³ But an indictment or information cannot be successfully prosecuted for words, unless they directly tend to a breach of the peace, as if they convey a challenge to fight.⁴ A magistrate may, indeed, bind over to the good behaviour a person who abuses him to his face whilst he is in the execution of his office, or he may commit him for contempt, but neither an indictment nor any other criminal proceeding can be enforced for mere words.⁵ And even where it is alleged that words import a challenge, or other breach of the peace, the matter must be very clear. The defendant said, "this is no justice of the peace's business, you shall not try this matter, have a care what you do, I have blood in me, if I had you in another place." He was convicted upon an indictment at the sessions, but upon arrest of judgment, the court said, that these words did not convey any necessary intendment of a challenge.⁶ And in another report of the same case,⁷ it is said that judgment was arrested for another reason,—because the indictment failed to allege the charge in respect of which the defendant spoke the words in the first instance, since it might not have been a matter within the jurisdiction of justices, and then it could not be a misdemeanor to speak in deprivation of an authority. Again: "your worship speaks to me here, but you dare not do so in another place." An indictment for these words was quashed on motion.⁸

A magistrate is not liable to punishment for words spoken in the execution of his office.⁹

Defences to libel and slander.] The law of libel has been materially changed by 6 & 7 Vict. c. 96.

By sect. 1, the offer of an apology is admissible in evidence in mitigation of damages.

By sect. 2, in actions against proprietors or publishers of newspapers, it may be pleaded that the insertion was made without malice and without gross negligence, and that they had published, or had offered to publish, a full apology. Also, the defendant

¹ Slander and defamation are the same. Therefore the court would not quash a writ *de ex cap.*, because the charge was in the disjunctive for "slander or defamation." *R. v. Kent*, W. Kel. 132.

² But not an indictment. *R. v. Cave*, 2 Ld. Raym. 857.

³ B. & C. 33; by Bayley, J., with reference to actions, which seem in this respect to correspond with indictments.

⁴ 2 Salk. 697; 3 Salk. 190. See

other instances, *Gregory v. Reg.* (in error), 15 Jur. 74.

⁵ See *post*, as to libels and slanders concerning magistrates.

⁶ *R. v. Nun*, 10 Mod. 186.

⁷ Gilb. Rep. 36, 40.

⁸ *R. v. Walden*, 12 Mod. 414.

⁹ *R. v. Skinner*, Lofft. 55. But the court will censure any intemperate language which he may happen to make use of in answering a criminal information. *R. v. Burn*, 7 Ad. & El. 190.

may pay into court a sum of money by way of amends for the injury sustained.

By sect. 3, to publish or threaten to publish any libel, or propose to abstain from printing, &c., or directly or indirectly to offer to prevent publication of a libel with a view to extort, or to obtain any office of profit or trust, is punishable with imprisonment, with or without hard labour, not exceeding three years. But the law concerning threatening letters, or writings, is left unaltered. The evidence was that an information would be laid against the prosecutor for an offence against the post-horse duties; that the defendants could and would prevent it upon payment of so much money. This evidence was held insufficient to warrant a conviction under the section.¹

By sect. 4, if any person shall publish any defamatory libel knowing it to be false, he shall suffer imprisonment not exceeding two years, and may also be fined at the discretion of the court.

And if the knowledge of falsehood be not charged, but yet if such a libel should appear, the punishments by sect. 5 shall be fine or imprisonment, or both, the imprisonment not to exceed one year.

By sect. 6, the truth of the matters charged may be inquired into, but they shall not serve as a defence unless their publication were for the public benefit. And the defendant must, in that case, plead his justification and the matter of public benefit, and why beneficial. Upon this the prosecutor may reply generally. Then, upon conviction, the court may take into consideration whether the defendant's guilt were aggravated or mitigated by his plea. Then follow provisos that without such plea the truth of the matters cannot be inquired into; that the defendant may plead not guilty in addition, and that nothing shall prejudice any defence under his plea of not guilty, which may now be made in any action, or upon any indictment or information for defamatory words or libel.

By sect. 7, the defendant may, in the case of a publication by an agent, prove that it was so made without his authority, and not for want of due care and caution on his part.

The 8th section gives the defendant costs upon an acquittal for a private libel.²

And by 8 & 9 Vict. c. 75, s. 2, every plea filed under the 2nd section, above mentioned, without payment of amends into court, shall be deemed a nullity.

Ignorance.] Ignorance is no answer, for it is the duty of every man to be cognizant of the law. And if a printer should think fit to suffer a paper to proceed from his press, he must take the responsibility of its contents.³ So, if the libel should come from a bookseller's shop, although there be no proof of privity, knowledge, consent, approbation, or *malus animus* in the bookseller, the evidence against him is conclusive.⁴ As if a servant should sell it.⁵

¹ *R. v. Yates*, 6 Cox, 441.

⁴ *R. v. Almon*, 5 Burr. 2686.

² Scotland is excluded: sect. 10.

⁵ *R. v. Dodd*, 2 Sess. Ca. 33.

³ *Lofft*. 544, 780.

For "nothing could be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher, would make him safe in dispersing them."¹ It is, indeed, said that one of the ingredients of libel is the publication of it knowing it to be a libel, but the law must, of necessity, presume that knowledge on the part of the master, where a libellous paper issues forth at the hands of his servant. Although it may be added, that this liability extends only to transactions in the way of trade. So that, where a customer sent back a bill which had been made out by the defendant's daughter, who returned it with a letter in which the supposed libel was contained, the court would not set aside a nonsuit which the judge had directed. The matter did not happen in the regular course of trade, and this writing could not be considered as coming within the scope of the defendant's authority delegated to his daughter, which was to write bills, and not libels.² There may be grounds for extenuation in a case of ignorance, but if a master so little attends to the conduct of his apprentice or servant, as to become, however innocently, the depository of a libel, he must, according to law, bear his share of the consequences. The rule is exactly the same with regard to the proprietorship of a newspaper. It had been, in the time of Lord Kenyon, the old and received law for above a century, and it was held, therefore, to be no answer to a criminal information, that the publication of a newspaper was entirely conducted by the servants of the defendant.³ So, where a proprietor of the "Morning Journal" lived at a distance of 100 miles from London, and took no part in the publication of the newspaper, and was in fact confined to his house by illness when the paper complained of appeared, Lord Tenterden held him criminally answerable, and he was found guilty together with others.⁴ If, indeed, a party were shut up in close custody, so that he could not possibly investigate the conduct of his servants, it might, indeed, be matter of justification.⁵

Another ground for appealing to the court is, that the author is prepared to give himself up in that character. This is not necessarily a discharge of the printer and publisher, but it will weigh with the court. Therefore, where an attachment was moved for against the publisher of a libel, upon his showing a letter, whereby it appeared that one M. was the author, time was given him to

¹ 1 Hawk. c. 73, s. 10. *R. v. Nutt*, 1 Barnard. 306; Fitzg. 47, where the attorney-general is said to have declined, under similar circumstances, to accept a special verdict. *R. v. Strahan*, 5 Burr. 2689, cited by Aston, J.; also *Moo. & M.* 436.

² *Harding v. Greening*, 8 Taunt. 42.

³ *R. v. Walter*, 3 Esp. 21.

R. v. Cuthell, M. & M. 435. *R. v. Williams*, Lofft. 759.

⁴ *R. v. Gutch and others*, Moo. & M. 433. But he was discharged upon his own recognizance. *Id.* 438. Ignorance may be a ground for mitigating the punishment. *R. v. Williams*, Lofft. 759.

⁵ *R. v. Woodfall*, Lofft. 780; 1 Hawk. c. 73, s. 10, n.

make out the proof. And upon the appearance and confession of the author, the rule against the publisher, with whom the printer was joined, was discharged.¹ But it is no defence that there are additions to the alleged facts which the person who requested another to write the libel has communicated, especially when the defendant has expressed his approbation of it.²

Former publications.] Neither can the impunity of other publishers of the same libel be relied upon as matter of defence. It was suggested on the behalf of a defendant that persons had published a paper ten years ago, similar to that which was the subject of the prosecution; but the opinion of Lord Kenyon, C. J., and Ashhurst, J., were unfavourable to the objection, whilst Buller and Grose, JJ., thought they could not entertain it at all, because it did not appear upon the judge's report.³ The defendant received sentence of fine and imprisonment.⁴ And by Lord Kenyon, "the consequence of admitting that evidence would have been, that these persons, who were not only not called upon, but could not have had any opportunity to defend themselves against this charge, might have been pronounced to be guilty."⁵

Truth of libel.] Neither is the alleged truth of the libel any defence to an indictment or information, notwithstanding 6 & 7 Vict. c. 96; for the greater appearance there is of truth in any malicious invective, so much the more provoking it is.⁶ Unless, indeed, the writing be pleaded, and proved to be under sect. 6 a public benefit. So that whether the party libelled be a person of good or ill fame is quite immaterial.⁷ There are, in fact, but two questions in general for the consideration of the jury. 1st, whether the defendant has published the libel; 2ndly, whether the innuendoes be true.⁸ The opinion of the House of Lords upon the passing of the Libel Bill, was decidedly adverse to the reception of truth as a defence.⁹ And where the defendant wished to show in

¹ *R. v. Wiatt*, 8 Mod. 123. Where the author confessed the libel, "*errors of the press and some small variations excepted*," Pratt, C. J., admitted the evidence, saying, that he should put it upon the defendant to show that there were material variations. *R. v. Hall*, 1 Str. 416.

² *R. v. Cooper*, 1 Cox, 266.

³ But both Buller and Grose, JJ. were manifestly hostile to the objection, so that it may fairly be said to have been overruled by the full court.

⁴ *R. v. Holt*, 5 T. R. 436.

⁵ T. R. 433. So was *R. v. Dr. Newman*, Dears. 85, 98; 22 L. J.

Q. B. 156; 1 El. & Bl. 268, under 6 & 7 Vict. c. 96, s. 6.

⁶ 1 Hawk. c. 73, s. 6.

⁷ 5 Rep. 125; Hob. 253.

⁸ *R. v. The Dean of St. Asaph*, 3 T. R. 428, n. by Ld. Mansfield; 4 Doug. 73. *R. v. Withers*, 3 T. R. 428, by Ld. Kenyon. This defendant, who attempted to excuse himself on the ground of his having been told that the composition in question was libellous, and of his having published it in order to negative the assertion of libel, was held to have aggravated rather than mitigated his guilt. *R. v. Shipley*, 4 Dougl. 73.

⁹ See 4 B. & Ald. 182.

answer to an indictment for libel, that some of the king's subjects had been killed and wounded by the dragoons in a conflict at Manchester, the bench were unanimous in their judgment that evidence of that nature was properly rejected.¹ And Abbott, C. J., mentioned the case of *R. v. Horne*, where Lord Mansfield allowed the defendant to call witnesses, as affording no ground for continuing such a course,² but, on the contrary, said the chief justice, "such an instance can, in my opinion, be of no avail against the current of prior and subsequent practice."³

But it is observable, that although the tender of the truth of allegations would not answer an indictment or information, it would be a ground for refusing an information, and leaving the party to his remedy by indictment, that the charges in the libel are not denied.⁴ So that it was customary, upon moving for a criminal information, to produce an affidavit repelling upon oath the truth of the imputations.

It seems that the repetition of oral slander is not justifiable, unless there be some good and reasonable cause for so doing, and, *à fortiori*, not so, if the repeating proceed from a bad motive.⁵ And even if the name of the author be communicated at the time, the party is still without excuse, unless he have a good ground for reiterating the matter in question.⁶ And in this sense, with this qualification, the passage in Lord Coke should be understood where he says, that one may justify slander, by revealing the name of the original calumniator.⁷

Again, irony is no defence. It is sufficient to say upon this point, that ironical observations of any description will not guard the offender from the consequences of his slanderous disguise. As if one who is known to be a statesman, but no soldier, should be held up as worthy of imitation for his courage, or an officer for his learning, or any other quality in precise opposition to the requisites of a soldier.⁸ If the defendant do not mean to scandalize the prosecutor by his irony, he should show it at the trial.⁹ For if this were not a crime, the defendant might, by contraries, libel any person without punishment.¹⁰ So, where the defendant said of one H., that he would not play the Jew nor the hypocrite, it was considered to mean an ironical imputation of vain glory against H., and the offender was fined 500*l*.¹¹ So, to sing songs from a paper jestingly, to the discredit of the prosecutor's children, is slanderous, and punishable as a libel.¹² So a libel may be published by asking questions.¹³

¹ *R. v. Burdett*, 4 B. & Ald. 95; Id. 314. See 2 M. & Ry. 152.

² 4 B. & Ald. 182.

³ Id.

⁴ *R. v. Bickerton*, 1 Str. 498.

⁵ See 4 B. & Ald. 614, 615.

⁶ Id. 615, by Holroyd, J.

⁷ 12 Rep. 134; 4 B. & Ald. 614, by Holroyd, J.

⁸ See 1 Hawk. c. 73, s. 4.

⁹ *R. v. Dr. Brown*, 11 Mod. 86; The defendant gave every lord a character ironically.

¹⁰ Holt's Ca. 425, by Holt, C. J.

¹¹ *R. v. Hicks*, Hob. 215. See 2 Str. 898.

¹² *R. v. Benfield and another*, 2 Burr. 980.

¹³ *R. v. Gathercole*, 2 Lew. C. C. 255.

There are, however, some circumstances which will justify a person in doing that which, strictly speaking, is in law the publication of a libel. As if A. should deliver a libel by mistake out of his study, not having written it, but merely endowed with the possession of it.¹ So if A. should deliver a letter without a knowledge of its contents, or deliver one paper instead of another.² But it lies upon the defendant to prove these facts to the satisfaction of the jury.

Proceedings.] The most open form of proceeding in cases of criminal prosecutions for libel is by indictment. That course is free to all the king's subjects. Another remedy is by information.³ But in this case it is customary for the court to require the prosecutor to deny upon oath the matter of the libel. So that where it was imputed to an apothecary that he had personated Dr. C., a physician, and had written, and taken his fee, Pratt, C. J., said that although truth was no justification, yet that as the apothecary did not pretend to deny this fact, there was sufficient cause to prevent the interposition of the court in an extraordinary manner, and the rule was discharged.⁴ And if the court should see cause for believing that the charge in question is true, they will probably abstain from granting the extraordinary remedy.⁵ But there are certain circumstances which form an exception to a rule otherwise invariable, and which the court will not depart from without much reason. As if the person libelled should live abroad at a great distance.⁶ Or if the imputation should be general,⁷ or charge treasonable practices and designs against the prosecutor. As where the Duke of Richmond was represented as having opposed in his speeches in parliament any increase of the military strength of the kingdom, for the purpose of advancing the interests of France. In this case the court hesitated very much, and the matter was very fully discussed. The duke only swore that he believed himself to be the person meant in the libel, and that it contained false, scandalous, and malicious aspersions and insinuations against him, but did not deny specifically the charges. The rule was made absolute.⁸ So, where it was said that the Duke of Athol and his family were held in such general abhorrence in the Isle of Man that if he should succeed in obtaining an Act then pending in parliament, a revolt would be occasioned, the court held that no affi-

¹ 5 Mod. 167.

² *R. v. Nutt*, 4 T. R. 127, cited by Lord Kenyon.

³ It will not be granted for a libel concerning disputed matters in trade. *R. v. Roberts*, 1 Barnard. 90. But in a case of a charge of felony it was granted. *R. v. Lofeild*, 2 Barnard. 128. See also *Id.* 84.

⁴ *R. v. Bickerton*, 1 Str. 498. *R. v. Beharrel*, cited in marg.

R. v. Miles, Dougl. 284. See *Id.* 387 (a) for other cases; also *R. v. Webster*, 3 T. R. 388; 1 Hawk. c. 73, s. 6, n.; *R. v. Taylor*, 1 Jurist, 53; *R. v. Wright*, 2 Ch. Rep. 162.

⁵ *R. v. Draper*, 3 Smith, 396.

⁶ 1 Dougl. 389.

⁷ *Id.* 390.

⁸ *R. v. Haswell*, *Id.* 387.

davit from the duke was necessary.¹ So in the case of a letter imputing unnatural practices, although the complainant did not positively swear to his innocence.² The court will refuse an information if it appear that slanderous words concerning the defendant have been used in the affidavit.³

An attachment for libel likewise has been granted.⁴

The rule for a criminal information in a case of libel must be moved for before the expiration of the second term after the publication, and within a reasonable time during the term, so that cause may be shown within that term. But the prosecutor may say that he had not knowledge of the libel so as to enable him to make an earlier application.⁵ It was held too late in a matter concerning the vindication of character to apply in January respecting a libel published in May, the person libelled not having spoken to the publisher about the matter till November, although he was aware of the libel in July.⁶

A rule for a criminal information for libel being enlarged on condition of the defendant pleading immediately in the event of its being made absolute, the defendant was deemed to be entitled to reasonable time for that purpose.⁷ The court will not restrain a proceeding by indictment because an information is pending for the same libel. Every copy of a libel, when published, subjects the defendant, in strictness, to a distinct prosecution.⁸

Surety for the peace or good behaviour may likewise be required in some cases, especially where the libel has a tendency to disturb the peace. But a justice must be careful, for if he acts too hastily, he may be found wanting in discretion, although he may escape the consequences of the action.⁹

Indictment.] We shall not attempt to go through the various indictments for libel. The common count charges that A. B. contriving to injure the reputation of C. D. and bring him into ridicule, with force and arms, and of malice, did unlawfully write¹⁰ a certain libel of and concerning C. D., containing the false, scandalous, malicious, and defamatory words and matter following.

¹ *R. v. Haswell*, Dougl. 391, n.

² *R. v. Dennison*, Loft. 148.

³ *R. v. Byrne*, 2 Nev. & P. 152; 7 Ad. & El. 190. And again, if a publication be not sworn to, although the affidavits on the other side admit the publication. *R. v. Baldwin*, 3 Nev. & P. 342, where a statement that the defendant did print and insert a libel in a certain newspaper, a copy of which is annexed, was held insufficient for this purpose. 8 Ad. & El. 168.

⁴ *R. v. Wiatt*, 8 Mod. 123.

⁵ *R. v. Jollie*, 1 Nev. & M. 483;

S. C. 4 B. & Adol. 867. See *R. v. Hartley*, Id. 869, n.

⁶ *R. v. Murray*, 1 Jurist, 37.

⁷ *R. v. Muntz*, 2 Jurist, 538.

⁸ *R. v. Carlisle*, 1 Ch. Rep. 451. An affidavit relating to several indictments must have as many stamps as there are cases to which the affidavit applies. S. C.

⁹ *Haylock v. Sparke*, 1 El. & Bl. 471; 22 L. J. M. C. 77.

¹⁰ It must not be said "or cause to be written." *R. v. Brereton*, 8 Mod. 330.

[Here the libel is accurately set out with innuendoes if necessary,¹ which said libel A. B. afterwards sent to one E. F., to the great damage and disgrace of C. D., and against the peace, &c.]

The words "with force and arms" were not necessary,² nor needs the libel to be called false, for the falsehood need not be proved.³ But the words, "of and concerning," cannot be set aside. An indictment charged the defendants with libelling the mayor of Colchester, and the essence of the writing was, that the mayor had practised corruption in granting a licence to retail beer. It was said in the prefatory part that the defendants intended to vilify the mayor, and the innuendoes applied the various portions of the libel to the prosecutor, and concluded to the injury and disgrace of the mayor, &c., but the count neglected to state that the publication was *of and concerning* the said mayor. It was moved to arrest the judgment upon the authority of *R. v. Alderton*,⁴ where it had been held that the innuendoes could not supply the want of the averment that the libel had been published of and concerning the prosecutors in that case. And a case in Strange was cited where a similar decision had taken place in the case of an action.⁵ And the court made the rule absolute, Lord Ellenborough observing that *R. v. Alderton* contained everything except the material words, "of and concerning."⁶ But having placed the words "of and concerning" on the record, the prosecutor will not fail if he does not express all his innuendoes in the most certain manner. As where the defendant was charged with having libelled certain troops, and the only innuendo was applied to the word "dragoons," meaning the said troops,—it was held sufficient without defining more particularly what troops were meant. So the court will expound a libel laid to have been published of and concerning the government, in its plain and ordinary sense, although it be not expressly averred that any act referred to was done by the government or its order.⁷ And "of and concerning" is a sufficient averment that "a false and scandalous libel was published of and concerning His Majesty's government and the employment of his troops," without any further allegations as to the subject matter by way of innuendo or otherwise.⁸

The libel itself must be accurately set forth, and it seems that there are two ways of doing this. One by the tenor, in which the pleader undertakes to set out the words with the greatest precision,

¹ But the technical expressions, "in these words," are not necessary, *R. v. Browne*, 1 Freem. 524; see *Id.* 456. Part of the libel may be set out without the residue.

² *R. v. Burks*, 7 T. R. 4, where several cases were referred to in which *vi et armis* had been omitted. Trem. 61; *R. v. Tutchin*, 2 Show. 468; 5 St. Tr. 527, &c.

³ 7 T. R. *ut supra*.

⁴ Say. Rep. 280; S. C. cited more correctly by De Grey, C. J.; Cowp. 686.

⁵ 2 Str. 934.

⁶ *R. v. Marsden*, 4 M. & S. 164.

⁷ *R. v. Burdett*, 4 B. & Ald. 314.

⁸ *R. v. Horne*, Cowp. 672. See also *Horne v. R.* (in error). 4 Bro. P. C. 368. See also *Gregory v. Reg.* (in error), 15 Jurist, 74.

and the libel given in evidence must agree exactly with that set out in the information; the other, by stating that the defendant made a writing containing, *inter alia*,¹ the words set out, in which case it would be necessary to set out those only which are material, and a variance would not be fatal unless the sense were altered.² In this manner we must understand, as Mr. Starkie expresses himself, the meaning of Lord Holt, where he says, that if a libel be described by its sense, exactness in words is not so material,³ and not that it is unnecessary to state the words themselves.⁴ Therefore, although, "according to the tenor and effect following" will be sufficient; to say—"according to the effect," without more, would not be good, for the court must judge of the words themselves, and not of the construction which the prosecutor puts upon them.⁵ Therefore, where the libel was recited with the word *nor* instead of *not*, the indictment was held faulty.⁶ But a single letter wrongly inserted or omitted, and which does not alter the sense, will not vitiate.⁷ Thus, an indictment for libel so far differs from one prosecuted for slander, inasmuch as words cannot be set out according to their tenor, there being no original to copy from. Words are transient, and vanish in the air as soon as spoken, and therefore an identity is not required;⁸ but nevertheless, this sentence must be understood with the qualification, that certain of the words spoken must be proved and found.⁹ Thus, when the defendant was indicted for speaking ill words to a justice, and obstructing him in the execution of his office, the count was held bad for want of adding what the words were,¹⁰ or how he was obstructed.¹¹ And it seems, moreover, that the charge could not have been sustained unless the slander tended to a breach of the peace.¹² So where the indictment charged that the defendant had said, *he* is a broken-down justice, a perjured justice, &c., but the proof was that the defendant said, "*You* are a broken-down justice," &c., the court gave judgment for the defendant, although Lord Kenyon had held at the trial that it was sufficient to prove the substance of the words. And Buller, J., added, that though there was a case in *Strange* in support of his lordship's opinion, it had been overruled in Lord Mansfield's time, and that he himself had known a variety of nonsuits upon the same objection.¹³ So, where a libel

¹ Where the term "*inter alia*" was used, but the whole libel was set out except "*finis*," the court would not arrest the judgment, saying that the time for taking advantage of the objection, if, indeed, it were at all available, was at the trial. *R. v. Johnson*, 2 Show. 488.

² Stark. Cr. P. 127.

³ 2 Salk. 661.

⁴ Stark. Cr. P. *ut supra*.

⁵ *R. v. Bear*, 2 Salk. 417; 1 Ld. Raym. 415, citing *R. v. Fuller*,

R. v. Young, and *Ford v. Bennet*, to the same effect. *R. v. Sacheverell*, 9 Ann. Stark. C. P. 124.

⁶ *R. v. Drake*, 1 Salk. 660; S. C. 3 Salk. 224; S. C. Holt's Ca. 348, 425.

⁷ Stark. C. P. 132.

⁸ 3 Salk. 225.

⁹ 2 Salk. 661.

¹⁰ *R. v. How*, 2 Str. 699.

¹¹ S. C. 2 Sess. Ca. 31.

¹² *Ante*.

¹³ *R. v. Berry*, 4 T. R. 217.

began, "my sarcastic friend ΜΩΡΟΣ"—and the count omitted the word ΜΩΡΟΣ, it was held defective.¹ So where a libel in a foreign language was translated, instead of being set forth in the original, the court arrested the judgment.²

These observations, however, upon the indictment in cases of libel are not inconsistent with the rule that no more of the writing or of words need be set out than will make the charge good.³ If the defendant would rely on other passages of the publication in order to qualify it, it is for him to do so by his own evidence, and this brings us to consider the mode of introducing two different passages in the same count. This may be done by saying, "In a certain part of the said libel there was and is contained," &c., and "in a certain other part of which said libel there was and is contained," &c.⁴ It is unsafe to depart from such a form as the above, for if passages not continuous in the original libel are set forth continuously in pleading, it is at the peril of the prosecutor, since any alteration of the sense would produce an acquittal.⁵ If the libellous quality of the writing be derived from circumstances extrinsic of the words, the extrinsic facts with reference to which the writing becomes criminal should first be stated. There should then be an averment that the libel relates to these facts, and lastly, innuendoes should be introduced, connecting such parts of the libel as require explanation with the introductory facts previously exhibited upon the record.⁶ So that where proper innuendoes are introduced, the defendant may be convicted of libel although he should not have expressed himself distinctly as to the persons libelled. Thus, by the word "bishops," the bishops of England were understood,⁷ and by "ministers," the ministers of the king of England,⁸ and by certain feigned names members of the royal family may be designated.⁹ The pretender was considered to be pointed at under the appellation of the "little gentleman on the other side of the water."¹⁰ So the "young Sophi,"¹¹ or the "chevalier."¹² So the "navy" was construed to mean the "royal navy," by means of an innuendo.¹³

In setting out the intent, care must be taken to make it consonant with common sense. It is reasonable to suppose that a libel directed to C. concerning B. might bring B. into discredit, but to

¹ *Tabart v. Tipper*, 1 Campb. 353, *cor.* Lord Ellenborough.

² 6 T. R. 162. See also *R. v. Peltier*, Holt, Libel, 78.

³ See Cro. Jac. 407; 8 Mod. 330; Stark. Cr. P. 129, 131.

⁴ See 1 Campb. 353, by Lord Ellenborough.

⁵ *Id.*

⁶ Stark. Cr. P. 132; Cowp. 684, by De Grey, C. J. See also 8 East, 427; Stark. C. P. 134, 135.

⁷ *R. v. Baxter*, 3 Mod. 69.

⁸ Stark. C. P. 136.

⁹ *R. v. Clerk*, 1 Barnard. K. B. 304.

¹⁰ *Anon.* 11 Mod. 99; "Innuendo the Prince of Wales," Holt, C. J., thought the meaning clear without the help of this innuendo. *Id.*

¹¹ 1 Barnard. *ut supra*.

¹² *R. v. Mathews*, 9 St. Tr. 679.

¹³ Stark. Cr. P. 137, citing 5 St. Tr. 528.

send a writing to B. himself may not always have that result. Therefore, where the defendant was charged with sending a libel to the prosecutor with intent to injure him in his profession of solicitor, Abbott, J., held that the indictment could not be supported. The intention might have been laid to provoke the prosecutor, and excite him to break the peace, but the libel sent, as this had been, direct to the prosecutor, could not have the effect of disparaging him as a professional man in the eyes of the world, who knew nothing of the publication.¹ Where, however, the letter, on the face of it, denotes a tendency to break the peace, the mere sending is a publication.² The learned judge also said, that where a libel is sent to the wife, it ought to be alleged as sent with intent to disturb the domestic harmony of the parties.³

Where an indictment concluded *in malum exemplum inhabitantium*, it was adjudged ill.⁴

Evidence.] We have seen, that two material points are in issue, the publication, and the truth of the innuendoes.⁵ If it be designed to charge the publication of a libellous letter to an individual, proof should be given of the delivery of the letter to the prosecutor.⁶ If there be a difficulty as to the handwriting, persons cognizant of the hand of the writer should be brought forward. But it is not competent to compare the libel in question with other writings supposed to have been the work of the same person. Comparison of hands is not evidence, although an individual accustomed to penmanship may be called for the prosecution to show that the paper tendered in evidence was the production of a feigned hand.⁷ However, letters may be read in explanation of other writings without proof of handwriting. As where the charge was for publishing a libellous placard: the prosecutor had received anonymous letters, and the placard was published concerning them. It was asked in this placard, whether the prosecutor had not received warning, and he understood that to refer to the letters, and said, he should not have understood the placard but for the letters. Upon this they were allowed to be read as above stated.⁸ Proof of the delivery of a sealed letter is evidence of publication, other circumstances being brought home to the writer, although the letter be opened in another county than that wherein it was originally delivered.⁹ So, where a libel in the defendant's handwriting was duly traced by the post from London to Scotland, and was produced at the trial with the proper post marks and the seal broken, it was held evidence of publication.¹⁰ So,

¹ *R. v. Wegener*, 2 Stark. 245.

² *R. v. Brooke*, 7 Cox, 251.

³ 2 Stark. *ut supra*.

⁴ *R. v. Baker*, 1 Mod. 35.

⁵ *R. v. Withers*, see 3 T. R. 428.

⁶ See *R. v. Sir B. Hicks*, Poph. 139. *R. v. Summers and another*,

1 Lev. 139. *Phillips v. Jansen*,

2 Esp. 624; 1 Hawk. c. 73, s. 11.

⁷ *R. v. Cator*, 4 Esp. 117.

⁸ *R. v. Fane*, 5 C. & P. 213.

⁹ *R. v. Burdett*, 4 B. & Ald. 95. See also *R. v. Johnson*, 7 East, 65, and *post*.

¹⁰ *Warren v. Warren*, 1 Cr. M. & R. 250.

where the defendant directed a letter to Berkshire, which the prosecutor received in Middlesex, the court held the publication sufficient, for the defendant having once put the paper into circulation must be taken to have published it in that place in which it was delivered to the person to whom it was addressed.¹ But the Islington twopenny-post mark was held insufficient to prove that the letter had been put into the post in Middlesex, because the post mark might have been forged.²

Proof that a libel has been stolen seems to be no evidence of publication.³

What a person said at a meeting nearly a year before the publishing of the supposed libel was not allowed to be asked in cross-examination.⁴ A. and B. were indicted separately for publishing the same libel; by consent, the evidence on A.'s trial was read over on B.'s trial from the judge's notes, B. being allowed to cross-examine the witnesses.⁵ It is a sufficient publication to send a letter to a wife accusing her husband of felony, and threatening to expose him if he did not return certain goods.⁶

Where the libel complained of has been published in a newspaper, the statute 6 & 7 Will. 4, c. 76, must be consulted in order to facilitate the mode of proceeding against the offender. By sect. 6 of that Act, no person shall print or publish, nor cause, &c. any newspaper before there shall be delivered to the commissioners of stamps and taxes, or to the proper officer at the head office for stamps in Westminster, Edinburgh, or Dublin respectively, or to the distributor of stamps or other proper officer appointed by the said commissioners for the purpose in the district where the newspaper is intended to be published, a declaration by the proprietor, setting forth the correct title of the newspaper, and of the printing house thereof, and likewise of the house where it is intended to be published, together with the true name, addition, and place of abode of the printer, publisher and proprietor, whether such proprietor be resident here or abroad. Should there be more than two proprietors, exclusively of the printer and publisher, the names, &c. of two resident proprietors, whose interests shall not be respectively less than those of any other resident proprietor, together with the amount of their interests, must be inserted, and such declaration shall be signed by the printer and publisher, and by all the proprietors resident in the kingdom. A fresh declaration must be made whenever the proprietorship of the newspaper becomes changed so as to alter the proportionate amount of the shares; or whenever any change takes place with respect to the

¹ *R. v. Watson*, 1 Campb. 215.

² *R. v. Watson*, 1 Campb. 215. See, however, *R. v. Plummer*, Russ. & Ry. 264. And it was clearly held in the case just cited, that the words "post paid, 2s." were not evidence of there being an inclosure.

³ 3 Ch. Burn. 730. Carrying a libel to the printer seems, under some circumstances, to be no publication. *R. v. Eden*, Loft. 72.

⁴ *R. v. Collins*, 9 C. & P. 456.

⁵ *R. v. Lovett*, Id. 462.

⁶ *Wenman v. Ash*, 22 L. J. M. C. 199.

printer, publisher, or proprietor; or whenever the title of the paper is altered, or the printing office or place of publication; or whenever such commissioners as aforesaid shall require such a declaration to be made, signed, and delivered, after due notice to the printer, publisher, or proprietors, or at the place of printing or publication; and such declaration may be made before any commissioner or officer of stamp duties, or other person appointed by the commissioners, who are authorized to receive such declaration. To make a false declaration is a misdemeanor. By sect. 7, a penalty of 50*l.* is imposed for a default in not making the declaration above required. The 8th section directs, that the declaration shall be filed, and that a certified copy shall be admitted as conclusive evidence against the parties who have made it, unless it be proved that any such person became lunatic, or had signed a declaration of his having ceased to be the printer, publisher, or a proprietor of the newspaper, or that there had been a new declaration, in which the person sought to be affected on such trial did not join. The commissioners are to deliver the certified copies, and after the production of the declaration so certified together with a newspaper entitled in accordance with such declaration, it shall not be necessary to prove a purchase of such newspaper. The penalty for a false certificate, by whomsoever given, is 100*l.* By sect. 9, service of process at the printing or publishing office shall be deemed good service against any person named in the declaration as printer, publisher, or proprietor. Sect. 10 directs that the titles of newspapers shall be entered in a book, to which all persons may have gratuitous access. Sect. 12 contains a proviso exempting the printers and publishers of the London and Dublin Gazettes from making the declaration alluded to. Sect. 13 ordains, that copies of newspapers, signed by the printer or publisher, together with the place of abode of the printer or publisher, shall be delivered to the commissioners of stamps, under a penalty of 20*l.*; and that such copies shall be evidence against the printer, publisher, or proprietor, if applied for within two years after the publication.¹

This statute supersedes the 38 Geo. 3, c. 78, which was repealed by it. Under that Act of Geo. 3 it was held, that it ought to have appeared upon the affidavit that the distributor had authority from the commissioners to take it, and, in default of that proof, Lord Ellenborough required evidence *aliunde*.² And it should seem

¹ As to what shall be called a newspaper, see schedule A. of the Act. And note, that so much of the Act 60 Geo. 3 and 1 Geo. 4, c. 9, is repealed by this statute as subjects any newspaper, or other paper or pamphlet, to any stamp duty. As to the duties on pamphlets, not being newspapers, see sect. 21 of 6 & 7 Will. 4, c. 76. And as to the partial repeal of the schedule

in 6 & 7 Will. 4, c. 76, see 16 & 17 Vict. c. 71. See also 11 Geo. 4 and 1 Will. 4, c. 73, ss. 2, 3. The bond given at the Stamp Office for the payment of duties, was formerly the usual evidence of publication. See *R. v. Topham*, 4 T. R. 126. Then followed the stat. 38 Geo. 3, c. 78, requiring an affidavit, which is now exchanged for a declaration.

² *R. v. White*, 3 Campb. 100.

that similar testimony should be ready to authenticate the declaration necessary under 6 & 7 Will. 4, c. 76. It should, however, be remembered, that if it be not competent to prove the publication under the statute, the prosecutor may resort to the common law, for the Act was only passed to facilitate conviction, not to shut out any other mode of proceeding. Therefore, in default of a certified copy, the original declaration, signed by the defendant, and stating him to be printer, publisher, or proprietor, may, it seems, be tendered, together with a copy of the newspaper in question, purchased or otherwise duly obtained.¹

It is no objection to urge that the particular copy offered in evidence has never been published. Though not stamped according to the Act of parliament, the paper may be produced. The publisher, indeed, would be liable to a penalty, but the newspaper is not the less receivable in proof of a libel.²

It may be added, that in a late case before the new Act, the rule adopted in actions was held applicable to criminal informations;—that upon the production of the Stamp Office affidavit,³ the newspaper, if corresponding with it in title and in the name of the printer and publisher and place of publication, might be read in evidence as published by the parties named therein, without further proof.⁴

Where the place of printing was called Union Street, Castle Street, in the affidavit, and Union Buildings, John Street, in the newspaper, the court would not allow the rule to be enlarged in order to show by supplemental affidavits that the places were identical. The court, moreover, will take notice of this correspondence and connection, although the paper be not annexed to nor expressly identified by any affidavit.⁵

The identity of the newspaper must appear. Therefore, unless the rule be drawn up on reading the newspaper, and unless the newspaper be filed, the court will discharge the rule for an information, although it may have been duly granted upon the production of a certified copy from the Stamp Office.⁶

The delivery of a newspaper containing the libel to the officer of the Stamp Office is of itself a publication; for the officer would, at all events, himself have an opportunity of reading the libel. A rule for a new trial was, therefore, refused.⁷

Thus far concerning the evidence required to prove libels conveyed through letters and newspapers. The particular proofs demanded respectively for the conviction of different offenders vary in each case, and, perhaps, cannot be said to fall within the scope

¹ *R. v. White*, 3 Campb. 100.

² *R. v. Pearce*, Peake, N. P. C. 75.

³ And now in the declaration.

⁴ *R. v. Donnison and another*, 4 B. & Adol. 698.

⁵ *R. v. Franceys*, 2 Ad. & El.

49; 4 Nev. & M. 251. The rule affects the proprietor or publisher only.

⁶ *R. v. Woolmer and another*, 4 P. & Dav. 137.

⁷ *R. v. Amphlett*, 4 B. & C. 35;

6 D. & Ry. 125.

of a work not especially dedicated to evidence, or to the consideration of the subject of libel. Some passages, however, in the progress of a criminal prosecution for this misdemeanor may, nevertheless, be useful and interesting. As, where the libel had reference to riot and outrages upon property, boasting that one Gen. Ludd had done much in Nottingham and the neighbourhood, &c. In this case the king's proclamation was admitted to show that deeds of violence had been perpetrated in certain districts, and the court considered the evidence quite proper, the document referred to being an act of state. The preambles to two Acts of parliament reciting those outrages and proposing to remedy them, were likewise received with equal approbation. And it was also held, that proof of the name of Gen. Ludd, being that of a fictitious person, was sufficient to sustain an averment that the outrages in question had taken place under the direction of a supposed and unknown person.¹ So a Gazette is evidence to show that certain addresses have been presented to the king, and an averment to that effect is supported by that proof.² But depositions taken before a magistrate in the absence of the defendant, cannot be permitted to be read upon the trial of the party for the misdemeanor, for he could not avail himself of the privilege of cross-examination.³

The libel itself must be produced and read, and if the defendant published it by exhibiting its contents, and then returning it to his own custody, parole evidence may be given of it upon his refusal to deliver it up for the purposes of evidence.⁴ And for the purpose of corroboration, other libels, written by the same person, upon the same subject, may be received in evidence.⁵

Should it be impossible to understand a libel without reference to other papers, those other papers may be read for the prosecution, and without proof of the handwriting.⁶

The defendant asked an editor to show up K., and he afterwards remarked on the story, and expressed his approbation of the article when it came out. This was held sufficient evidence

¹ *R. v. Sutton*, 4 M. & S. 532. In, and in the neighbourhood of N., were held, in this case, to be divisible averments, so that there was no need of proof that the outrages were committed both *in* and *in the neighbourhood*, and a distance of 14 or 15 miles would satisfy the word "neighbourhood." The judge also said, that the jury were at liberty to refer to their own personal knowledge if they saw any of those acts committed. And this was considered not by any means a misdirection.

² *R. v. Holt*, 5 T. R. 436.

³ *R. v. Paine*, 5 Mod. 163.

⁴ 2 T. R. 201. A., a printer, delivered a paper to his servant, who took it to the servant of the defendant, an editor. A. and his servant proved this, but it was insufficient to connect the defendant, through his servant, with the paper, in the absence of more direct proof. *R. v. Pearce*, Peake, N. P. C. 76.

⁵ *R. v. Pearce*, Peake, N. P. C. 75.

⁶ *R. v. Slaney*, 5 C. & P. 213.

to show that the defendant authorized the publication of the story, and it did not signify that the editor had, in fact, heard the story before the defendant told it.¹

An information for a libel alleged that, a person unknown had committed a murder on G., and that H. had been charged with it. The libel was then set out, and the information charged, that the murder was imputed by the libel to C. The libel, as set out, spoke of the murder of G., and that H. had been charged with it. It was held, that the inducement was proved by evidence that a person had been murdered, that H. was charged with the murder, and that on an inquest held, the witnesses called the dead person by the name of G.²

It is, of course, not competent for the defendant to prove the truth or falsehood of a libel upon the trial of an indictment or information, but evidence to show that the libel does not apply to the transaction referred to by the pleading is admissible. If, however, it be admitted that the transactions have happened, and that the libel related to them, the defendant cannot go into proof of the justice of the connection between the libel and these transactions, for that would be to admit the question of truth or falsehood.³

Upon a criminal information for a libel, importing neglect of duty to magistrates during a riot, Patteson, J., refused to let the defendant prove that there was in fact a riot, and that a pistol was fired at the people.⁴ Upon an information, the plea stated, that the prosecutor, who had been a Dominican, had earned the reputation of a scandalous friar. The defendant was allowed to ask his witnesses as to the prosecutor's moral character.⁵

Trial.] Some discussion has taken place as to the proper venue in libel. Setting aside the question whether merely writing a libel is a misdemeanor,⁶ it seems to be a rule that wherever the publication has taken place, the venue may be safely laid.⁷ Whence it follows, that if the defendant should have propounded his libellous paper in two counties, he may be proceeded against in either. A defendant's acknowledgment is the best evidence of his having published in the county where the venue is laid. As where expressions were used by the defendant in his letter, denoting that he had sent certain other letters to Cobbett's Register, in Middlesex. These other letters being proved to be in the defendant's handwriting, and being the subjects of the libel, it was held that the jury might find a publication in Middlesex by the

¹ *R. v. Cooper*, 8 Q. B. 533.

² *R. v. Gregory*, Id. 508.

³ *R. v. Grant and others*, 5 B. & Adol. 1081; 3 Nev. & M. 106.

⁴ *R. v. Brigstock*, 6 C. & P. 184.

⁵ *R. v. Newman*, 3 Car. & K. 252.

⁶ See 3 B. & Ald. 717; 4 B. &

Ald. 95. As well as the question, whether if publication be necessary as well as writing, the venue can be laid in any county except that where the publication takes place.

⁷ *R. v. The Seven Bishops*, 12 St. Tr. 354; 12 How. St. Tr. 183.

procurement of the defendant.¹ So, where a defendant wrote a libel in one county, and consented to its publication in another.² But owning a signature without more, conveys no proof as to the county.³ If a letter be proved to have been put into the post in the county of A. directed to a person in the county of B., it is clear that the trial may take place in either county. As where a libel is written in London, and forwarded by post to Exeter.⁴ So, where a libellous letter was sealed up and put into the post in Westminster, addressed to a person in the city of London, it was held (upon due proof no doubt of the posting of the letter,) that there was a sufficient publication in Middlesex.⁵ And we have seen, that if the party to whom the letter is addressed should happen to receive it in the county where the venue is laid, the trial cannot be set aside because the libel was directed to another county.⁶ So, under the old Act, 38 Geo. 3, c. 78, the affidavit of names of the printer, publisher, and proprietor of a newspaper was deemed sufficient evidence that the paper was published in the county where the printing was alleged in such paper to have taken place.⁷ The Court of King's Bench, however, has gone one step further than entertaining the confession of a defendant, and the ordinary proof. They have called presumption in aid to establish the fact of publication in a particular county. Sir F. Burdett was prosecuted for a libel, and the venue was laid in Leicestershire. The letter containing the libel was dated in L.⁸ and was received in Middlesex by one B., from a gentleman who was not called as a witness, and who was, moreover, not proved to have been in Leicestershire. Satisfactory proof of the defendant's handwriting was given, and it was shown that he himself was in L. about the time of the delivery of the libel in M. It was objected, that there was no proof of a publication in L. But Best, C. J., thought there was, and the jury, in obedience to the directions of the judge, found the defendant guilty. This point was fully discussed upon a motion for a new trial, and Abbott, C. J., Holroyd and Best, JJ., held, that there was a sufficient publication in the county of Leicester, not only by reason of the presumptions arising from extrinsic evidence coupled with the contents of the libel, but likewise from the want of contrary evidence within the knowledge and power of the defendant (and of which he must be supposed to be cognizant), in order to weaken or rebut these presumptions against him. Bayley, J., thought that the presumptions could not be entertained, unless the gentleman, who was not called as a witness, had appeared to have been in L. at the time, or there had been reason to doubt

¹ *R. v. Johnson*, 7 East, 65.

² 12 St. Trials, 331.

³ *R. v. The Seven Bishops*, 12 How. St. T. 183.

⁴ 12 How. St. Tr. 332.

⁵ *R. v. Williams*, 2 Camp. 506.

⁶ *R. v. Watson*, ante.

⁷ *R. v. Hart and another*, 10 East, 94.

⁸ Which is said to be evidence of its having been written in L.; 4 B. & Ald. 124, by Best, citing *R. v. Dr. Hensey*.

that the defendant or any of his agents had been instrumental in concealing the mode by which the paper had come to the hands of B. The rule, however, for a new trial was discharged, there being three opinions against one.¹

Verdict.] The charges of composing, printing, and publishing are divisible, so that there may be a verdict of guilty as to one or more, and in like manner an acquittal. As where the defendant was charged with composing, printing, and publishing in one count, and with printing and publishing, and publishing only in others. There was no evidence that he had composed the libel, and an acquittal was claimed for him on the first count, but Lord Ellenborough was quite clear to the contrary, observing that it was invariably enough to prove so much of the indictment as would show that the defendant had committed a substantive crime therein specified.² So, upon an indictment for printing and publishing, the defendant was convicted of printing only.³ So, the defendant upon another occasion was convicted of composing and publishing, and acquitted of printing.⁴ But where the jury found Woodfall guilty of publishing and printing only, there being no other charge, the court awarded a *venire de novo*;⁵ and by Lord Mansfield, "where there are more charges than one, guilty of some only is an acquittal as to the rest;" and "clearly there can be no judgment of acquittal, because the fact found by the jury is the very crime they were to try."⁶

By 32 Geo. 3, c. 60, s. 1, on every trial by indictment or information for the making and publishing any libel where the issue is between the king and the defendant, the jury sworn to try the issue may give a general issue of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the court or judge before whom such indictment or information shall be tried, to find the defendant guilty merely on the proof of the publication by such

¹ *R. v. Burdett*, Bart., 3 B. & Ald. 717; 4 B. & Ald. 95. See also *R. v. Sir M. Lopez*, cited by Holroyd, J., 4 B. & Ald. 141.

² *R. v. Hunt*, 2 Campb. 583. Verdict, Not guilty.

³ *R. v. Knell*, 1 Barnard. K. B. 305.

⁴ *R. v. Williams*, 2 Camp. 646.

⁵ *R. v. Woodfall*, 5 Burr. 2661.

⁶ 5 Burr. 2668. — If there be reason to suspect that a mistake has occurred when the jury have delivered their verdict, as that all had not agreed when their foreman pronounced the verdict, affidavits of bystanders may be received to

explain the facts, but certainly not an affidavit of any of the jury who tried the cause. Independently, however, of such affidavits of bystanders, if the court see reason that all the jury did not in reality hear the verdict of their foreman so as to be in a condition to express their dissent, they will grant a new trial. But they will not vacate the verdict, and permit the same jury to try the cause over again; for the court has no process by which it can order the same twelve persons to be assembled again to rehear the case and reconsider their verdict. *R. v. Wooler*, 6 M. & S. 366.

defendant of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information. But by sect. 2, the court or judge before whom the trial is had shall, according to his discretion, give an opinion and directions to the jury in the matter in issue as in other criminal cases; and by sect. 3, the jury may give a special verdict notwithstanding, as in other criminal cases. Sect. 4 enables the defendant to move in arrest of judgment, as he might have done before the passing of the Act. Acting upon the second section of this statute, the judges still instruct the jury upon the law of libel, and require them to adopt the law so laid down, unless they should be satisfied that the judicial direction is wrong.¹

Costs.] The defendant was allowed to recover costs upon a criminal information, although the only plea upon the record was Not guilty, and the judge had certified as to reasonable cause under 4 & 5 Wm. & M. c. 18, s. 3.² The judge cannot order the taxation of the clerk of assize to be reviewed after the expiration of his commission.³

Judgment.] The judgment at common law is fine or imprisonment, or both together, with suretyship to keep the peace, but in measuring out the punishment the court will have regard to several circumstances. It is matter of mitigation that the party lives at a distance, whilst his servant directs the publication of the newspaper in which the libel is contained, and that he takes no part in the publication.⁴ It is likewise a mitigating fact, that the defendant actually read a statement of certain facts in newspapers, where his libel purported to have been written in consequence of his having read such accounts, but an affidavit of the truth of those facts was refused.⁵ And the court will receive an affidavit that the defendant believed the charges to be true, if reasonable grounds for that belief be set forth.⁶ So provocation may be a ground for mitigation.⁷ The conduct of the defendant generally after the trial, may be considered with a view to mitigation.⁸ So that the court will give him an opportunity of answering affidavits brought against him by way of aggravation,⁹ and will even advise a defendant to offer extenuating circumstances for their consideration if he attempt to justify his conduct. For they will not suffer him to urge the truth of his libel as a ground for

¹ *R. v. Burdett*, 4 B. & Ald. 115, 131, 146, 147, 183. See *R. v. Dean of St. Asaph*, 3 T. R. 428; 1784, before the statute. 4 Dougl. 73.

² *R. v. Latimer*, 20 L. J. Q. B. 129; 15 Q. B. 1077.

³ *R. v. Newhouse*, 22 L. J. Q. B. 127, Erle, J.

⁴ See *R. v. Gutch and others*, Loft. 780; Moo. & Malk. 433.

⁵ *R. v. Burdett*, 4 B. & Ald. 414.

⁶ *R. v. Halpin*, 9 B. & C. 65.

⁷ Either by writing or by words, 7 C. & P. 395; 2 Bingh. N. C. 437. See also 1 M. & Rob. 449; 7 Ad. & El. 223.

⁸ 3 T. R. 432, by Lord Kenyon.

⁹ *R. v. Withers*, Id. 428.

mitigation.¹ The court will allow a defendant to explain his reasons by affidavit, for having made allegations in his plea of justification, although no proof of such allegations was given at the time. They are receivable in mitigation of punishment. But a document purporting to be an official record of the conviction of the prosecutor before a foreign police court, must not be annexed. It would put the prosecutor on his trial without giving him the power of making any defence.² It is rather an aggravating consequence of his fault to do so, and it may be remarked that the court will hear topics of aggravation in respect of the defendant's conduct after conviction, as well as matters of excuse. So that an affidavit with a pamphlet annexed, written by the defendant after the trial, and which was more libellous than that proved at the trial, was admitted in aggravation.³ Although care will be taken not to inflict a greater punishment than the principal offence will warrant.⁴ So a repetition of slander may lay a foundation for a more severe sentence. Whereas, on the other hand, an affidavit that the defendant has stopped the sale, may operate in mitigation.⁵ But it is not enough for the prosecutor to state in his affidavit that he heard a third person, who refused to join in the affidavit, state this, and that the defendant repeated the libellous matter to the third person. Even if the affidavit had gone on to say, that such third person was under the control and influence of the defendant, Lord Ellenborough doubted whether he should have been disposed to receive it, although such an affidavit was admitted in *Archer's case*,⁶ for an assault. And both Lord Ellenborough and Grose, JJ., seemed to cast a doubt upon the authority of *Archer's case*.⁷ Where the defendant was under a recognizance to appear and receive judgment; but it was agreed that he should not be punished if he discontinued his libels, the court would not pass judgment on him with the other defendants in the absence of proof that he had published fresh libels since the recognizance.⁸ All persons connected with this misdemeanor are principals, and may receive judgment accordingly.⁹

Judgment may be passed upon a defendant in his absence under some circumstances. As where a person was convicted of publishing a libel, and was committed to prison, but the prosecutor showed no disposition to bring him up for judgment. The defendant then made an affidavit, setting out the circumstances, and

¹ *R. v. Finnerty*, 4 B. & Ald. 320. *R. v. Bradley*, cited, 2 M. & Ry. 152; *R. v. Halpin*, 9 B. & C. 65; S. C. on the authority of *R. v. Finnerty*, 4 M. & Ry. 8. "In *R. v. Draper*, Easter term, 1809, the court received such affidavits, but I believe it was with the consent of the prosecutor." By Best, J., 4 B. & Ald. 321.

² *R. v. Dr. Newman*, Dears. 125, 130.

³ *R. v. Withers*, 3 T. R. 428.

⁴ *Id.* 432, by Lord Kenyon.

⁵ *R. v. Hone*, 3 Ch. Burn. 741, citing 3 Ch. Cr. L. 877, n.

⁶ 2 T. R. 203, n.

⁷ *R. v. Pinkerton*, 2 East, 356.

⁸ *R. v. Richardson and others*, 8 Dowl. P. C. 511.

⁹ *R. v. Drake*, Holt's Ca. 426.

that he was unable to procure bail, upon which a rule *nisi* was made upon the prosecutor, to show cause why judgment should not be pronounced upon the defendant in his absence, unless the prosecutor would undertake to bring him up for judgment during the term. This rule was subsequently made absolute after hearing counsel.¹

A motion was made after judgment, upon one occasion, that the court would direct the original letters which had been proved at the trial, to be delivered up by the prosecutor, and deposited with the officer of the court. But the judges said that they had hardly any authority to grant such a motion, as the prosecutor was out of court, but independently of that circumstance, they deemed the motion unprecedented, and not fit to be entertained.²

¹ *R. v. Boltz*, 5 B. & C. 334. further upon the subject of libel, 1

² *R. v. Cator*, 2 East, 361. See Hawk, c. 73.

PART XII.

Of Indictable Offences respecting Religion and Morals.

CHAPTER I.

DISTURBING MINISTERS AND CONGREGATIONS.

By 1 Wm. & M. c. 18, s. 18, if any person shall maliciously or contemptuously come into any cathedral or parish church, chapel, or other congregation permitted by the Act, and disquiet or disturb the same, or misuse any preacher or teacher, such person, upon proof before a justice, by two or more sufficient witnesses, shall be bound with two sureties in the sum of 50*l.*,¹ and in default thereof, shall be committed to the general or quarter sessions, and, upon conviction there, shall be fined 20*l.* to the use of the king, &c. By 52 Geo. 3, c. 155, s. 12, this fine is raised to 40*l.* in the case of Protestant dissenters. By 9 & 10 Vict. c. 59, s. 2, Jews are placed upon the same footing as Protestant dissenters. By sect. 4, all laws relating to religious assemblies shall apply generally, for the protection of *all* meetings, assemblies, or congregations lawfully assembled for religious worship.²

Protection is afforded to preachers and teachers of the Roman Catholic religion by 31 Geo. 3, c. 32, s. 10; and the fine for disturbing their places of worship is 20*l.* Sect. 14 of this latter Act, however, excepts Quakers, but they are, nevertheless, protected by the statute 1 Wm. & M., c. 18, before mentioned.

It was objected in an indictment on the Toleration Act,³ for disturbing Protestant dissenters, that German Lutherans, being foreigners, were not within its provisions, but Lord Kenyon intimated his opinion clearly against the objection, and it was not pressed. It was likewise held to be no defence that the disturbance took place in consequence of a disputed right to the office of clerk.⁴ And upon conviction, the Court of King's Bench were quite satisfied that it was a case which needed not, of necessity, to be tried at the quarter sessions, but might well be removed by *certiorari*.⁵

¹ That is, to appear at the quarter sessions.

² See 18 & 19 Vict. c. 81, s. 1; 19 & 20 Vict. c. 119, s. 24.

³ 1 Wm. & M. c. 18.

⁴ *R. v. Hube and others*, Peake's Cases, 132.

⁵ *R. v. Hube and others*, Peake, *ut supra*. And see *ante*.

The question, however, as to the *certiorari* was raised again some years afterwards, and upon the new statute, 52 Geo. 3, c. 155. In that case, Lord Ellenborough confessed he was struck with the passage which enacts that the offender, upon conviction of the said offence at the general or quarter sessions, should suffer the penalty of 40*l*. So that it might seem to be a condition precedent to try at the sessions. But his lordship then went on to say that, upon consideration, he concurred with the decision in *R. v. Hube*. And Le Blanc, J., added, that unless the defendant could show that if the proceedings had been before the quarter sessions, they could not have been sustained, the argument on his behalf would be at an end, for all the incidents of the common law attached to an indictment at sessions, and one of these is the *certiorari*. Judgment was accordingly given against him.¹

It should not be forgotten, nevertheless, that the act of disturbing a congregation may be treated as a misdemeanor at common law. And the proceedings may be either by indictment or information.² Thus, where such an information had been granted for a misdemeanor in obstructing divine service in Pewsey church, and insulting the rector, Lord Mansfield took occasion to say, that Methodists had a right to the protection of this court, if interrupted in their decent and quiet devotion; and likewise dissenters from the Established Church, if so disturbed.³

The statute 1 Wm. & M. c. 18, s. 18, seems to have been insufficiently considered in the enactments upon the subject which have been enumerated. Great difficulties, therefore, were experienced in enforcing that and similar Acts.

Trespass was brought for false imprisonment. The plaintiff having persisted in reading a notice in church, was taken into custody, and detained for an hour. He obtained a verdict, and the court refused to set it aside; for, as the plaintiff read the notice during an interval of the service, he could not be said to have come within 1 Mar. st. 2, c. 3; neither was his case within 1 Wm. & M., c. 18, because there the offence must have been done wilfully, notoriously, and of purpose.⁴

This old and almost obsolete Act has revived lately. It was recognized by Lord Tenterden in *Williams v. Glenister*. It was actually put in force against an unfortunate Dorsetshire labourer, who was punished under its provisions. One justice may commit the offender under these provisions, till within six days he can be brought before two justices, who may commit him for three months, and further, to the next quarter sessions, when, upon his repentance, he may be discharged upon giving surety for one year for his

¹ *R. v. Wadley*, 4 M. & S. 508. See 5 & 6 Will. 4, c. 33, s. 1.

² A *certiorari* to remove such an indictment at common law was refused upon one occasion (1 Keb. 491), but the court will exercise their discretion. See 5 & 6 Will. 4, c. 33, s. 1.

³ *R. v. Wroughton*, 3 Burr. 1683. The rule for the information was, however, discharged upon the merits.

⁴ *Williams v. Glenister*, 2 B. & C. 699.

good behaviour. If he do not repent he may be committed till he do so repent. This Act is said to be repealed as to disturbing the prayers, by 1 El. c. 2, s. 9, which prescribes a forfeiture of 100 marks upon an indictment as to the prayers, but not as to the preacher. For the second offence, under 1 Eliz., the penalty is 400 marks. The third offence is punishable with imprisonment for life and forfeiture of goods and chattels. If the 100 marks be not paid within six weeks after conviction, the offender shall suffer six weeks' imprisonment. (Sect. 12.) The like upon the second commission, with twelve months' imprisonment. (Sect. 13.) The Dorsetshire labourer was punished under the Act of Mary. He expressed his sorrow at the quarter sessions (Easter, 1851), after having lain in gaol for some months, and was then discharged. But there are other grievances. The justices at sessions have no power to mitigate the fines of 20*l.* and 40*l.* Hence, it is very rare to find a case remitted to the sessions. The justices either prefer to inflict a fine upon their own responsibility, which is illegal, or they require sureties, which may, probably, be right. However, under the 52 Geo. 3, c. 155, in default of sufficient distress, there is a power to imprison for a term not exceeding three months. And there is another grievance. Under the Act 1 Wm. & M. c. 18, there must have been a preconcerted intention to disturb, which cannot be easily proved; whereas, under 52 Geo. 3, c. 155, the mere disturbance is sufficient. Therefore the Dissenter is better protected than the Establishment. Nevertheless, there might have been proceedings in the ecclesiastical courts until the year 1860, and *it has been said* that the plaintiff in *Williams v. Glenister* was proceeded against there after his successful verdict, and that he incurred considerable expense. But now, by 23 & 24 Vict. c. 32, s. 2, any person guilty of riotous, violent, or indecent behaviour in England and Ireland in any cathedral church, parish or district church or chapel of the Church of England and Ireland, or in any chapel of any religious denomination, or in England in any place of religious worship certified under 18 & 19 Vict. c. 81, whether during the celebration of divine service or at any other time, or in any church-yard or burial ground, or who shall molest, disturb, vex, or trouble, or by any other unlawful means disquiet, or misuse, any preacher duly authorized, &c., or any clergyman in holy orders ministering or celebrating any sacrament, or any divine service, rite, or office, in any cathedral, &c., or in any church-yard or burial ground, shall, on conviction before two justices, be liable to a penalty of not more than 5*l.*, or may be committed for a term not exceeding two months. By sect. 3, the constable or churchwarden may apprehend immediately after the offence. Sect. 4 gives a right of appeal. Sect. 5 repeals 5 & 6 Edw. 6, c. 4, as far as relates to persons not in holy orders. And sect. 6 saves the statutes 1 Mar. sess. 2, c. 3, 1 Eliz. c. 2, and 1 Wm. & M., c. 18, s. 18. Of course the punishment by commitment is alone available, because no machinery is constructed for recovering the penalty of 5*l.*¹

¹ See also *Glover v. Hynde*, 1 Mod. 168.

CHAPTER II.

CONGE D'ELIRE.

By 25 Hen. 8, c. 20, the appointment of the archbishops and bishops is vested in the crown. And by sect. 7, if the prior and convent of any monastery, or the dean and chapter of any cathedral church, shall disobey the royal mandate to elect, they shall incur the penalties of a *præmunire* under 25 Edw. 3 and 16 Ric. 2.

CHAPTER III.

CLERGY MAKING CANONS WITHOUT THE CONSENT OF THE CROWN.

It might be inconvenient to have an ecclesiastical code of laws in opposition to the common or statute law. And thus by 25 Hen. 8, c. 19, s. 1,¹ any of the clergy who shall presume to attempt, allege, claim, or put in use any constitutions, ordinances, provincial or synodal, or any other canons; or enacting, promulgating, or executing any such canons, constitutions, &c., by whatever name they may be called in their convocations, unless the same clergy may have the king's most royal assent and licence to make, promulge, and execute such canons, constitutions, and ordinances, provincial or synodal, shall be guilty of a misdemeanor, and imprisoned, and fined at the king's will.²

¹ Confirmed by 1 Eliz. c. 1, s. 6.

² Which means, at the will of the king's justices.

CHAPTER IV.

FALSE RECITALS IN ECCLESIASTICAL LEASES.

By 6 Will. 4, c. 20, s. 3, to introduce any false recitals into ecclesiastical leases is punishable as a misdemeanor, and, in addition, the offender shall pay to any person suing for the same the full sum of 500*l.*, or, at the option of such person, five years improved annual value of the hereditaments comprised in the lease.

CHAPTER V.

OFFENCES CONCERNING REGISTERS OF BIRTHS, &c.

These offences consist chiefly in false particulars, forgery, false entries, damages to books, and illegal certificates. The 41st section of the 6 & 7 Will. 4, c. 86, ordains that the wilful giving of false particulars to be inserted in any register of birth, death, or marriage, shall be visited by the penalties of perjury.

The charge against a defendant was, that he had made a false statement after marriage, to the officiating clergyman, in order to have such statement entered in the marriage register book. It appeared, however, that the statement in question was made to the clerk before the marriage; but that the defendant averred the truth of it after marriage, when asked by the clergyman. It also appeared that the marriage register book was not the book provided by the registrar-general. These points were made for the prisoner, and were argued before the judges; but the judges held the count sufficient, and that the identical book directed by the registrar-general was not necessary in this case,¹ and the purpose need not be effected;² but the Act must, of course, be intentional.³

¹ *R. v. Brown*, Den. 291; 2 Whether the prosecution must
Car. & K. 504. take place within three years, qu.?

² *R. v. Mason*, 2 Car. & K. 622. Contra, *R. v. Dr. Bruce*, Al. 50.

³ *R. v. Dunboyne*, 3 Car. & K. 1. *R. v. Moore*, Tho. Jones, 159.

CHAPTER VI.

JESUITS.

By 10 Geo. 4, c. 7, s. 29, if any jesuit or member of any religious order, community, or society, of the Church of Rome, bound by monastic or religious vows, shall come (without licence) into the realm; or, having obtained such licence from the secretary of state to remain there,¹ shall not depart from the United Kingdom within twenty days after the expiration of such licence, or of its revocation after notice given to him, shall be guilty of a misdemeanor, and be banished for life.² And if, after sentence of banishment, such person shall be found at large, without lawful excuse, after the end of three calendar months from the time of the sentence, he shall be likewise deemed guilty of a misdemeanor, and be transported for life.³ And the offence of being admitted or becoming a jesuit, or brother, or member of any such religious order, community, or society as aforesaid,⁴ is made punishable in like manner.⁵

And if a jesuit or member of any religious order, community, or society of the Church of Rome, bound by monastic or religious vows, within any part of the United Kingdom, shall admit any person to become a regular ecclesiastic, or brother, or member of any such religious order, &c., or aid or consent thereto, or shall administer or cause to be administered, or aid or assist, &c., in taking any oath, vow, or engagement purporting or intended to bind the person taking the same to the rules, ordinances, or ceremonies of such religious order, &c., he shall be guilty of a misdemeanor,⁶ and be punishable by fine and imprisonment.

¹ Under the same Act.

² By sect. 31.

³ By sect. 36.

⁴ By sect. 29.

⁵ By sect. 34.

⁶ 10 Geo. 4, c. 7, s. 33.

CHAPTER VII.

OF BLASPHEMY, &c.

The law regards several acts which are in opposition to the established religion of the country as misdemeanors; and conduct which has a plain tendency to subvert public morals is likewise viewed with disapprobation, and deemed to be the subject of punishment. Offences against the state religion may consist in libels or slander, as blasphemous writings and speeches, abuse or ridicule of the Christian religion, contempt of the sacrament of the Lord's Supper, expressed either by words or otherwise, impeachment of the divine authority of the Scriptures, and, in the case of ministers, derogatory observations on the Book of Common Prayer. There are also other misdeeds, as neglecting the ordinary prayer, sabbath-breaking, swearing, &c.¹ Very many misdemeanors to the detriment of public morals are likewise to be met with in our books. Such are gaming, adultery, acts tending to prostitution, indecencies of various kinds, and many other circumstances which have a tendency to lower the standard of proper conduct. We will examine this list in the order which has been mentioned. And first, with reference to those acts of ill-behaviour which are committed against the settled religion of the country.

Blasphemy.] It may be said, that blasphemy is one of those offences which the law views with much displeasure. Thus to deny the being or providence of God is punishable under this head.² So to speak of Jesus Christ in terms of contumely or reproach is not permitted by the common law, and persons who have erred in this manner have been the subjects of severe punishment.³ It was, indeed, urged as a defence upon one occasion, that as the 53 Geo. 3 had relieved persons from penalties who denied the divinity of Jesus Christ, a publication in support of such a position was not a libel; but to this it was replied by the court, that the defendant had gone further than this by declaring that the Saviour was "an impostor and murderer in principle, and a fanatic," and that the relief contemplated by the statute could never be intended to permit the promulgation of matter which was, at common law, a

¹ By 13 Edw. 1, st. 2, c. 6, it is made a misdemeanor to hold a fair or market in a church-yard. Fine and imprisonment are the punishments.

² 1 Hawk. c. 5, s. 1; 4 Com. 59.

³ *R. v. Taylor*, 1 Ventr. 293; 3 Keb. 607.

blasphemous libel.¹ So, a blasphemous libel concerning the Old Testament is punishable at common law.² Profaneness on the stage is likewise indictable at common law.³

Judgment at common law.] The judgment for blasphemy at common law⁴ is fine and imprisonment, accompanied by such infamous corporal punishment as the court may think fit to adjudge.⁵ Or these respective punishments may be severally awarded.⁶

The Holy Scriptures.] Although blasphemy, strictly speaking, may be said to relate only to a dishonourable mention of the Deity, it is, nevertheless, very commonly understood to extend to speech or writing in derogation of the Holy Scriptures, so that the Almighty would then be considered as receiving an insult through the medium of a disrespect offered to the book which he has given. And as the Christian religion is a very chief principle in the Holy Scriptures, an attack upon that religion is frequently looked upon in the light of a blasphemous misdemeanor. All profane scoffing at the Bible, or exposing it to contempt or ridicule is, accordingly, held to be punishable in like manner as blasphemy at common law.⁷ So, to say that "religion is a cheat" is punishable; it is to dissolve all those obligations whereby civil obligations are preserved.⁸

And notwithstanding this statute, it has been clearly held, that the proceeding for blasphemy at common law remains untouched.⁹ And upon a modern occasion, *R. v. Robinson*¹⁰ was referred to as an express authority, to show that where a matter is unlawful at the common law, the punishment prescribed by a statute in respect of that matter is cumulative,¹¹ and, consequently, the conviction for a blasphemous libel was confirmed, although there was no count

¹ *R. v. Waddington*, 1 B. & C. 26. See also *R. v. Akenhead*, 3 Meriv. 682, n., in Scotland, cited there. Judgment of Lord Eldon, C., in *Att.-Gen. v. Pearson*, Id. 435, 408.

² *R. v. Hetherington*, 5 Jur. 229. And see to the same effect, *R. v. Caton*, 1 Russ. C. M. 231.

³ 11 Mod. 142. By 3 Jac. 1, c. 21, if any person shall in any stage play, interlude, show, &c., jestingly or profanely speak or use the holy name of God, or of Christ Jesus, or of the Trinity, he shall forfeit 10*l.*, half to the king, and half to him that shall sue.

⁴ Which continued in full force notwithstanding the statute of

William. *R. v. Paine*, 1 East, P. C. 5.

⁵ 1 Hawk. c. 5, s. 6, and it should seem that the party may be bound over to his good behaviour.

⁶ The pillory being abolished, whipping only remains as a corporal penalty. See as to the old law with respect to the denial of the Holy Trinity, 1 Wm. & M. c. 18, s. 17; 9 & 10 Will. 3, c. 32; 53 Geo. 3, c. 160. *R. v. Hall*, Str. 486; Id. 790.

⁷ 1 Hawk. c. 5, s. 2.

⁸ *R. v. Taylor*, 1 Ventr. 293; 3 Keb. 607, Hale, C. J.

⁹ *R. v. Woolston*, Fitzg. 64.

¹⁰ 2 Burr. 799.

¹¹ 3 B. & Ald. 163, 164.

on the statute of Will. 3.¹ In the case of *R. v. Woolston*, likewise, it was declared by the court, that they would not suffer it to be debated whether to write against Christianity in general was not an offence punishable in the temporal courts at common law.² And they added, that they would not allow even of an indirect attack upon that worship; so that the defendant's suggestion, that the intent of his book went only to disprove the literal meaning of the miracles, and merely as striking against one received proof of Jesus being the Messiah, was deemed quite inadmissible as a defence; for the very foundation of the religion was threatened by such an attempt.³ So again, the reiteration of a blasphemous libel was at once discountenanced by the court, notwithstanding the pretext of legality in publishing a correct account of proceedings in a court of justice.⁴ And it was subsequently observed in another case, that if the name of the Redeemer was suffered to be traduced, and his holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed.⁵ So, words of contumely are said to be indictable, as tending to a breach of the peace, as "your religion is a new religion," &c.⁶

Personating the Saviour, or suffering worship to be paid to the defendant, has been likewise deemed an offence of this nature;⁷ and religious impostors who pretend to extraordinary commissions, and so terrify or abuse the people with false denunciations of judgments, are offenders of a similar character.⁸ However, it has long been acknowledged, that disputes by learned men upon controverted points are not to be deemed blasphemies.⁹ And the distinction recognized by the law seems to be between such discussions as are carried on dispassionately and with decency, and those which treat so serious a matter with offensive levity.¹⁰ Yet, nevertheless, doctrines which have immediately a tendency to subvert Christianity cannot be entitled to this indulgence, with whatever tenderness they may be promulgated, for they would savour of that "malicious and mischievous intention which is the broad boundary between right and wrong."¹¹ The judgment for these last-mentioned offences in the nature of blasphemy is the same which has already been related in a former page.¹² And it may be

¹ *R. v. Carlile*, Id. 161. See 1 Wms. Saund. 135 (a), note (4).

² *R. v. Woolston*, Str. 834. Conviction on four informations for blasphemous discourses on the miracles of our Saviour. *R. v. Annet*, cited, 1 Sir Wm. Bl. 395. *R. v. Williams*, 26 How. St. Tr. 656. *R. v. Eaton*, mentioned, 3 B. & Ald. 162.

³ Fitzg. 66.

⁴ *R. v. Mary Carlile*, 3 B. & Ald. 167.

⁵ *R. v. Williams*, Holt on Libel, 69, note (e).

⁶ 1 Hawk. c. 5, s. 5.

⁷ *R. v. Naylor*, 2 St. Tr. 265.

⁸ 1 Hawk. c. 5, s. 3.

⁹ Str. 834.

¹⁰ 3 Merivale, 376, note (a).

¹¹ See Stark. *ut supra*.

¹² *Ante*.

further remarked, that in case of a second conviction, the defendant might until lately have been punished with banishment, and with transportation, if he had neglected to banish himself;¹ but, by a more recent Act,² this sentence of banishment is abrogated, and the offence, upon a second conviction, remains, as on the first occasion, a very high misdemeanor, and punishable accordingly. However, the judge may still, under 60 Geo. 3 and 1 Geo. 4, c. 8, make his order for the seizure and detainer of all copies of blasphemous and seditious libels in the possession of a convicted defendant, or any other person for his use, such person being also named in the order, for the statute has undergone no repeal in that respect.

Forms of worship.] A public disrespect to the forms of worship belonging to the Established Church, and, *à fortiori*, if done by one of the ministers of religion, is punishable as a misdemeanor.

These faults are not at present noticed with the same rigour as in former times; perhaps, indeed, some of them may not be of such frequent occurrence, so that a brief mention of them will be sufficient for our purpose. By 1 Edw. 6, c. 1, s. 1,³ to treat the sacrament of the Lord's Supper with dishonour, in any way whatsoever, is made punishable upon a conviction at the quarter sessions, with fine and imprisonment.⁴ But the indictment must be preferred within three months next after the offence.⁵

Again, by 1 El. c. 2, ss. 9, 10, 11, to speak in any way in derogation of the Common Prayer Book, whether in plays, songs, or otherwise, or to compel any minister, or procure him to say any common prayer, or minister any sacrament, in any other form than that prescribed in the Common Prayer Book of the Church of England, or to interrupt the saying of any such prayer, or ministering of any sacrament, is made punishable, for the first offence, upon conviction, by a fine of 100 marks, and of 400 for the second. By sect. 12 & 13, upon default of payment, the party shall, for the first offence, be imprisoned for six months, and for twelve in respect of the second. For the third offence, he shall forfeit his goods and chattels, and be imprisoned for life.⁶ This Act, however, does not

¹ 60 Geo. 3 and 1 Geo. 4, c. 8.

² 11 Geo. 4 and 1 Will. 4, c. 73; and a similar provision was made with respect to Scotland by 7 Will. 4, c. 5.

³ Repealed by 1 Mar. c. 2, but revived by 1 El. c. 1, s. 14, and confirmed by 13 & 14 Car. 2, c. 4, s. 24.

⁴ Three justices, at the least, one being of the quorum, must be present.

⁵ 1 Edw. 6, c. 1, s. 5. The Act uses the words "fine and ransom," and

it appears from Co. Litt. 127 (a), that these terms are but as one; and the case in Dy. 232, which mentions the ransom as being treble the amount of the fine, must be understood to mean where a fine was set nominally and the ransom adjudged accordingly.

⁶ Where the party died within six weeks, it was made a question, whether, as his election to pay the fine or suffer imprisonment was gone, his executors should continue liable to the forfeiture. See

affect Roman Catholics since the 31 Geo. 3, c. 32, s. 3, and 7 & 8 Vict. c. 102.¹

So again, with reference to spiritual persons, if any parson, vicar, &c. shall refuse to use the common prayer in a church, or use any other form, or speak in derogation thereof, he shall, for the first offence, lose one year's profit of his spiritual promotions, and suffer six months' imprisonment; for the second, shall be deprived; and for a third, shall be deprived and suffer imprisonment for life.² If the party have no spiritual promotion, he shall, for his first offence be imprisoned for one year, and for the second, be imprisoned for life.³ But the prosecution for these respective offences must be at the next general sessions to be holden before justices of oyer and terminer, or justices of assize, next after the offence committed.⁴

Justices of the peace at their quarter sessions had power, under 23 El. c. 1, s. 8, to inquire concerning these last-mentioned misdemeanors; but this jurisdiction was subsequently withdrawn by the introduction of other forms under later statutes which did not revive the authority of magistrates.⁵

It was soon held, that a priest or minister, whether he had the cure of souls or not, was equally within the statute 1 El. c. 2.⁶ But it was a part of the offence, that other prayers were used in lieu of the common prayers. The defendant, a clergyman, was charged with this offence under 1 Eliz., and the indictment charged him with using other prayers, and in another manner than that which is mentioned in the Common Prayer Book; but the court held the count bad, for the indictment should have said, that the defendant used other forms and prayers instead of those enjoined, which were neglected by him; for, otherwise, every parson using prayers before his sermon other than that required by the Book of Common Prayer might be indicted.⁷

It may be remarked here, that the sentence of deprivation prescribed in respect of the second offence in these respects, does not restrain the ecclesiastical court from awarding that judgment in the first instance. It was so determined by the Court of King's Bench in an action of trespass brought by a clerk in orders against the defendant, a servant of the ecclesiastical commission.⁸

R. v. Sir E. Walgrave, Dy. 203, 231. See also *R. v. Horne*, Gouldsb. 162; Hob. 97.

¹ And see 9 & 10 Vict. c. 59, s. 1.

² 1 El. c. 2, ss. 4, 5, 6. See also 2 & 3 Edw. 6, c. 1.

³ Id. ss. 7, 8. See likewise 2 & 3 Edw. 6, c. 1.

⁴ 1 El. c. 2, s. 20.

⁵ *R. v. Sparks*, 3 Mod. 78.

⁶ Dy. 203.

⁷ *R. v. Sparks*, 3 Mod. 78; 2 Show. 447.

⁸ *Cawdry v. Atton*, Poph. 59; 5 Rep. 1.

CHAPTER VIII.

OF SABBATH-BREAKING.

Sabbath-breaking.] Many statutes have been passed from time to time with respect to the violation of the Lord's day or Sabbath, but those which are chiefly applicable at the present time relate, for the most part, to the exercise of certain trades on that festival, and to the suing out of civil process. The acts of parliament which treated an omission to go to church, or suffering absence in others, as misdemeanors,¹ no longer threaten the community; and even those statutes which forbid trading are very rarely enforced by indictment, and are not very popular when used as the instruments of penalties. It is only when these acts are regarded in the light of misdemeanors by the prosecutor, and so punishable by indictment, that we have to deal with them in this undertaking, and by reason of the rarity of the proceeding, we shall be brief upon this head of Sabbath-breaking.

The principle seems to be, that an indictment will not lie at common law unless the act of trading can be viewed under the character of a nuisance, and by this clue the different precedents and cases may be safely reconciled. Thus, it is said, that there is a form of indictment which calls the defendant a common Sabbath-breaker and profaner of the Lord's day, and for having kept public and open shop, and exposed meat to sale to divers persons unknown.² And the usual course is affirmed in books of authority to be an indictment for a nuisance, where the offence will bear that aspect.³ Whereas, on the other hand, if the matter be not considered as a public mischief, the authorities tend the other way; and, therefore, it is laid down, that to sell meat on a Sunday is not an offence at common law, so that an indictment must conclude against the form of the statute.⁴ And so it was held, upon one occasion, where the court, upon demurrer, gave judgment for the defendant.⁵ And the same law might well apply to a baker, whose exercise of his trade on a Sunday might be productive of that general annoyance which is understood by the term "nuisance."

But an indictment will lie upon the statute respecting these offences. Thus, by 3 Car. 1, c. 2, every butcher who shall kill or sell any victual upon the Lord's day shall forfeit 6s. 8d. And, although a pecuniary forfeiture is attached to the offence, together with the jurisdiction of magistrates who are to inquire summarily

¹ See 1 Hawk. chap. 10, 11.

² East, P. C. 5.

³ 1 Hawk. c. 6, s. 6, citing C. C. C. 372.

⁴ 1 Hawk. c. 6, s. 6; 3 Car. 1, c. 2, s. 2.

⁵ *R. v. Brotherton*, Str. 702.

into the matter, an indictment will lie, nevertheless, according to the express words of the Act.

By 29 Car. 2, c. 7, s. 2, no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, &c., on the Lord's day (works of necessity and charity only excepted); provided that nothing in the Act shall extend to prohibit the dressing of meat in families, or dressing or selling meat in inns, &c., for such as otherwise cannot be provided; nor to crying milk before nine in the morning nor after four in the afternoon. The time for prosecution is limited to ten days after the offence committed.

The stress of this statute seems, in a great measure, to have fallen upon bakers; and before the 34 Geo. 3, c. 61, there was some discussion as to the works of necessity mentioned in the 29 Car. 2, and likewise as to the proviso at the conclusion of the third clause.

There was an indictment against one S., for not executing a justice's warrant upon a common baker for exercising his trade on a Sunday, and the court recognized the principle at once, that the charge could not be sustained in respect of necessities,¹ as puddings and pies, although it might be good for baking bread,² evidently because that might have been done on the Saturday. And this doctrine was maintained upon a subsequent occasion.

A motion was made for an information against a justice who had refused to receive a charge against a baker for exercising his trade on a Sunday; and the court observed, that this was an attempt to punish a person for baking pies, puddings, and meat for dinner, but not saying a word about bread, which is the business of a baker's ordinary calling; they were, accordingly, of opinion that this Act of baking pies, &c., was not within the Act, and the rule was discharged with costs.³

In conformity with the same principle, it seems that the baking of rolls on a Sunday would have been holden to be within 29 Car. 2, had not the conviction been untenable upon another ground.⁴ But still it was pressed upon the court in another case, that *R. v. Cox* turned upon the exception introduced into the statute with respect to necessity and charity, and that it could not be supposed that a baker who should work for his customers on a Sunday could come within that exception.

John Younger was seen baking for several persons, who were by no means in poor circumstances, and it being the Lord's day when he was so occupied, an information was laid against him, and the magistrate convicted him. But the court were quite clear in favour of the baker. "Thirty-four years," said Lord Kenyon, "have nearly passed since the decision of *R. v. Cox*, which in-

¹ The word "unnecessary" is manifestly misprinted for "necessary." 11 Mod. 114.

² *R. v. Pawlett*, 11 Mod. 114.

³ *R. v. Cox*, 2 Burr. 785. See Cowp. 643.

⁴ *Crepps v. Durden and others*, Cowp. 649.

formed the public that all bakers have a right to do what is imputed to this defendant as an offence." "I agree," added the lord chief justice, "with Mr. J. Foster, that I am for an observation of the Sabbath, but not for a pharisaical observation of it." The conviction was quashed.¹

Shortly after this the stat. 34 Geo. 3, c. 61, passed, and bakers were thereby forbidden to make, bake, or expose to sale, any bread or rolls of any sort or kind, or to bake any meat, puddings, pies, or tarts, or in any other manner to exercise their trade on the Lord's day. Except the selling of bread or baking meat, puddings or pies only, on the Lord's day, before nine in the forenoon and one in the afternoon.²

Swearing. Drunkenness.] Swearing and drunkenness are likewise offences against religion, but they are not usually treated as misdemeanors, being punishable before a magistrate by way of summary conviction.³ Nevertheless, if it be determined to proceed by indictment against such, the charge should not be that the defendant was a common drunkard, or a common frequenter of tippling houses, for that language would be too loose.⁴

¹ *R. v. Younger*, 5 T. R. 449.

² See further as to convictions upon 29 Car. 2, c. 7; 1 Hawk. c. 6, ss. 9, 10. As to the sale of mackerel on Sundays, see 10 & 11 Will. 3, c. 24, s. 14. Fish carriages, 2 Geo. 3, c. 15. Fairs and markets on Sunday (the four Sundays in harvest excepted out of the Act), 27 Hen. 6, c. 5, repealed by 13 & 14 Vict. c. 23; 1 Hawk. c. 6, ss. 1, 2, 11,

19. Public sports, 1 Car. 1, c. 1; 1 Hawk. c. 6, s. 4; 4 Com. 63. Debating societies, 21 Geo. 3, c. 49; 1 Hawk. c. 6, ss. 5, 12, 13, 14. Carriers, 3 Car. 1, c. 2. Watermen, 11 & 12 Will. 3, c. 21, s. 13. And see generally, 1 Hawk. c. 6.

³ See 1 Hawk. c. 6, s. 23, *et seq.*

⁴ *R. v. Buckbridge*, 7 Mod. 52.

CHAPTER IX.

OF INDICTABLE OFFENCES CONCERNING MARRIAGE NOT
HITHERTO MENTIONED.

Marriage under age at common law.] At common law it seems, that although there may be a doubt as to the validity of an indictment for marrying a woman under age, without the consent of the father or guardian,¹ the act of carrying away such infants by violence, deceit, or any corrupt practice, or even by ordinary blandishments,² and, *à fortiori*, for any improper or immoral purpose, must certainly be deemed an offence.³

Undue solemnization of marriage.] By 6 & 7 Will. 4, c. 85, s. 39, every person who, after the said 1st day of March, shall knowingly and wilfully solemnize any marriage in England, except by special licence, in any other place than a church or chapel in which marriages may be solemnized according to the rites of the Church of England, or than the registered building or office specified in the notice and certificate as aforesaid, shall be guilty of felony (except in the case of a marriage between two of the Society of Friends, commonly called Quakers, according to the usages of the said society, or between two persons professing the Jewish religion, according to the usages of the Jews); and every person who in any such registered building or office shall knowingly and wilfully solemnize any marriage in the absence of a registrar of the district in which such registered building or office is situated shall be guilty of felony; and every person who shall knowingly and wilfully solemnize any marriage in England after the said 1st day of March (except by licence) within twenty-one days after the entry of the notice to the superintendent registrar as aforesaid, or, if the marriage is by licence, within seven days after such entry, or after three calendar months after such entry, shall be guilty of felony.

By 4 Geo. 4, c. 76, s. 21, if any person shall, from and after the said 1st day of November, solemnize matrimony in any other place than a church or such public chapel wherein banns may be lawfully published, or at any other time than between the hours of eight and twelve in the forenoon, unless by special licence from the Archbishop of Canterbury, or shall solemnize matrimony without due publication of banns, unless licence of marriage be first had and obtained from some person or persons having authority to grant the same; or if any person, falsely pretending to be in holy orders, shall solemnize matrimony according to the rites

¹ See 4 Mod. 145, per Holt, C. J.

² *R. v. Twisleton and others*, 1 Leo. 257.

³ East, P. C. 458, 459.

of the Church of England; every person knowingly and wilfully so offending, and being lawfully convicted thereof, shall be deemed and adjudged to be guilty of felony, and shall be transported for the space of fourteen years, according to the laws in force for transportation for felons; provided that all prosecutions for such felony shall be commenced within the space of three years after the offence committed.

The indictment must contain the words "knowingly and wilfully," and it would be as well to negative the special or other licence, although, strictly speaking, it would lie on the defendant to prove the licence.

Seduction.] Nor is seduction by any means an inferior misdemeanor at common law. An information was preferred against certain defendants for carrying away a young woman for the purpose of marriage, and it was objected, that no artifice had been used, excepting the ordinary compliments which usually take place amongst young people; but the court directed a verdict of guilty, even although some encouragement had evidently proceeded from the girl.¹ If such a decision could be come to in the case of a marriage, it is clear that the more grave crime of seduction cannot be justified by pleading that no other means than address and compliment were employed. So, again, the defendant was fined for seducing and lying with the wife of another, but the court would not allow him to be charged with an action as well as punished by a penalty.² And wherever conspiracy has been made use of to effect the sinister design, no doubt has been entertained of the defendant's liability. As in the well-known case of Lord Grey, who contrived that Lady H. Berkeley should be taken away at night from her father's house, and against his consent, for the purpose of cohabiting with him. Several persons were indicted together with Lord Grey for a conspiracy at common law, and the defendants were found guilty, notwithstanding the absence of any artifice, and the admission of the lady, who was examined as a witness, that she left her father's house willingly, and concurred in all the measures taken for her departure and concealment.³

The defendant, Sir Francis Delaval, and others, were concerned in obtaining a female apprentice, to be assigned over to Sir F. D., for the purpose of being kept by him. The transaction took place with the consent of the apprentice, but the court made the rule absolute for an information at common law against the defendant, Sir Francis Bates, the master of the girl, and the attorney who prepared the indentures.⁴

¹ *R. v. Twisleton and others*,
1 Lev. 257; 1 Sid. 387; 1 Hawk.
c. 41, s. 10.

² *R. v. Johnson*, Comb. 377.

³ *R. v. Lord Grey and others*,
3 St. Tr. 519; East, P. C. 460.

⁴ *R. v. Delaval and others*, 3
Burr. 1434; 1 Sir Wm. Bl. 410,
439.

So where a man had fraudulently assigned his wife to another, Lord Hardwicke directed a prosecution, the act being against public decency and good manners.¹ The words "being above the age of fourteen" are sufficient. "Being" is a sufficient averment of the facts which follow.² *A fortiori* where there has not been consent.³

Enticing a person of fortune to an improper marriage.] It seems, again, to be an offence to persuade a party under age to contract an improper marriage, and the nullity of the union in the case of a minor would not furnish any excuse for the common law misdemeanor.

The council of the Marches in Wales granted an information for this offence in 15 Car. 1, and the parties were fined, but a doubt was raised in the King's Bench whether that court had jurisdiction, and the defendants were bailed.⁴

This point was argued at some length upon another occasion, when the court observed that it was lawful to marry, but that if the marriage was obtained by unlawful means, an offence would be committed. But we are informed that no judgment was given.⁵ However, soon afterwards leave was given to file an information against the defendants, for "procuring a gentleman's son to marry a woman of infamous reputation."⁶ So, again, an information was granted against persons who were suspected of using artifices in order to obtain a will from a female who was addicted to liquor, and who was incapable, from intemperate habits, of making one.⁷

Judgment.] The judgment at common law for these offences is fine and imprisonment, at the discretion of the court.

Threats by parish officers.] By 7 & 8 Vict. c. 101, s. 8, if any officer of a union, &c., endeavour to induce any person to contract a marriage by threat or promise respecting any application to be

¹ 3 Burr. 1439, by Lord Mansfield. See also *R. v. Sellinger*, 12 Mod. 413, where the court refused to quash an indictment for adultery upon motion, but left the defendant to demur.

² *R. v. Moore*, 2 Lev. 179.

³ *R. v. Mears and another*, Den. & P. 70; 20 L. J. M. C. 59.

⁴ *R. v. Seeles and others*, Cro. Car. 557, prisoners upon a *habeas corpus*. "It is extraordinary," says Professor Christian, "that prosecutions are not instituted against those who publicly sell their wives, and

against those who buy them." Notes to 4 Com. 65.

It is believed, however, that the disapprobation of public opinion has done more towards the decrease of these exhibitions than any prosecutions could have effected.

⁵ *R. v. Thorp and others*, Carth. 384; Comb. 456.

⁶ *R. v. Blacket and another*, 7 Mod. 39. See also *R. v. Pierson and others*, Andr. 310, on the st. of Ph. & Mary. *R. v. Clarke*, 1 Burr. 606.

⁷ *R. v. Wright and others*, 2 Burr. 1099.

made or order to be enforced respecting a bastard, he shall be guilty of a misdemeanor.

Indictment.] The indictment states, that A., on, &c., being then overseer, &c., of the parish of —, did unlawfully endeavour to induce one B. to contract a marriage with C., by threatening [promising that —] [state the threat or promise], against the form, &c.

CHAPTER X.

OF OFFENCES AGAINST DECENCY.

Brothels.] A bawdy-house is held to be a common nuisance,¹ and persons who keep it are liable to be prosecuted for a misdemeanor. A lodger keeping a single room for such immoral purposes is within the rule.² And so is a *feme covert*, for participating in the government of the house: she may be said, in that sense, to keep it.³ But the bare solicitation of chastity is not indictable.⁴

This conduct of keeping a brothel is narrowly watched by the law. The stat. 25 Geo. 2, c. 36, s. 5, enacts, that if any two inhabitants of a parish, paying scot and lot, do give notice to any constable, or peace officer where there is not any constable, of such parish, of any person keeping a bawdy-house, &c., the constable shall immediately go with such inhabitants before a justice, and upon oath being made by the inhabitants that they believe the contents of the notice to be true, and upon their entering into a recognizance⁵ to give or produce material evidence against such person, shall himself enter into a recognizance⁶ to prosecute with effect at the next sessions or assizes, according to the discretion of the magistrate. All reasonable expenses of the prosecution to be ascertained by two justices, and paid by the overseers, and 10*l.* to be paid to each of such inhabitants in case of conviction; and in default of payment by such overseers, such overseers shall forfeit to the constable double the amount of the sum he may be entitled to for expenses, and

¹ 1 Hawk. c. 74.

² *R. v. Pierson*, 1 Salk. 382.

³ *R. v. Williams*, 1 Salk. 384.

⁴ 1 Salk. 382; 2 Ld. Raym.

1: 97.

⁵ Of 30*l.*

⁶ Of 30*l.*

to the inhabitants double the sums of 10*l.* respectively due to them. It is to be observed that the next general or quarter sessions or the next assizes do not exclude the borough jurisdiction.¹

By sect. 6, the person so charged with keeping the house shall be apprehended and bound over, and the justice may take security for the good behaviour of the accused in the mean time, until the indictment shall be found, heard, and determined, or until the grand jury shall throw out the bill.

Sect. 7 imposes a penalty of 20*l.* on the constable who shall neglect, upon the notice given as aforesaid, to go before the justice, or enter into the recognizance, or who shall be wilfully negligent in carrying on the prosecution.

Sect. 8 provides for more easy proof as to the keeping of such a house, and enacts, that any person who shall appear, act, or behave as master or mistress, or as having the care, government, or management of any bawdy-house, &c., shall be deemed and taken to be the keeper thereof, and be punished as such, notwithstanding that he or she shall not, in fact, be the real owner or keeper thereof.

Under sect. 9, any inhabitant of the place may give evidence either for the prosecution² or on behalf of the defendant, notwithstanding his inhabitancy, or his having entered in the recognizance. And sect. 10 takes away the writ of *certiorari*, whether the prosecution be instituted under ss. 5, 6, of that Act, or in the ordinary course.³ But if the prosecutor should remove the indictment into the Central Criminal Court, under 4 & 5 Will. 4, c. 36, s. 16, the statute of Geo. 2 does not apply.⁴

However, by 58 Geo. 3, c. 70, s. 7,⁵ reciting the stat. 25 Geo. 2, a copy of the notice which shall be given to such constable shall also be served upon the overseers, or one of them, and they shall have reasonable notice to attend before the justice, and if they shall then and there enter into a recognizance to prosecute the offender, then the constable shall be relieved from entering into the said recognizance; but in the event of their neglect to attend, or refusal to comply with the request, the constable shall, in that case, continue liable to prosecute under the circumstances already mentioned in the Act of 25 Geo. 2, c. 36.

Judgment.] The judgment for this misdemeanor is fine and imprisonment, and such infamous punishment as the court shall think proper to inflict.⁶

¹ *R. v. Charles*, 31 L. J. M. C. 69; 9 Cox, 18.

² On an indictment of this nature, a female witness swore she was a sailor's wife, and that she had often prostituted herself in that house during her husband's absence out of the realm. Lord Raymond, C. J., said it was an odious piece of evidence, and ought not to be heard. Burn's Just. tit. "Lewdness."

³ *R. v. Sanders*, 9 Q. B. 235.

⁴ *R. v. Brier and others*, 19 L. J. M. C. 121. Rule to quash the writ of *certiorari* and for a *procedendo* refused.

⁵ This is the only section of the Act which is not repealed.

⁶ 3 Inst. 205; 1 Hawk. c. 74. And surety for good behaviour for a reasonable time may likewise be required.

The stat. 25 Geo. 2, c. 36, s. 2, prescribes a penalty of 100*l.* against such as keep unlicensed houses for music, dancing, &c., and that they shall be otherwise punishable as the law directs in the case of disorderly houses. The gist is the licence. It needs not to be shown that disorderly or improper conduct existed in the house. The defendant had his name over the house as a vintner; another had contracted to supply visitors with refreshments. Neither took any part in the management, although they were sometimes seen in the room. The recorder directed an acquittal.¹

Lewdness.] Very nearly connected with the offence just described are the faults of lewdness and disorderliness.² As the case of Sir C. Sedley, who was fined 2000 marks for indecent conduct in Covent Garden.³ So it is settled that a night-walker, or other such disorderly person may be indicted,⁴ and so likewise the frequenter of a bawdy-house; but it must be shown that the defendant knew the bad character of the place,⁵ and care must be taken to discriminate between matters which partake of the character of lewdness and those which merely relate to disorderly persons.

An indictment for an indecent exposure is not supported unless it be shown that more than one person might have witnessed it. Where no one was in sight at the time excepting L. C., although L. C. saw it, the count was held not to have been proved.⁶ And Parke, B., had ruled the same way in the case of a French master at York in 1830. The learned judge directed the jury to consider whether the defendant was in such a position that the passers-by in the street could have seen him if they had happened to look.⁷ So, in a public urinal, an exposure to a single individual is not indictable.⁸ But where a girl who witnessed an offence of this nature ran and called a policeman and another person, who, themselves, then saw it, the proof was held sufficient.⁹ So, again, a person was indicted at the sessions for an indecent exposure of his person. It appeared, however, that no one was in sight but A. when the offensive act took place, and as the indictment charged the act to have been done in the presence of A. and divers others, it was contended that the judgment must be arrested, or a verdict of Not guilty entered. The indictment, moreover, used the words "expose and ex-

¹ *R. v. Wolf and others*, 3 Cox, 578.

² See 1 Hawk. c. 5, s. 4; East, P. C. 3.

³ *R. v. Sir C. Sedley*, 1 Sid. 568. And by 5 Geo. 4, c. 83, s. 4, every person wilfully, openly, lewdly, and obscenely exposing his person in any street, road, or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female, shall be deemed a rogue and vagabond, and shall, upon conviction, be committed for

a term not exceeding three calendar months, with hard labour. See *R. v. Justices of Newcastle*, 1 Barn. & Cress. 933. See also 2 & 3 Vict. c. 47, s. 58. [Metropolis Police Act.]

⁴ Poph. 208.

⁵ Burn's Just. tit. "Lewdness."

⁶ *R. v. Watson*, 2 Cox, 376.

⁷ Cited in *R. v. Webb*, post; Den. 344. Parker, B.

⁸ *R. v. Orchard*, 3 Cox, 248.

⁹ *R. v. Bunyan*, 1 Cox, 74. The girl was not called.

hibit," without adding "to the view of," or words to that effect. The court held the evidence defective, and a majority of the judges thought the indictment bad in arrest of judgment, and *Watson's case*¹ was relied upon. And Parke, B., mentioned the case of the French master at York who was tried before him, and that he directed the jury in that case to acquit if they thought that no person except one *could* have seen the defendant. It did not matter whether passers-by did see, but the question was whether they might have seen had they looked. A verdict of Not guilty was entered in the principal case.² But where the defendant exposed himself in an omnibus where any one *might* have seen him, the judges held—1, that an omnibus is a public place; 2, that as the defendant might have been seen [in fact he *was* seen] he was rightly convicted; 3, that the indictment need not conclude *ad commune nocumentum*.³ A charge of having obscene pictures, with intent to publish, *in possession*, is not indictable as a misdemeanor,⁴ but the *procuring and obtaining* them for that purpose is.⁵

It has been held that a woman who ran in a public way naked down to the waist was not indictable, for "nothing appears immodest or unlawful."⁶

An indictment was once preferred against an individual for converting his house into an hospital for taking in and delivering lewd, idle, and disorderly unmarried women, who, after their delivery, went away and deserted their children, whereby such children became chargeable to the parish. It certainly might be desirable that the parish should be indemnified against such casualties, but the court were clear that an indictment could not be sustained, and by Lord Mansfield: "By what law is it criminal to deliver a woman when she is with child?" The rule was, therefore, made absolute to quash the indictment.⁷

Showing a monstrous birth for money seems likewise to have been disapproved of by Lord Chancellor Nottingham.⁸

Judgment.] The sentence for the respective offences mentioned above is fine and imprisonment, together with hard labour.⁹

Obscene libels.] Obscene writings or pictures are highly repudiated at common law. Their tendency to deprave public morals

¹ *Supra*.

² *R. v. Webb*, Den. 338; 18 L. J. M. C. 39.

³ *R. v. Holmes*, 22 L. J. M. C. 122; Dears. 207. Whether the indictment should have said that he exposed his private parts, instead of his person, qu.?

⁴ *R. v. Heath* was cited as authority for this; *ante*.

⁵ *R. v. Dugdale*, Den. & P. 64. *R. v. Fuller* was cited. S. C. nom.

Dugdale v. Reg. (in error), 22 L. J. M. C. 50; 1 El. & Bl. 425.

⁶ *R. v. Gallard*, W. Kel. 163.

⁷ *R. v. M' Donald*, 3 Burr. 1645.

⁸ *Herring v. Walround*, Ca. in Ch. 1735, p. 110, and in the margin of the book it is said to be a misdemeanor.

⁹ 1 Hawk. c. 5, s. 6; Poph. 208; and, as it should seem, bound over to good behaviour, if thought fit. 14 & 15 Vict. c. 100, s. 29.

cannot be too deeply felt, and we consequently find, that the legislature has not been backward in lending assistance to diminish a nuisance of this description.¹

But we have, in this place, to deal with the offence as a misdemeanor, and so subject to indictment. At one time, nevertheless, it was conceived, that although a crime calculated to shake religion, as profaneness on the stage, was indictable, yet that the writing of an obscene book was punishable only in the spiritual court.² But this opinion was subsequently overruled, after much consideration, in *R. v. Curl*. The defendant was indicted for printing and publishing an obscene libel, and his counsel urged the case of *R. v. Read* as an authority in his favour, upon which the court determined to give the matter a full consideration. And, subsequently, they said, that they should have adjudged *Read's case* otherwise, and gave judgment for the crown.³ No doubt has since been entertained but that such acts as these are misdemeanors.

Judgment.] The judgment is, that the offender be fined and imprisoned, and suffer such corporal punishment as the court may award,⁴ and hard labour is added by 3 Geo. 4, c. 114. And by 14 & 15 Vict. c. 100, s. 29, any public selling or exposing for public sale, or to public view, of any obscene book, print, picture, or other indecent exhibition, is punishable with hard labour in addition to any other punishment. And, moreover, by 20 & 21 Vict. c. 83, s. 1, a power of search into premises suspected of having obscene books, &c., is given to magistrates. And proof upon oath must be given that one or more of such books, &c., has been sold, &c., at or in connection with the place, and that the publica-

¹ By 5 Geo. 4, c. 83, s. 4, every person exposing to view, in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition, shall be deemed a rogue and vagabond, and liable, upon conviction, to be punished with imprisonment for three calendar months, with hard labour. And by 1 & 2 Vict. c. 38, s. 2, reciting that doubts had arisen whether exposing to public view in the windows of shops in streets, highways, &c., any obscene print, &c., was an offence, it was enacted, that whoever shall expose, or cause to be exposed to public view, in the window or other part of any shop, or other building, situate in any street, road, highway, or public place, any obscene print, &c., shall be deemed to have so exposed the print, &c., within the intent and meaning of 5 Geo. 4, c. 83, s. 4,

and shall be punished accordingly. See likewise 2 & 3 Vict. c. 47, s. 54.

² *R. v. Read*, 11 Mod. 142; S. C. Fort. 98.

³ *R. v. Curl*, Str. 788. See also *Id.* 790, *R. v. Hill*, cited. The defendant went abroad, and was outlawed, being indicted for printing some obscene poems; and by the attorney-general, he would not have done so, if his counsel had thought it no libel. See also *R. v. Wilkes*, 4 Burr. 2527.

The evidence against the defendant must be exact. Upon a charge of exhibiting a box with an obscene painting on it, it was considered insufficient for the witness to say, "that is the box, or one similar to it." The identical box must be sworn to. *R. v. Rosenstein*, 2 C. & P. 414.

⁴ 1 Hawk. c. 73, s. 21.

tion in question is a misdemeanor. A power of destruction of the books, &c., is given to the justice upon non-appearance, or satisfaction to the mind of the justice that the article is of an obscene character.

Bathing.] It has been resolved, that bathing in a place of public resort is an offence, being *contra bonos mores*. As where the defendant bathed upon the east cliff at Brighton, dressing and undressing himself upon the beach. However, as it was the first prosecution in modern times, the court consented to his discharge, upon his entering into a recognizance to appear when called for, to receive sentence.¹ The judgment would otherwise have proceeded as in cases of misdemeanor similar to those which have been lately discussed.

CHAPTER XI.

OF GAMING AND GAMBLING HOUSES.

Both gaming and the keeping of a gambling house are offences punishable by indictment. Gaming accompanied by deceit is a misdemeanor both at common law and by statute, and play beyond a certain sum is made the subject of an indictment by the legislature. And the keeper of a gambling house is likewise obnoxious, at common law as well as by statute, to punishment for his mischievous vocation.

In the first place if a person be guilty of cheating, as by using false dice or cards, he may be indicted, and, upon conviction, fined and imprisoned at the common law.² And although play when practised innocently and as a recreation is said not to be unlawful, yet it should seem, that if the stake be excessive, such play would be deemed gaming, and so a misdemeanor at common law.

By 8 & 9 Vict. c. 109, s. 17, every person who shall by any fraud or unlawful device, &c., in playing at or with cards, dice, tables,³ or

¹ *R. v. Crunden*, 2 Campb. 89.

² *Anon.* 7 Mod. 40, defendant prosecuted by information. See 11 Rep. 87 (*b*), Cro. Jac. 497; Cro. El. 90. Such a person may be apprehended by a private person, if caught in the act of using false dice, Cro. Car. 234.

³ Games within the old Act, 9 Ann. c. 14, are cricket, 1 Wils. 220; *ut semb.* 1 Cr. & M. 798: foot races, 2 Wils. 36; Cowp. 281; 1 Younge, 361: horse-racing, Str.

1159; 4 Burr. 2432; 4 T. R. 1;

6 T. R. 499; 2 Bos. & Pul. 51.

See 3 Vict. c. 5, repealing so much of 13 Geo. 2, c. 19, as relates to horse-racing. Wagers on horse-racing, although the race be for a legal plate: 2 Sir Wm. Bl. 706.

And see further as to wagers, Cowp. 282; 6 T. R. 499; 3 Campb. 140; as to billiards. *R. v. Bedford*, Lofft.

29, 42. See also Burn's Justice, tit. "Gaming" wagers 1 Hawk. c. 92, s. 47, *et seq.*

in bearing a part in the stakes, &c., or in betting on the side or hands of them that do play, or in wagering on the event of any game, &c., win from any other to himself or another, any sum of money or valuable thing, or shall, at any one time or sitting, win above the sum or value of 10*l.*,¹ shall be deemed guilty of obtaining such money, &c., by a false pretence with an intent to cheat or defraud, and be punishable accordingly.²

By 8 & 9 Vict. c. 109, s. 4, certain penalties are ordained against the keepers of gaming houses, but there is a proviso that nothing in the Act should prevent any proceeding by indictment against the owner or keeper, or other person having the care or management of a common gaming house. Still, if summarily convicted, the defendant shall not be subject to an indictment, but he is open to an information at common law. Then by 16 & 17 Vict. c. 119, s. 1, houses, offices, rooms, &c., opened for the purpose of any money or valuable thing being received by the owner, &c., as a consideration for any assurance, &c., to pay or give any money or valuable thing on the event or contingency of any horse race, or other race, fight, game, sport, or exercise, or for securing such payment by some other person, are declared to be common nuisances and contrary to law. Then follows sect. 2, enacting, that every such betting house shall be deemed a gaming house within 8 & 9 Vict. c. 109. Therefore, although the offence is visited by penalties under this Act of 16 & 17 Vict., it is indictable as a nuisance under 8 & 9 Vict. c. 109. An information charged the keeping of a betting house on Oct. 5, and on divers other days and times between Oct. 5 and Nov. 16. The proof was, that the defendant kept the house on November 8. This was held good by Wightman, J.³ The keeping of a room for betting upon horse-racing is not within the statute.⁴

By sect. 3, upon a bill filed in equity for any sum won, the defendant may be compelled to answer upon oath with respect to any such gain. Sect. 9 excepts the queen's palaces from the operation of the Act during the residence of royalty, provided the play be for ready money.

Under the old Act of 9 Ann. the court would not allow of two proceedings, even upon the same statute, where one had been tried, and might be resorted to a second time. As where an information was moved for against the defendant, upon the prosecutor's affidavit that he had lost 15*l.* to the defendant at one sitting. It was objected, that the prosecutor had already indicted the defendant, and that the grand jury had found the bill, and although to this it

¹ Other sections relate to summary convictions, to the power of magistrates with respect to gaming, &c. And see the stat. 16 & 17 Vict. c. 119, declaring betting houses a common nuisance.

² Penalties are awarded by various clauses, but the 8 & 9 Vict.

c. 109, shields the defendant from two prosecutions upon that statute in respect of the same act.

³ *Onby v. Gee*, 30 L. J. M. C. 222.

⁴ *R. v. Crawshaw*, Bell, 303; 30 L. J. M. C. 58.

was answered, that the indictment had been quashed for insufficiency, yet the court observed, that the grand jury might find another bill, and that there was no reason for their interposition.¹

With regard to the words "*any time or sitting*," Blackstone, J., observed upon one occasion, that to lose 10*l.* at one time, would be to lose it by a single stake or bet, but that to lose it at one sitting, would be to lose it in a course of play, where the company never parts, though the person may not be actually gaming during the whole time. So that an interval of an hour or two at dinner was held not to be such an interruption as to prevent the sum in question from being considered as won at a single sitting.²

By 3 & 4 Vict. c. 5, the Acts against horse-racing were repealed,³ and the stakes or deposit to be paid to the winner of any race, or lawful sport, game, or exercise, or to the owner of any horse engaged in any race, are expressly saved by 16 & 17 Vict. c. 119, s. 6. But by 8 & 9 Vict. c. 109, s. 18, all contracts and agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void. No suit shall be brought to recover any money or valuable thing alleged to be won upon any wager, or which has been deposited to abide the event of any wager. Then follows a proviso, saving any plate, prize, or sum of money awarded to the winner of any lawful game, sport, pastime, or exercise.⁴

Nevertheless the keeper of a gambling house is punishable both at common law and by statute. It is regarded at common law in the light of a nuisance,⁵ and the attorney-general may take up proceedings, if he should think fit, which a private party has abandoned, and prosecute the offender to judgment.⁶

It has been decided, that *rouge et noir* is a game punishable by indictment. It was urged on the behalf of a defendant prosecuted for keeping a house where that game was played, that the keeping of a common gaming house was not an offence at common law, and that it only became a nuisance when it drew together a number of people in an inconvenient manner. It was also alleged, that *rouge et noir* was not a game mentioned in any one of the statutes which prescribe penalties for play. But the court would not entertain the rule for arresting the judgment, being clearly of opinion that the indictment was good, and Holroyd, J., observed, that he should have thought an allegation of the defendants having kept a common gaming house, sufficient.⁷

¹ *Bones v. Booth*, 2 Sir Wm. Bl. 1226. Anon. 5 Mod. 187. v. *Longbotham*, 2 Wils. 36. *R. v. Darley and others*, 1 Stark. 359.

² Under the repealed Act, "losing 10*l.* at any one time or sitting."

⁵ 10 Mod. 336.

³ 13 Geo. 2, c. 19.

⁶ *R. v. Wood*, 3 B. & Ad. 657. *R. v. Oldfield*, Id. 659, n.

⁴ See some old cases. *Whaley v. Pajot*, 2 Bos. & P. 51. *Pulling v. Frost*, 1 Esp. 235. *M'Allister v. Haden*, 2 Camp. 438. *Lynall*

⁷ *R. v. Rogier and another*, 1 B. & C. 272; 2 D. & Ry. 431; see also *Leach*, 493, per *Grose, J.*; 3 B. & C. 507, by *Abbott, C. J.*

So, a cock-pit has always been considered an unlawful game, and although the indictment was at common law, the court, upon one occasion, fined the defendant 12*l.* according to the measure prescribed by 33 Hen. 8, c. 9, and which, in this respect, is unrepealed (being at the rate of 40*s.* a day), for keeping such a place.¹ And one who suffered "fighting of cocks" in his house, was held properly convicted of a nuisance, by keeping a disorderly house.² And again, Lord Ellenborough refused to try a right to recover four guineas, because the action was founded upon a transaction of this nature.³ So is the law again with regard to bowling, if it be so conducted as to occasion a nuisance.⁴ It must be remarked, that the fraud under the Act must be a fraud *during the game*. Therefore, fraud to induce play is not sufficient. Still a combination so as to make it appear that the play of A. is less skilful than it really might be, is a conspiracy if the prosecutor be thereby tempted to play.⁵

Judgment.] The judgment at common law for unlawful gaming or keeping a gambling house, is fine and imprisonment, and hard labour is added by 3 Geo. 4, c. 114.

Lotteries.] By 10 & 11 Will. 3, c. 17, s. 4, all lotteries are declared to be "common and public nuisances," and all grants, &c. in respect of the same are "void and against law." The 2nd section imposes a pecuniary penalty, but a public nuisance is an indictable misdemeanor. The same may be said of "little goes," which are "common and public nuisances, and against law."⁶

The defendant kept an eating house, he also sold tickets for "White South Union Weekly Money Club," and "The Great Eastern Money Club." Prizes were drawn, and the fortunate holders received them, and the prizes were delivered by the defendant. The charge was for keeping a house for little goes, lotteries, and horse-racing bets. The court held, that the indictment was not good as to the horse-racing, but good as to the lotteries. "A ticket was purchased at the defendant's house with the expectation of a prize, and the defendant was concerned in delivering the ticket and the prize to the purchaser. The jury were therefore justified in inferring that the defendant kept a lottery." And as the 1st section declared the act of keeping a lottery to be a nuisance, it was clearly indictable, notwithstanding the penalty.⁷ The jury recommended the defendant to mercy, on the ground that he did not know that he was acting contrary to law. That

¹ *R. v. Howell*, 3 Keb. 465, 510.
And see 11 Rep. 87 (b); S. P., as
to the unlawfulness of cock-fighting.

R. v. Medlor, 2 Show. 36.

² *R. v. Higginson*, 2 Burr. 1223.

³ *Squires v. Whishen*, 3 Camp.
140.

⁴ 3 Keb. 465.

⁵ *R. v. Bailey*, on 8 & 9 Vict.
c. 117, 4 Cox, 390.

⁶ 42 Geo. 3, c. 119.

⁷ *R. v. Gregory*, 5 B. & Adol.
555, was cited by the court.

recommendation did not invalidate the verdict.¹ And because there is a penalty attached, the offence of promoting lotteries is not the less a misdemeanor.²

CHAPTER XII.

SLAVE DEALING.

We have already intimated that slave dealing on the high seas, accompanied by a forcible carrying away of the slave, was made piracy, felony, and robbery, by 5 Geo. 4, c. 113, s. 9. By the same statute, sect. 10, if any person shall deal or trade in, purchase, &c., any slaves, or shall otherwise than as aforesaid (that is, as under sect. 9,) carry away any slaves, or contract for that purpose, or import them, or ship such persons, tranship, embark, receive, detain, or confine them on board, or contract for that purpose, or to ship, tranship, &c., such slaves for the purpose of being imported, or fit out, &c., any vessel for the unlawful purpose aforesaid, or knowingly and wilfully lend or advance, &c., any money, goods or effects, for the like purposes; or in like manner shall have become guarantee or security for agents for similar ends, or shall become a partner, directly or indirectly therein, or ship any money, goods, or effects, to accomplish the same, or take the charge or command of, or navigate, &c., any ship in furtherance of the above concerns, either as captain, master, mate, surgeon, or supercargo, or contract for that purpose, or shall knowingly or wilfully insure, or contract to insure any slaves or property embarked in slave dealing, or shall forge any certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence or decree of condemnation or restitution, or any receipt (such receipt being required), or any part of any such certificate, or shall knowingly and wilfully utter and publish the same, with a guilty knowledge and intent to defraud the king, shall be and are thereby declared to be felons.

By sect. 2, if any petty officer, seaman, &c., shall knowingly give his services towards the carrying on any objects or contracts relating to the slave trade, he shall be guilty of a misdemeanor, and be imprisoned for a term not exceeding two years. And all

¹ *R. v. Crawshaw*, Bell, 303. horse-racing, but they were not
30 L. J. M. C. 58; 8 Cox, 330. considered sufficient to uphold an

² *R. v. Crawshaw*, 30 L. J. M. indictment for nuisance.
C. 58. There were some counts for

procurers, counsellors, aiders and abettors of such acts are made liable to the same punishment.¹

By sect. 48, offences committed within the jurisdiction of the admiralty, are to be dealt with according to 28 Hen. 8, c. 15, or 11 & 12 Will. 3, c. 7, or 46 Geo. 3, c. 54, and 4 & 5 Will. 4, c. 36. By 5 Geo. 4, c. 113, s. 49, all offences against the Act which are committed out of the admiralty jurisdiction, and not within the local jurisdiction of any ordinary court of a British colony competent to try the offence, may be prosecuted by virtue of a commission issued under 46 Geo. 3, c. 54. And by sect. 50, all offences committed against the Act may be inquired of, tried, determined, and dealt with, as if the same had been respectively committed within the body of the county of Middlesex.

Serva and others were indicted at Exeter for murder on the high seas. The *Felicidade* was a Brazilian schooner, and was certainly a slaver. Orders were given by the captain upon the station to capture this vessel, if she appeared to be fitted up for the slave trade. The *Felicidade* was accordingly captured, and all the crew, except the prisoner Majavel, and three of the others, were put on board of the king's ship. The *Felicidade* was then manned with British seamen, and sent in pursuit of another vessel. The *Echo*, a Brazilian brigantine, was the name of this vessel, and she also surrendered. Serva, the prisoner, was on board of the *Echo*, and there the officer found 434 slaves. Serva was told he was to be taken for violating the slave treaties. On the next morning, a midshipman and nine British seamen were put on board the *Felicidade* to take charge of her; and, amongst others, the prisoners. But these prisoners immediately rose, and destroyed the midshipman and the nine seamen. It was insisted for the prisoners, that the capture both of the "*Felicidade*" and of the *Echo* were illegal, and several cases were cited. But Platt, B., thought that the *Felicidade* was in the lawful custody of His Majesty's officers, and that all on board the vessel were within the admiralty jurisdiction, and the jury found the prisoners guilty of murder. However, the case was reserved for the judges, and it was again argued; the last time by civilians. The prisoners' counsel said, that the force used was in order to regain liberty. If there were no legal capture, there was no *corpus delicti*. Now in the case of the *Felicidade*, the search was lawful, but the detention unlawful, for she had no slaves on board. In the case of the *Echo* the search was unlawful, although the detention might, *per se*, have been lawful, for the conditions precedent prescribed by the convention had not been performed. The judges were not unanimous, but eleven² held the conviction wrong.³ First, because there was a want of jurisdiction in an English court

¹ As to the trial, &c. see ss. 48, 49, 50, 4 & 5 Will. 4, c. 36.

² Tindal, C. J.; Pollock, C. B.; Parke, B.; Alderson, B.; Patteson, J.; Williams, J.; Coltman,

J.; Maule, J.; Rolfe, B.; Wightman, J.; Erle, J.

³ *R. v. Serva and others*, Den. C. C. 104; 2 Car. & K. 53.

to try an offence committed on board the *Felicidade*; secondly, because if the lawful possession of that vessel by the British crown, through its officers, would be sufficient to give jurisdiction, there was no evidence brought before the court at the trial to show that the possession was lawful.¹ Lord Denman, C. J., held that the possession of the Brazilian vessel by the British officers was a lawful possession under a seizure made whilst the vessel was employed in the slave trade, and thence, that the jurisdiction to try the case at Exeter,² grew out of the possession of the vessel under the general authority of the crown.³ Platt, B., thought that during the detention of the *Felicidade*, she was in the lawful possession of Her Majesty, and as much within the admiralty jurisdiction as the ship which captured her.⁴

The prisoner was charged with slave dealing. He pleaded *auterfois acquit*. It was objected, however, to the indictment, that it was bad in substance. The court held the plea bad, and proceeded to consider the objections to the indictment. As to the last four counts, it was admitted by the crown that the words "knowingly and wilfully" were essential, and that this omission was fatal. It remained, therefore, to consider whether the first four counts could stand. The objection was, that each charged distinct felonies, such as, to fit out, man, navigate, equip, despatch, use or employ, any ship or vessel, in order to accomplish the acts forbidden by the statute. As each count charged the prisoner with having done *all the acts* before mentioned, it was argued that the respective counts were bad for duplicity. But the court held, that one felony only was charged in each count, the whole being alleged to have been done to accomplish one and the same single object. Another objection was, that the counts were bad for want of negating the exceptions in the statute of Geo. 4. But the court said, that the subsequent Act 3 & 4 Will. 4, c. 73, s. 12, had virtually repeated the exceptions in the former statute, and, moreover, the offences were charged as having been done after the passing of the repealing statute.⁵

Another objection was, that there was no allegation that the prisoner was a British subject, nor, that the offence was committed within Her Majesty's dominions. However, each count stated the offence to have been committed at London, within the jurisdiction of the Central Criminal Court.⁶

Judgment.] The judgment under 5 Geo. 4, c. 113, s. 12, is confinement not exceeding fourteen years, with hard labour for a term not exceeding five nor less than three years. Procurers, counsellors, aiders, and abettors, are included by the statute, but accessories after the fact are punishable under 7 & 8 Geo. 4, c. 28, ss. 8, 9.⁷

¹ Den. 154.

² Under 4 & 5 Will. 4, c. 36, s. 22; and 7 Vict. c. 2, ss. 1, 3, 4.

³ Den. C. C. 155.

⁴ Den. 156.

⁵ *R. v. Jennings*, 1 Cox, C. C. 116.

⁶ S. C.

⁷ See Lonsdale, p. 36, n.

CHAPTER XIII.

OF ATTEMPTS TO COMMIT FELONY, &c.

Attempts and solicitations to commit crimes are, where not otherwise provided for by the legislature, indictable misdemeanors at common law. As an attempt to commit felony or misdemeanor, whether such misdemeanor be statutable or at common law.¹ An attempt to commit felony is punishable by hard labour, in addition to fine and imprisonment.² Drunkenness is no excuse for an attempt to commit suicide, although it may be evidence to show the intent of an act.³

Solicitations are equally illegal and punishable. As to commit an unnatural crime.⁴ And it is not necessary to negative in the indictment the commission of the crime, for the bare inciting is sufficient, being an act of itself. And, again, there was the like rule upon an indictment against the defendant for an attempt to suborn a person to commit perjury.⁵

By 14 & 15 Vict. c. 100, s. 9, persons charged with felony or misdemeanor may be convicted of the attempt upon the same indictment. But there shall be no prosecution for the same attempt. By sect. 12, no person shall be entitled to an acquittal for misdemeanor if the offence turn out to be felony, but the court may discharge the jury at their discretion. And no person shall be charged with felony upon the same facts, if convicted of misdemeanor.⁶ But an acquittal for murder does not bar an indictment for administering poison, by virtue of this section.⁷

Keys are implements of housebreaking within the 58th section of 24 & 25 Vict. c. 96,⁸ and there should be a comma between "pick-lock" and "key."⁹ The indictment needs not to allege that the prisoner had the implements with intent to commit felony, nor is it necessary to prove that fact at the trial.¹⁰

So, again, soliciting by bribes, although they be not accepted, is an offence. And likewise soliciting a servant to steal his master's goods, although it be not laid in the indictment that the servant stole the goods, or that any act was done excepting the solicitation.¹¹

¹ *R. v. Roderick*, 7 C. & P. 795.
R. v. Butler, 6 C. & P. 368. *R.*
v. Scholefield, Cald. 397. See *Russ.*
& Ry. 107. *R. v. Martin*, 9 C. &
 P. 215. Not an intention, but an
 attempt.

² 3 Geo. 4, c. 114.

³ *R. v. Doody*, 4 Cox, 465.

⁴ 2 Ch. C. L. 50.

⁵ 2 East, 14, 17, 22, at Shrews-
 bury, *cor.* Adams, B.

⁶ See *R. v. Shott*, ante.

⁷ *R. v. Connell*, 6 Cox, 178.

⁸ The cases below were decided
 under 14 & 15 Vict. c. 19, s. 1,
 repealed.

⁹ *R. v. Oldham*, Den. & P. 472;
 21 L. J. M. C. 134.

¹⁰ *S. P. R. v. Bailey*, Dears. l.
 244. *R. v. S — — and ux.* 5 Cox,
 279; 23 L. J. M. C. 13.

¹¹ *R. v. Higgins*, 2 East, 5. *R. v.*
Daniel, 1 Salk. 380. *R. v. Colling-*
wood, 3 Salk. 42; 2 L. R. 1116.

The soliciting of any person to commit a misdemeanor under the Post Office Act is a misdemeanor, and punishable with two years' imprisonment, with or without hard labour, and solitary confinement.¹

Cruelty to children, servants, and helpless persons.] Cruelty is also an offence against public morals. As, where a master neglects to provide sufficient sustenance for his servant. But the indictment must allege that the party was of tender years, and under the defendant's control and dominion. For want of such a statement, a charge of this nature has been considered defective upon more than one occasion.² Although Lawrence, J., expressed his opinion in *R. v. Ridley*, that nonfeasance, with regard to food and clothing towards a child of tender years, was a misdemeanor.³

Judgment.] The judgment is fine and imprisonment.

CHAPTER XIV.

OF STEALING DEAD BODIES.

The offence of taking up dead bodies, either for the purposes of dissection or for profit, is considered to be an act of great indecency,⁴ and it is a misdemeanor at common law.⁵ But there may be a lawful custody of dead subjects for scientific purposes, which

¹ 1 Vict. c. 36, s. 36. Provided such confinement do not exceed one month at a time, nor three months in one year.

² *R. v. Ridley*, 2 Campb. 650. Id. 652, case at Exeter, *cor.* Le Blanc, J. This is the case of *R. v. Friend and ux.* Russ. & Ry. 20. The wife was acquitted upon two indictments, and the husband convicted on both, and sentence of imprisonment was passed upon him, but as the objection presented to the judges related not so much to the indictment as to the evidence adduced in support of it, they thought it best to adjourn the final decision, and so allow the defendant to un-

dergo the whole of his sentence, although they considered the indictment defective for want of the allegation as to tender years mentioned in the text. Chambre, J., thought that this was not in any manner an indictable offence, being founded wholly on contract. Id. 22.

³ 2 Campb. 653. See also the case of an overseer who refused to provide necessary food for a pauper. *R. v. Booth*, Russ. & Ry. 47, *n.* See 24 & 25 Vict. c. 100, s. 26.

⁴ 4 Com. 236.

⁵ It is said that sixteen attempts at the least have been made in parliament to make this offence felony.

is calculated to work well for society, and the legislature has prescribed certain rules for the possession of bodies, which are designed to confine the practice of receiving such bodies within due limits, and, at the same time, not to offend against the feelings of the multitude.¹ However, although the unlawful taking of bodies from the grave is a misdemeanor, yet if the shroud, or other covering, or any property placed with the corpse, be taken away by the parties, the offence, as far as the chattels are concerned, is felony. And in such a case, the shroud, or coffin, &c., may be laid in the executors or other persons who buried the deceased, or, under some circumstances, in persons unknown.²

Upon one occasion, it was attempted to be argued in a case of misdemeanor of this nature, that it was one of ecclesiastical cognizance, if, indeed, it could be treated as a crime in any respect. The indictment charged a surgeon with entering a burying ground and taking a coffin out of the earth, from which it was alleged that the defendant took a dead body and carried it away for the purpose of dissecting it. And it was moved to arrest the judgment. But the court said, that common decency required that the practice should be put a stop to; that it was cognizable in a criminal court, as being highly indecorous, and *contra bonos mores*, and that the practice at the Old Bailey had been to try and punish such offences, and the defendant was fined five marks.³ The like decision was come to where the offence was committed for the sake of gain and profit. The indictment charged that the defendant, a certain dead body of a person unknown, lately before deceased, wilfully, unlawfully, and indecently did take and carry away, with intent to sell and dispose of the same for gain and profit. The evidence was that the defendant had taken a body from some burial ground, but from what particular place was uncertain. He was found guilty, and it was so clear that the indictment well lay, that no case was reserved.⁴ A person took away the body of his mother from the burial ground of dissenters, in order, through filial affection, to bury it with that of his father, then lately dead. He was held to have committed a misdemeanor.⁵

Judgment.] The judgment for this misdemeanor is fine or imprisonment, or both, at the discretion of the court.

¹ See the statute 2 & 3 Will. 4, c. 75; and *R. v. Feist*, 27 L. J. M. C. 164; Dears. & B. 590.

² *R. v. Haynes*, 12 Rep. 113; East, P. C. 652; see also *Id.* 654.

³ *R. v. Lynn*, 2 T. R. 733; S. C. Leach, 497.

⁴ *R. v. Gilles*, 1 Russ. C. M. 415; S. C. Russ. & Ry. 366, n. This case was mentioned privately to the judge of the King's Bench, who intimated the opinion stated in the text. *S. P. R. v. Cundick*, 1 Dowl.

N. P. C. 13, where the defendant had illegally sold the body of a capital criminal. In this case the indictment was drawn in the form of a declaration or assumpsit, but the court held it good, the main points being rightly placed on the record.

⁵ *R. v. Sharpe*, Dears. & B. 160; 26 L. J. M. C. 47. But he was only fined 1s. and discharged. The cases of *Lynn*, *Gilles*, and *Cundick* were cited.

CHAPTER XV.

OF THE PURCHASE AND SALE OF OFFICES.

Purchase and sale of offices.] The sale or purchase of offices is looked upon as highly inexcusable. There is no doubt but that such an offence is punishable at common law. And thus Hawkins says, that the *taking* or *giving* a reward for offices of a public nature is bribery.¹ And, again, where it was objected upon an indictment for a conspiracy, that it was not a misdemeanor at common law to buy or sell the office of coast waiter, Lord Ellenborough observed, that it would be very difficult to argue after reading the case of *R. v. Vaughan*, in Burrow, that such an act was not a misdemeanor. It must be debated upon arrest of judgment, or upon a writ of error, and Grose, J., expressed himself without doubt to the same effect.²

The sale of offices has always been a ground for prosecution.³ This conduct was early forbidden by the legislature.⁴ The statute, however, which declares both sale and purchase to be misdemeanors, is the 49 Geo. 3, c. 126. By that Act, sect. 3, if any person shall sell or bargain for the sale of, or receive, have, or take any money, fee, gratuity, loan of money, reward or profit, directly or indirectly, or any promise, agreement, covenant, contract, bond or assurance, or shall by any device or means contract or agree to receive or have any money, &c.; or shall purchase or bargain for the purchase of, or give or pay any money, &c.; or make or enter into any promise, &c., to give or pay any money, &c.; or shall by any way, &c., contract or agree to give or pay any money, &c., directly or indirectly, for any office, commission, place, or employment specified or described in the said recited Act,⁵ or this Act,⁶ or for any deputation thereto, or any part,

¹ 1 Hawk. c. 67, s. 3.

² *R. v. Pollman and others*, 2 Campb. 229.

³ Noy. Rep. 102; Mo. 781.

⁴ By 12 Ric. 2, c. 2, in the case of chancellors, &c., who should appoint justices, sheriffs, escheators, &c. or other officers or ministers of the king. By 4 Hen. 4, c. 5, in the case of sheriffs, who are forbidden to let their bailiwicks to farm. By 5 & 6 Edw. 6, c. 16.

⁵ That is to say,—5 & 6 Edw. 6, c. 16, repealed; and the offices are,—49 Geo. 3, c. 126, s. 2,—any office, or the deputation thereof,

concerning the administration of justice, or the receipt, controlment, or payment of the king's treasure, rent, revenue, &c.; or the customs, or custom houses, or the keeping of towns, castles, and fortresses, or any clerkship in a court of record where justice is to be administered. This Act is repealed as to offices in the customs only, by 6 Geo. 4, c. 105.

⁶ That is to say,—sect. 1,—offices in Scotland and Ireland,—all offices in the gift of the crown, or appointed by the crown. All commissions, civil, naval, or military. All places

parcel, or participation of the profits thereof, or for any appointment or nomination thereto or resignation thereof, or for any consent to such appointment, nomination, or resignation, he shall be guilty, together with all such as wilfully and knowingly aid and abet the same, of a misdemeanor. By sect. 4, the like offence is declared in respect of any person who shall, in like manner make bargains, either by receiving or paying money, &c., for any interest or solicitation, or negotiation relating to such office, &c.; or shall, for or in expectation of any gain, &c., solicit, recommend, or negotiate in any manner for any person touching a nomination or appointment to such office. A cadetship is within the statute, and it was held well described in an indictment, as "office, commission, place, and employment."¹

And by sect. 5, persons opening or keeping any house, room, office, or place for soliciting, transacting, or negotiating such appointments, &c., or who shall knowingly aid, abet, or assist therein, shall be deemed and adjudged guilty of a misdemeanor. Exceptions to the rule are however enacted by sect. 7,² provided there be no advertisements, nor printed proposals; nor any bribe of any kind whatsoever relating to the same. And again, by sect. 9, offices particularly specified by 5 & 6 Edw. 6, c. 16, are excepted,³ and offices legally saleable before the passing of the 49 Geo. 3, c. 126, and in the gift of any person, by virtue of any office or of which any person is or shall be possessed under any patent or appointment for his life, and all promises, &c., which were valid before the passing of the Act, and acts done in pursuance thereof. Sect. 10 saves all legal deputations to offices, and all agreements, &c., lawfully made in respect of any allowance, salary, or payment by or to such principal or deputy respectively, out of the fees or profits of such offices. Sect. 11 excepts annual payments of fees due to former possessors of offices and agreements, &c., relating thereto, provided that the amount thereof be stated in each particular commission. Sect. 12 excepted certain offices in Ireland.⁴

and deputations belonging to the treasury, the secretary of state, the admiralty, the ordnance, the commander-in-chief, secretary-at-war, paymaster of the forces, the India board, excise, the treasurer of the navy, the commissioners of the navy, the commissioners of transports, the commissary-general, the store-keeper-general, and also to the principal officers of any public department or office in the kingdom, or the king's dominions here or abroad; and also to the East India Company.

¹ *R. v. Charettie*, 18 L. J. M. C. 100; 13 Q. B. 447.

² Commissions in the board of gentlemen pensioners, or yeomen of the guard. The marshalsea, the palace court, army commissions.

³ Offices whereof a person is seised in any estate of inheritance, or parkership, or keeping of any park, house, manor, garden, chase, forest: sect. 4. And sect. 7 saved harmless the chief justices of the King's Bench and Common Pleas, and the justices of assize; but alterations have been made in some respects with regard to these functionaries.

⁴ Sect. 13 directs the punishment of these misdemeanors in Scotland.

Under 33 Geo. 3, c. 52, s. 62, it was held that the defendant might be charged with receiving a sum of money as a gift or present in the words of the statute, without mentioning the rupees alleged to have been accepted as a bribe, as Madras, Bombay, or Sicca rupees. And the money need not be called the money of the person from whom it was received, nor of any other person; nor need it be said that the money was received exclusively, or under colour of the defendant's office or employment; nor for whose use such money was received.¹ This case was carried into the Exchequer Chamber in error, where the court affirmed the conviction, and held the indictment well preferred, as the statute 7 Geo. 4, c. 64, applied to offences abroad as well as in England. The judgment was under 33 Geo. 3, that the defendant should be fined in, and forfeit 766*l.* 13*s.* 4*d.*, the full value of the gift, and be imprisoned till payment of such fine and forfeiture. Upon this judgment, it was held in the Exchequer Chamber that the gift being money, the money was forfeited, and the court had no option. Secondly, that as the jury had found the value of the gift, *i. e.* 8000 rupees to be worth 766*l.* 13*s.* 4*d.*, it was rightly estimated as the value at the time of its receipt. Thirdly, that the sentence of imprisonment until, &c. was correct.² By 15 & 16 Vict. c. 87, s. 3, it is a misdemeanor for any officer in Chancery to receive any gratuities. He is to be fined 500*l.*, to be removed, and to be incapacitated from ever thereafter holding any office, &c. By sect. 4, any such offender may be prosecuted by information by the attorney-general, or by a criminal information in the Queen's Bench, or by indictment.³

Indictment.] A count which alleged the offence to be that the defendant did unlawfully and corruptly contract with D. N. to procure an appointment to a certain office, &c., was held bad for setting out the offence. The contract must be to receive money or profit in order to come within the Act.⁴

Trial.] By 49 Geo. 3, c. 126, s. 14, all offences committed against that Act and 5 & 6 Edw. 6, c. 16, (now repealed,) by any governor, lieutenant-governor, or person having the chief command, civil or military, in any of His Majesty's dominions, colonies, or plantations, or his or their secretary or secretaries, may be prosecuted in the Court of King's Bench, in like manner as any crime, &c., committed by any person holding a public employment abroad, might be prosecuted under 42 Geo. 3, c. 85.

¹ *Douglas v. The Queen*, 13 Q. B. 74.

² S. C.

³ S. C.

⁴ *Day v. The Queen*, 2 Cox, 178.

CHAPTER XVI.

OTHER OFFENCES.

Unlawful oaths.] It has been already shown in a former section, that oaths which are inconsistent with the public safety are the subjects of misdemeanor. The like may be said of such oaths as are inimical to public trade. And it may here be added, that any oaths which do not fall under the heads already treated of, and which are, nevertheless, against public convenience, are also entitled to be ranked as matters of misdemeanor. Therefore, where certain night poachers were sworn to keep secret a scheme which was proposed to them, it was made the subject of an indictment to administer such an oath. And it was considered sufficient to say that the oath was to do an illegal act, without showing what the act was. And in the same case it was held immaterial to prove that the parties were sworn upon a Testament.¹

Conspiracy.] Certain conspiracies likewise, which militate against the public convenience, but which are neither *mala in se*, nor *mala prohibita*, may be mentioned here. As if an agreement be entered into to indict or acquit, so as to leave the question of right or wrong entirely indifferent.² So, where certain persons agreed to hiss at the Birmingham theatre, it was deemed to be an illegal confederacy, although *one* might clearly have hissed without offence.³ So, a combination amongst officers to resign their commissions is a conspiracy. The military service cannot be determined by such a confederacy.⁴

¹ *Broadribb and others*, 6 C. & P. 571.

² 9 Rep. 56; 1 Salk. 374; see 33 Edw. 1, stat. 3.

³ Anon. 2 Russ. C. M. 556. See also S. P. 2 Campb. 372, in the case of *Macklin*, the comedian, who indicted certain persons for hissing

him whenever he appeared upon the stage. *R. v. Clifford and others*, 2 Campb. 227, against whom a criminal information was granted for a conspiracy to disturb the performances at Covent Garden theatre.

⁴ 3 Burr. 2476.

CHAPTER XVII.

OF BRIBERY AND RECEIVING BRIBES.

Bribery.] Very heavy punishments are awarded by the legislature against such as tamper with the parliamentary franchise. The usual proceeding is by information. The old Act, 2 Geo. 2, c. 24, prescribed two years as the limit of the time for prosecution, and as the punishment by way of penalty was not warded off by the judgment upon indictment or information,¹ the court would not aid an attempt to inflict the double pain. And although informations were at one period granted by the court within the two years, yet it was subsequently resolved, that an information ought not in general to be allowed, and especially after a judgment for the penalty, and that whilst the person is liable to that judgment, the extraordinary interposition ought to be withheld.² But the court entertained no doubt of their jurisdiction to permit such an information, as at common law,³ in addition to the penalties of the statute.⁴ It was the same thing as though the defendants had been convicted upon an indictment.⁵ And where there has been a conviction upon an *indictment*, the court will adjourn the passing of their sentence until the two years shall have elapsed, upon the defendant's entering into a recognizance. It was arranged upon one occasion, that the defendant should be bound in his own bond in 100*l.* to appear at the expiration of that period.⁶ As soon as the time had expired, however, the defendant was brought up, and received judgment of fine and imprisonment.⁷ And an information will not be granted until the same period has elapsed.⁸ It was totally immaterial, under the statute 2 Geo. 2, whether the party bribed had a right to vote or not, by reason of the words "claim to have" in that Act of parliament; but this point does not seem to have been decided at common law.⁹ So again, an information will lie for endeavouring to

¹ Sir Wm. Bl. 524.

² *R. v. Pitt* and *R. v. Mead*,
3 Burr. 1335; S.C. 1 Sir Wm. Bl. 380.

³ See *R. v. Taylor*, 12 Mod. 314.

⁴ 3 Burr. 1339.

⁵ *Id.*

⁶ *R. v. Heydon*, *Id.* 1359, 1389;
1 Sir Wm. Bl. 351, 356, 404.

⁷ *Id.* 1389. Although he stood convicted on the testimony of a single witness, whom he had himself indicted for perjury. But the court said, that all the witnesses to

be brought forward upon the trial for perjury (except one), as well as Heydon himself, had been examined on Heydon's trial, and they added, that he could not be examined by reason of interest, and so they would not defer their judgment; S. C. See also *Id.* 1440.

⁸ *R. v. Robinson*, 1 Sir Wm. Bl. 541.

⁹ 4 Burr. 1591. See further upon this subject, 1 Hawk. c. 67, s. 9, &c.

corrupt an elector to vote at the election of mayor, although no money be paid.¹

The 17 & 18 Vict. c. 102, however, repeals several Acts and provisions respecting bribery at elections, and amongst others, the 2 Geo. 2, c. 24, for the most part, and by sect. 2 makes the following acts misdemeanors:—1. Directly or indirectly giving, lending, &c. any money or valuable consideration to voters, or to induce or refrain from a vote. 2. Directly or indirectly giving, &c. any office, &c. in like manner. 3. Directly or indirectly making any gift, loan, &c. in order to induce a person to procure a return, or a vote. 4. The receiver or procurer as above. 5. Advancing or paying, &c. money for the purpose of bribery, or discharging or repaying money in like manner. The punishment is fine and imprisonment, and, moreover, a penalty of 100*l.* may be recoverable in respect thereof, with full costs of suit, by any person who will sue. *Bonâ fide* legal expenses are excluded. By sect. 3, voters guilty of corrupt practices upon, during, or after the election shall be alike guilty, and moreover, forfeit 10*l.*, recoverable as aforesaid.

By sect. 5, directly or indirectly using or threatening any force, &c., or threats of harm, or intimidation with reference to voters; or abduction, duress, or fraud, so as to interfere with the franchise, or compel, &c. any voter to give or refrain from his vote, is made a misdemeanor, accompanied by a forfeiture of 50*l.* as above. Again, by sect. 15, every election auditor must make a declaration, &c.; if he do any act wilfully contrary thereto, he becomes guilty of a misdemeanor.²

Other cases.] But bribery may be committed in many other matters connected with public affairs and the administration of justice. And thus the defendant who promised one H. 500*l.* as a compensation for his vote, in the election of certain members of a corporation, was held to be guilty of this offence.³ And, again, in a case concerning the election of a mayor, informations for bribery were allowed to be filed against both the contending parties.⁴ So a bribe offered to a jurymen, in order to influence his verdict, whether accepted or not, may be made the subject of an information.⁵ So where the defendant, who was clerk to an agent

¹ *R. v. Cripland*, 11 Mod. 357. And procuring one to personate a voter is a misdemeanor. *R. v. Marsh*, 6 Ad. & El. 236.

² Whether sect. 14, as to limitations, applies to informations as well as to penalties, *qu.*? 8 Cox, 425. See ss. 9, 12, 13, 35.—Sect. 10, costs of prosecution. Sect. 14, limitation of actions or prosecutions to one year. The 36th section declares a person, guilty of bribery

by himself or his agents, incapacitated from sitting in that parliament. See also 21 & 22 Vict. c. 87.

³ *R. v. Plympton*, 2 Ld. Raym. 1377. It was deemed sufficient to allege, that H. had a right to vote without setting out the enabling clauses of the corporation charter.

⁴ *R. v. Mayor of Tiverton*, 8 Mod. 186.

⁵ *R. v. Young*, cited, 2 East, 14, 16.

for French prisoners, took bribes in order to procure the exchange of some of them out of their turn, he was visited, upon conviction, with a heavy punishment.¹ So, under 33 Geo. 3, c. 52, s. 62, to demand or receive any sum of money, or other valuable thing, as a gift or present, or under colour thereof, by any British subject holding office or employment under the crown, or the East India Company, shall be deemed and taken to be an extortion and a misdemeanor at law, and the offender shall forfeit the whole gift or present, or the full value thereof.²

So if an attorney should receive a bribe, he may be punished; and any undue reward for anything either against justice, or exceeding the fair measure of a reward, is a bribe.³ So if a commissioner for the examination of witnesses were to take a bribe, it would be a breach of trust, and he might be indicted and fined at the common law.⁴ And, of course, judicial bribery is a most grievous offence, whether the judge be swayed by the temptation, or refuse to accept the tender.⁵ Bribery, on the part of officers of the customs or excise, or officers of the army, navy, or marines, duly employed for the prevention of smuggling, is punishable by a pecuniary penalty; and an attempt to bribe such a person is an undoubted misdemeanor.⁶ So again, the court were quite clear that the defendant, who attempted to induce a privy councillor to give him a situation, by offering 5,000*l.* for that purpose, was guilty of misdemeanor.⁷

¹ *R. v. Beale*, cited, 1 East, 183.

² See upon this statute, *R. v. Stevens and another*, 5 East, 244.

³ Hob. 9.

⁴ Cro. Jac. 65.

⁵ See 3 Inst. 147; 4 Burr. 2500.

⁶ *R. v. Cassano*, 5 Esp. 231. But the defendant was acquitted, because the averment was,—“Delivered at a quay or wharf, appointed for the landing of certain goods,” whereas the order was to deliver them at the *king's* warehouse,

which, not being a quay or wharf, became thus the subject of a variance. So, again, *R. v. Everett*, 8 B. & C. 114; 1 M. & Ry. 35. But the defendant was held entitled to have the judgment arrested for want of an allegation that the officer was a person whose duty it was to make seizures of goods liable to forfeiture, because every person employed in the service of the customs is not so authorized.

⁷ *R. v. Vaughan*, 4 Burr. 2494.

The first of these is the fact that the United States is a young nation, and that its history is a history of growth and expansion. The second is the fact that the United States is a nation of immigrants, and that its history is a history of the struggle for the rights of these immigrants. The third is the fact that the United States is a nation of free men, and that its history is a history of the struggle for the rights of these free men. The fourth is the fact that the United States is a nation of law, and that its history is a history of the struggle for the rights of these laws. The fifth is the fact that the United States is a nation of peace, and that its history is a history of the struggle for the rights of these peace.

The sixth is the fact that the United States is a nation of progress, and that its history is a history of the struggle for the rights of these progress. The seventh is the fact that the United States is a nation of justice, and that its history is a history of the struggle for the rights of these justice. The eighth is the fact that the United States is a nation of liberty, and that its history is a history of the struggle for the rights of these liberty. The ninth is the fact that the United States is a nation of equality, and that its history is a history of the struggle for the rights of these equality. The tenth is the fact that the United States is a nation of unity, and that its history is a history of the struggle for the rights of these unity.

The eleventh is the fact that the United States is a nation of strength, and that its history is a history of the struggle for the rights of these strength. The twelfth is the fact that the United States is a nation of wisdom, and that its history is a history of the struggle for the rights of these wisdom. The thirteenth is the fact that the United States is a nation of courage, and that its history is a history of the struggle for the rights of these courage. The fourteenth is the fact that the United States is a nation of faith, and that its history is a history of the struggle for the rights of these faith. The fifteenth is the fact that the United States is a nation of hope, and that its history is a history of the struggle for the rights of these hope.

PART XIII.

Of Indictable Offences against Public Trade.

CHAPTER I.

FORESTALLING, &c.

THE common law and the legislature have at times recognized many acts as prejudicial to commerce in general, and have marked them with the character of misdemeanors. The offences known by the names of engrossing and forestalling, although now abolished, were obnoxious to the common law, and punishable by indictment. The common law likewise views with displeasure any attempt to deceive by fraudulent exhibitions of goods, so as to give them a different appearance from their real value or composition, and the legislature has inflicted penalties for this misdeed.

All oaths taken by secret associations or societies are declared to be unlawful by statute, and such, therefore, which may be the fruits of private meetings, in order to raise wages, or compel regulations respecting work, &c. are illegal. The payment of wages otherwise than in coin is likewise, for the third offence, a misdemeanor. It seems also, that if a mayor or other officer corruptly refuse to confirm the freedom of the borough upon a person who has earned it, or become entitled to it, he may be proceeded against by information; for the freedom is one of the rewards belonging to industry, and it is to the disparagement of trade to withhold it, but this is not an offence punishable by indictment.¹ Nor is it the subject of an indictment to keep an open shop in a city contrary to immemorial custom.² Nor to exercise a trade, contrary to the byelaws of a borough.³

Forestalling, &c.] It has been said that forestalling and engrossing were punishable at common law. They were formerly subject to imprisonment and the pillory by statute, but by 12 Geo. 3, c. 71, the Acts upon this head were repealed, and the matter was again left to the operation of the common law. And now by 7 & 8 Vict. c. 24, all the offences of badgering, engrossing, forestalling

¹ *R. v. Atkinson*, 3 Salk. 188.

³ *R. v. Sharples*, 4 T. R. 777.

² *R. v. George*, 3 Salk. 188.

and regrating were abolished, and all proceedings and prosecutions inhibited for the future. By sect. 2, numerous statutes on the subject were repealed. But by sect. 3, the offence of knowingly and fraudulently spreading or conspiring to spread false rumours, in order to enhance or decry the price of any goods; and of preventing or endeavouring to prevent by force or threat, any goods, &c. from being brought into any fair or market, are retained as though the Act had not been made.

Forestalling consisted in enhancing the common price of merchandise, or in using means to that effect, as by spreading false rumours, buying things or going to market¹ before the usual hour of the market, buying and selling the same thing in the same market, &c.² Wherefore it is that corn cannot be sold in the sheaf at common law.³

Engrossing was the getting into possession of large quantities of provisions, as fish,⁴ with intent to sell them again at an unreasonable profit.⁵ Regrating, a species of huckstery, was the buying and selling again in the same market, or within four miles thereof.⁶ The great case upon the subject was that of a Kent merchant, who was tried at Worcester for endeavouring in that city to raise the price of hops at market. The defendant found the market there very slack. The price had been 15*l.* and 16*l.* per cwt. but it had declined to 11*l.* and 13*l.* per cwt. The defendant said that this fall was owing to a prosecution which had been instituted against him, that the charge had been abandoned, and that hops must rise again. Further, he said that the stock of hops in the hands of the brewers was nearly exhausted, so that they must soon come to him or to the hop planters for hops, that hops would be at 20*l.* per cwt. and that the planters might depend on his help to keep up the price. The defendant then entered into contracts, by which he would become the purchaser of one-fifth of the produce of Worcestershire and Herefordshire, at a much higher price than that at which hops were when he arrived at Worcester: telling the hop-dealers at the same time that they had better with-

¹ Therefore an indictment charging the purchase of goods coming *towards* the market will be insufficient. *R. v. Patchin*, Gilb. Rep. 276.

² 1 Hawk. c. 80, s. 1.

³ *Id.* s. 4, clearly not in the market itself, Holt's Ca. 325.

⁴ *R. v. Penn*, Cro. Car. 314.

⁵ And the quantity engrossed should be stated in the indictment. *R. v. Foster*, 1 Ld. Raym. 475; engrossing wild fowl. Apples have been held by the barons of the exchequer not to be within the statute of 5 Edw. 6, c. 14. *R. v. Baron and Boys*, 13 Rep. 18.

⁶ See *R. v. Rushby*, 13 Rep. 529. But the defendant had been previously convicted before Lord Kenyon of the offence of regrating 30 quarters of oats, and the learned chief justice expressed a strong opinion, though it was strenuously urged on his behalf by *Law*, that one partner could not be held criminally answerable for the act of another partner, and it was proved that the act of regrating in question was done against the defendant's express order and consent by his partner. *R. v. Rusby*, Peake's Add. Ca. 189.

hold their hops from market, or not to sell them at a less price than he offered to give. The defendant succeeded in raising the value of hops from 13*l.* to 15*l.* per cwt. in a very short time. The reports he had thus promulgated appeared to be without foundation. Being convicted upon an information filed by leave of the court, who clearly recognized the conduct of the defendant as a misdemeanor at common law, he was fined 500*l.*, and sentenced to a month's imprisonment. But the prosecution by indictment against him had not been abandoned, as the defendant incorrectly declared in the Worcester market. This charge against him was for engrossing hops at Maidstone, and being convicted in London before Lord Kenyon, he was fined 500*l.* more, and sentenced to three months' imprisonment, it being considered that his offence had been aggravated by his neglect of the first proceedings which were taken against him.¹ Soon afterwards, a person was indicted for engrossing a great quantity of fish, geese, and ducks, with intent to sell the same again, but, as no quantity was specified, judgment was given in his favour upon demurrer.²

CHAPTER II.

MONOPOLIES.

Monopolies are also offensive to the common law, and those who engage in them are liable to fine and imprisonment. The monopoly arises by patent from the king, whereas engrossing is the act of the subject. But certain patents are legalized in the case of new inventions, with restrictions as to their term, and others concerning printing, saltpetre, &c. are likewise made exceptions.³ And although there is not much fear of jeopardy at the present day from such an event, it appears that an undue abatement of the price of our native commodities, as wool, &c., is punishable by fine and ransom.⁴

The statute 6 Geo. 1, c. 18, s. 18, was passed to restrain the raising of sums of money by small subscriptions, in other words, to discourage bubble companies. This Act is so far repealed, but

¹ *R. v. Waddington*, 1 East, 583. *R. v. Gouldsburrough*, Winch. 143; second case, *Id.* 167. The defendant had likewise suffered some imprisonment when he was called upon to receive his first sentence.

² See also *R. v. Gilbert*, 1 East,

5, by Hobart, C. J.; 1 Ro. Rep. 134. *R. v. Copeland*, Comb. 3.

³ See 3 Inst. 195, &c.; 1 Hawk. c. 79; 21 Jac. 1, c. 3.

⁴ 3 Inst. 181, 196; 4 Com. 158.

as analogous cases are sometimes useful, we have retained the four authorities on the subject.

It was not easy to convict upon this statute. Upon one occasion a question was made, whether the mere raising of a large sum by subscription, and making shares transferable, were unlawful, without reference to the tendency of the particular facts likely to come before the court and the jury. But it seemed to be considered an offence within the Act, that subscriptions were invited by holding out false and illegal conditions. The court, however, would not grant an information in the particular case, because the statute had not been acted upon for a great length of time, and the application was made by a private relator who had not been deluded by the scheme.¹

Again, the defendants were charged with making subscriptions towards raising a great sum of money for the purpose of buying corn, grinding it, making bread, and dealing in or distributing flour and bread. They were also charged with presuming to act as a corporate body, and pretending to raise a transferable and assignable stock. Other counts varied the mode of setting out the misdemeanors imputed. The jury found a special verdict, from whence it appeared that this was a company known by the name of "The Birmingham Corn and Bread Company," instituted for the purpose of supplying Birmingham and its neighbourhood with provisions during a time of scarcity. The jury further found that the company was beneficial to the inhabitants at large, but that, at the time of the verdict, the bakers and millers were injured by it.² The court, after hearing argument upon the subject, gave judgment for the defendants; for, first, the special verdict negatived the nuisance as to the time mentioned in the indictment, by using the word "is," by which the time of finding the verdict must be intended. And secondly, the particular facts complained of were not only not found to be nuisances, but the contrary, and as they did not come within any of the specific grievances pointed out by 6 Geo. 1, c. 18, the defendants could not come within the fair sense and meaning of any of the prohibitions.³

So again, where fifty persons agreed to raise 200 shares, at 210*l.* each, by small monthly subscriptions, for building houses for each other, the engagement being at an end as soon as the money should be paid, the court held that there was no illegality in the undertaking. And it made no difference that these persons were not to employ any others than their own tradesmen, or that the shares might be sold and transferred, because the purchaser was to be approved of by the society, and to become a party to the original articles. And if it were alleged that numbers joining in such undertakings might work a prejudice to the community, it might be at once replied, that the jury would take that

¹ *R. v. Dodd*, 9 East, 516.

² The words of the verdict were, "it is prejudicial," &c.

³ *R. v. Webb and others*, 14 East,

406. See 4 Taunt. 587; 3 M. & S. 488.

point into their consideration, and weigh it in deliberating upon their verdict.¹

The common law would, without doubt, punish an attempt to impose false goods upon the market. But the legislature has interfered on several occasions, and has particularly pointed out certain frauds against trade, visiting them with pecuniary penalties.² At common law, an offence of this nature would be a misdemeanor, and punished accordingly.³

CHAPTER III.

UNLAWFUL OATHS.

By 39 Geo. 3, c. 79, s. 2, all societies where unlawful oaths shall be taken within the intent and meaning of 37 Geo. 3, c. 123, or any oath not required nor authorized by law—and every society where the names of the members shall be kept secret from the society at large—and branch societies, acting separately from each other, but yet composing altogether one society—shall be deemed guilty of the like unlawful confederacy. Sect. 3 excepts declarations approved by two justices, and registered with the clerk of the peace, provided such approbation be confirmed at the quarter sessions. Sect. 4 excepts former members who do not continue members of such societies after the passing of the Act. And sects. 5, 6, and 7, relate to freemasons, who are likewise excepted upon certain conditions. Then by sect. 8, the proceedings against offenders is declared to be either before a justice, who may impose a penalty of 20*l.*, or by indictment. The judgment in this latter case is transportation for seven years, or imprisonment not exceeding two years. Sect. 9 empowers the justice or court to mitigate the punishment, if by fine or imprisonment, to one-third of such fine or imprisonment. Sect. 10 declares that the defendant shall not be punished by both modes of proceeding. And, by sect. 11, offenders may be indicted, as heretofore, if not prosecuted under the Act.

¹ *Pratt v. Hutchinson* (on demurrer), 15 East, 511. The plea did not allege that the society was prejudicial to the public at large. See *Buck v. Buck*, 1 Campb. 547. *Kempson v. Saunders*, 4 Bingh. 5; *Duvergier v. Fellows*, 5 Bingh. 248. *Josephs v. Pebrer*, 3 B. & C. 639; 5 D. & Ry. 542.

² See *R. v. Pack*, 6 T. R. 374. *R. v. Reason*, Id. 375, on 7 Geo. 2, c. 19, s. 2, for colouring hops

with the vapour of the sulphur and brimstone. *R. v. Jukes*, 8 T. R. 536, 542, 625, on 36 Geo. 3, c. 60, s. 2. For falsely marking buttons with the word "gilt," knowing the same not to be gilt. 1 Eliz. c. 12, s. 1. Concerning deceitful practices with linen cloth, so as to make it look better than it really is. Punishment, one month's imprisonment, fine and forfeiture.

³ See *ante*, "False Pretences."

It is an offence against this statute to enter into an engagement not to make buttons under a certain price.¹ Certain night poachers were sworn to keep secret a scheme proposed to them. This was an indictable offence, and the indictment was correct, without showing what the illegal scheme was.²

By 57 Geo. 3, c. 19, s. 25, all Spencean clubs, and every other society where unlawful oaths, contrary to 37 Geo. 3, c. 123, and 52 Geo. 3, c. 104, are permitted, or where any illegal oath is taken, or any test or declaration, whether by words, signs, or otherwise, or any society employing any committee, delegate, &c., to confer with any other society, or to induce persons to become members thereof, shall be deemed unlawful combinations and confederacies within 39 Geo. 3, c. 79; and all persons corresponding with such societies, shall be considered equally guilty.

Sections 26 and 27 except Freemasons' lodges and declarations approved by magistrates under 39 Geo. 3, c. 79; and, likewise, meetings of Quakers, or for charitable purposes.³

¹ *R. v. Ball and others*, 6 C. & P. 6 C. & P. 571. And it was immaterial to show whether they had been sworn upon a Testament.
563. See *R. v. Nield and others*, 6 East, 417, upon the repealed statute, 39 & 40 Geo. 3, c. 106.

³ These acts are fully set out,

² *R. v. Broadribb and others*, ante, p. 349.

CHAPTER IV.

PAYMENT OF WAGES OTHERWISE THAN IN COIN.

By 1 & 2 Will. 4, c. 37, s. 9, any employer entering into a contract, or making any payment declared illegal by the Act, which forbids such payment otherwise than in the current coin of the realm to certain artificers,¹ shall, for the third offence,² be guilty of a misdemeanor, and, on conviction, shall be liable to a fine not exceeding 100*l*.

¹ In iron manufactories. Working mines of coal, iron, stone, limestone, salt rock. Working stone, slate, or clay; making salt, bricks, tiles, or quarries. Nails, &c., or articles of hardware made of iron or steel. Plated cutlery. Brass, tin, lead, pewter, or other metal, or japanned wares. Making, spinning, throwing, &c. any kinds of woollen, worsted, yarn, stuff, kersey, linen, fustian, cloth, serge, cotton, leather, fur, hemp, flax, mohair, or silk manufactures.

Making or preparing any glass, porcelain, china, or earthenware, or branches, &c. Making any bone, thread, silk, or cotton lace, or lace made of mixed materials. Sect. 20. Not to extend to any domestic servant, nor servant in husbandry. Sect. 21.

² First offence, a penalty before justices not exceeding 10*l*. nor less than 5*l*.; second offence, not exceeding 20*l*. nor less than 10*l*. Sect. 10.

CHAPTER V.

REFUSING FREEDOM.

It has been held, that an information, in the nature of a *quo warranto*,¹ should go against the mayor of a borough for refusing to admit certain persons to their freedom.² But it was subsequently arranged, that the right should be tried by means of feigned issues.³

However, an information for a conspiracy will not be granted for disfranchising freemen, if corrupt motives be denied.⁴

CHAPTER VI.

SEARCH OF CHINA PASSENGER SHIPS.

By 18 & 19 Vict. c. 104, s. 6, any person hindering a due search under the Act, is made liable to the penalties of misdemeanor. By sect. 7, the master who neglects to comply with the regulations of the Act, or who refuses to fulfil his contract with the passengers, and any person guilty of aiding such neglect or refusal, is liable to the same penalty. Under the Merchant Shipping Act,⁵ false declarations are punishable as misdemeanors.

¹ Not an indictment. See *ante*, p. 276.

² *R. v. Osborn*, Com. Rep. 240. By three justices. Eyre, J., *contra*.

³ *Id.* 241.

⁴ *R. v. Davie and others*, Dougl. 588. To the misdemeanors above mentioned in this section, offences against the stat. 5 Eliz. c. 4, respecting terms of apprenticeship, and 23 Geo. 2, c. 13, concerning the seduction of artificers, might have been added. But these statutes have been repealed; the 5 Eliz. by 54 Geo. 3, c. 96, and 23 Geo. 2 by 5 Geo. 4,

c. 97, which also repealed the 39 & 40 Geo. 3, c. 56, as to the seduction of colliers from the kingdom. See 3 Campb. 344. Upon 23 Geo. 2, c. 13; 4 Burr. 2026; 6 T. R. 739.

To entice an apprentice from his master is not a misdemeanor, although the court would not quash an indictment for that act, leaving the defendant to demur. *R. v. Daniell*, 6 Mod. 99. *R. v. Kitchenner*, 12 Mod. 195. An action upon the case is the proper remedy. Cowp. 54.

⁵ 18 & 19 Vict. c. 91, s. 9.

PART XIV.

Of Indictable Offences against the Public Revenue.

CHAPTER I.

OF SMUGGLING.

THE Act for the prevention of smuggling¹ contains, amongst many *felonies*, a *misdemeanor* respecting signals at sea. By that statute no person shall, after sunset, and before sunrise, between September 21 and April 1, or after eight in the evening, and before six in the morning, at any other time in the year, make, aid or assist in making, any signal from any vessel or boat for the purpose of smuggling, or on the coast, or within six miles thereof, for the like purpose. Any person may stop and arrest the offender making such signal, and convey him before a justice. And it shall not be necessary to prove on any indictment or information that any vessel or boat was actually on the coast. And the judgment is, that the offender shall, upon conviction, pay the penalty of 100*l.*, or be imprisoned, at the discretion of the court, for any term not exceeding one year, and be kept to hard labour.²

By sect. 245, it is provided, that if the defendant mean to insist that the signal was not given for the purpose charged, he must himself be prepared to show the fact negatively. And by sect. 246, in order to prevent the making of any such signal, any person may go for that purpose upon any lands without being liable to any indictment, suit, or action, for the same.

In a case upon the 52nd section of the old Act, 6 Geo. 4, c. 108, the indictment had set out that the defendants between sunset on the 8th and sunrise on the 9th of March, *i.e.*, on the morning of the said 9th of March, did make the signal charged as the offence. Proof was given to this effect. But it was objected, that the indictment should have alleged the making of the signal "between

¹ 16 & 17 Vict. c. 107, s. 244. This and the following sections are not touched by 18 & 19 Vict. c. 96, s. 44. The stat. 19 Geo. 3, c. 69, against smuggling, was repealed as late only as the session of 1861. 24 & 25 Vict. c. 101.

² The words of the statute are, "The court before whom such offender or offenders shall be con-

victed." The same term occurred in an old Act, and it was objected for a defendant, that the court before whom, &c., must mean the judge at *nisi prius*. But *per cur.* "These words mean the court before whom judgment is given," and the defendant received sentence. *R. v. Cock*, 4 M. & S. 71.

the 21st day of September and the 1st of April," inasmuch as the prosecutor was not bound to the day laid, but might prove the offence to have been committed on any other day, or in any other month, so that, time being here of the essence of the misdemeanor, it ought to have formed a distinct and substantive averment in the words of the statute. But the court held, that judicial notice must be taken that the day averred in the indictment was, in fact, within the period mentioned in the statute. What burden of proof that throws upon the prisoner, it is not necessary to inquire; upon the face of the indictment the offence is charged upon a day between September and April.¹

By 16 & 17 Vict. c. 107, s. 248, if any persons, to the number of three or more, armed with fire-arms or other offensive weapons, shall within the United Kingdom, or within the limits of any port, harbour, or creek thereof, be assembled in order to be aiding and assisting in the illegal landing, screening, or carrying away of any prohibited goods, or any goods liable to duties, or in rescuing any person apprehended for any felony under this Act, or preventing such apprehension, or in case any persons to the number of three or more so armed as aforesaid, shall within the United Kingdom, or within the limits of any port, &c., be so aiding and assisting, every person so offending, or aiding, abetting, or assisting therein, shall be guilty of felony. By sect. 249, if any person shall maliciously shoot at any vessel or boat belonging to the navy, or in the service of the revenue, within 100 leagues of any port on the coast of the United Kingdom, or shall maliciously shoot at, maim, or dangerously wound any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or any person acting in his aid and assistance, or duly employed for the prevention of smuggling, in the due execution of his office or duty, every person so offending, and every person aiding, abetting, or assisting therein, shall be guilty of felony.

By sect. 250, if any person being in company with more than four other persons, be found with any goods liable to forfeiture, under this or any other Act relating to the customs or excise, or in company with one other person within five miles of the sea coast, or of any navigable river leading therefrom, with such goods, and carrying offensive arms or weapons, or disguised in any way, he shall be guilty of felony. Under sect. 248, the assembling must be deliberate, and for the purpose of committing the forbidden offence. When a number of drunken persons went out from an alehouse, and proceeded to carry away some geneva which was found concealed in a vault, but it did not appear whether the prisoners were armed or not, the prisoners were acquitted, for there was neither a deliberate meeting, nor an armed assembly, and if the meeting had been deliberate, still the prisoners must have been armed to come within the Act. And the

¹ *R. v. Brown and others*, M. & M. 163.

attorney-general declined to take a special verdict.¹ Under sects. 248 and 250, there must be some proof that the goods were prohibited or uncustomed; reasonable testimony should be given to this effect, and the matter will then be left with the jury.²

By 16 & 17 Vict. c. 107, s. 305, if in any prosecution under the direction of the commissioners of customs in respect of any goods seized for nonpayment of duties, or any other cause of forfeiture, or for the recovering any penalty or penalties under this or any Act relating to the customs, any dispute shall arise whether the duties of customs or excise have been paid in respect of such goods, or the same have been lawfully imported or lawfully unshipped, or concerning the place from whence such goods were brought, then and in every such case the proof thereof shall be on the defendant in such prosecution.

And by sect. 308, upon the trial of any issue, or upon any judicial hearing or investigation touching any seizure, penalty, or forfeiture, or other proceeding under any law or laws relating to the customs or excise, or incident thereto, where it may be necessary to give proof of any order issued by the commissioners of the treasury, or by the commissioners of customs or inland revenue respectively, the order, or any letter or instructions referring thereto, which shall have been officially received by any officer of customs or excise for his government, and under which he shall have acted as such officer, shall be admitted and taken as sufficient evidence and proof of such order.

Questions have arisen as to what shall be called an offensive weapon. Upon one occasion, a common horsewhip was made the subject of discussion, but, after argument, the court strongly inclined in favour of the prisoner; thus construing the Act strictly. It was offered, however, to the attorney-general to argue the point, but he declining to do so, the prisoner was discharged.³ And large sticks about three feet long, with large knobs at the end, with several prongs, (the natural growth of the stick,) arising out of them, were held not to be offensive weapons, and it occurred to Gould, J., Perryn, B., and the recorder, that these weapons must be such as the law calls dangerous.⁴ So, long poles used by smugglers for the purpose of carrying their tubs of spirits, were held not to be offensive weapons within 6 Geo. 4, c. 108.

Upon the authority of *Ince's case*⁵ one Cosans was acquitted, but the court added, that although it would be difficult to say what should or should not be called an offensive weapon, it would be going a great deal too far to hold, that nothing but guns, pistols, daggers, and instruments of war should be so considered.⁶ Bludgeons, properly so called, clubs, bats, and anything not in com-

¹ *R. v. Hutchinson*, Leach, 339.
R. v. Spice and another, Id. 343, n.

² *R. v. Shelley*, Id. 340, n.

³ *R. v. Fletcher*, Id. 23; 2 Str. 1166.

⁴ *R. v. Ince*, Leach, 342, n.

⁵ *R. v. Noakes*, 5 C. & P. 326.

⁶ Id.

mon use for any other purpose than a weapon, the court said, were clearly offensive weapons within the statute.¹ However, although the weapon be offensive, yet if it be snatched up during the heat of an affray, the offence is not complete, for there must be a deliberate arming. It was so held, where the prisoner had accidentally seized a hatchet under these circumstances.² It was once held that if a person were active in perpetrating this offence, he need not be armed,³ but some doubts were subsequently entertained as to the correctness of this doctrine, and it was said to be a material circumstance in each man's case, that he should be armed with an offensive weapon.⁴ Nevertheless, it seems that if one man of a party be armed with an offensive weapon, the remainder, being in company and acting with their associate, will be brought within the provision of the statute. It was so considered in a case of poaching, where the judges held that one being armed, the offence was complete.⁵ Under sect. 64, the shooting must be malicious, and the other offences therein mentioned must be accompanied by malicious conduct.

Rescue of smugglers.] By 16 & 17 Vict. c. 107, s. 251, if any person shall assault, resist, or obstruct any officer of the army, navy, or marines, employed in the prevention of smuggling and on full pay, or any officer of customs or excise, or any other person duly so employed, in the execution of his duty, or any person aiding him, he shall be transported for seven years,⁶ or suffer imprisonment, with hard labour, not exceeding three years.

By 16 & 17 Vict. c. 107, s. 218, if any vessel or boat liable to seizure or examination under any Act or law for the prevention of smuggling, shall not bring to, when required, upon being chased by any vessel or boat within hearing, having the proper pendant and ensign of Her Majesty's ships hoisted, or by any vessel, &c., duly employed for the prevention of smuggling, having a proper pendant hoisted, it shall be lawful for the captain, master, or other person having the charge or command of such vessel, &c., in the navy employed as aforesaid, (first causing a gun to be fired as a signal,) to fire at or into such vessel or boat, and such captain, &c., shall be indemnified and discharged from any indictment, penalty, action, or other proceeding for so doing.

It is evident that the proof of what shall be a proper pendant or ensign is more easy under this enactment than under the Act which required that such a pendant, &c., as should be sanctioned by an order in council, or by a royal proclamation, must have

¹ *R. v. Cosans*, Leach, 342, n.
See the decisions as to "offensive weapons" upon indictments for robbery.

² *R. v. Rose*, Leach, 342, n.

³ *R. v. Franklyn*, Id. 225; Cald. 244.

⁴ Leach, 342, n.

⁵ *R. v. Smith and others*, Russ. & Ry. 368.

⁶ Penal servitude not exceeding three years: 20 & 21 Vict. c. 3, s. 2.

been the pendant, &c., the hoisting of which would have warranted the captain in firing upon the smuggler. In one case, the custom-house vessel had not complied entirely with the direction of the statute 52 Geo. 3, c. 143, (an old Act for the prevention of smuggling,) and, consequently, the return of the fire by a smuggler thus attacked was held not to be a malicious shooting, although two of the custom-house crew were dangerously wounded. And a pardon was recommended on behalf of two prisoners who had been convicted.¹

When the defendant is brought up upon an attachment for rescuing a person arrested on a warrant for obstructing excise officers, the court will allow interrogatories to be put to the defendant, if it be thought fit on the part of the prosecution.²

It is a misdemeanor to obstruct officers of the revenue in the execution of their duty, and the defendants are punishable with fine and imprisonment.³ And, with reference to a search by custom-house officers, it has been said, that the person obstructing them in their search is liable to be proceeded against in cases where an information concerning smuggled goods has been laid, whether smuggled goods are found or not.⁴

In this case, however, the information was probably upon oath, for the writ of assistance conferred upon officers by the old Act of 3 & 4 Will. 4, c. 53, s. 38, has been held not to authorize them to break open and search houses without probable cause, or without reference to the event.

And, therefore, under 6 Geo. 4, c. 108, s. 40, (a similar clause to the present,) it was determined that an information against persons for assaulting and obstructing officers of the customs in the execution of their duty, cannot be supported, unless, at all events, some reasonable cause of suspicion be shown, as that uncustomed goods were in the house with a guilty knowledge on the part of the defendant. And, perhaps, that knowledge would be presumed from the circumstance of such goods being found in the house.⁵

¹ *R. v. Reynolds and another*, Russ. & Ry. 465.

² *R. v. Horsley*, 5 T. R. 362.

³ 3 & 4 Will. 4, c. 53, s. 61.

⁴ *R. v. Akers*, 6 Esp. 125, note. By Lord Kenyon. "But the officers search at their peril." *Id.* The name of the person giving the information shall not be asked by the defendant's counsel. *Id.*

⁵ *R. v. Watts and another*, 1 B. & Adol. 166. That informations may be exhibited before commissioners of excise by another person than the attorney-general, or a revenue officer, see *R. v. Ste-*

verton and others, 2 East, 362.

In this case it was held that the stat. 26 Geo. 3, c. 77, extends only to the superior courts of record.

See also *post*, sect. 7, Bribery of officers. *R. v. Barfoot and others*, 13 East, 506. Custom-house officer authorized to seize goods out of the limit of the particular port in respect of which he has received his deputation. What shall be said to be "*found on board on the high seas*," so as to incur a forfeiture. *R. v. Nunn*, 8 B. & C. 644; 3 M. & Ry. 75.

By 16 & 17 Vict. c. 107, s. 95, it is made a misdemeanor to take any goods out of a warehouse without paying the duty.

By sect. 303, the time for prosecuting under the Act is limited to three years.

By sect. 304, any indictment or information for any offence under the Act, may be tried in any county in England where the offence is committed in England, and so in Scotland and Ireland, as if the offence had been committed in the county where the indictment or information shall be tried.

By sect. 275, offences on the high seas shall be deemed to have been committed at the place on land into which the offender may be taken or be brought.

By 8 & 9 Vict. c. 93, s. 71, (an Act to regulate the trade of British possessions abroad,) if any person shall by force or violence, assault, resist, oppose, &c., any officer of the customs or navy, or other person employed in his office, or any person aiding, &c., such person, being convicted, shall be adjudged a felon, and shall be proceeded against as such, and shall be punished at the discretion of the court before whom such person shall be tried.

Naval and military stores.] The statute 7 & 8 Geo. 4, c. 27, s. 1, expressly excepts the 4 Geo. 4, c. 53, from its repealing clause. By that Act of 4 Geo. 4, which relates to the stealing and embezzlement of naval stores, the stealing or embezzling his Majesty's ammunition, sails, cordage, or naval or military stores, is made punishable by transportation for life, or not less than seven years,¹ or imprisonment for not more than seven years, with or without hard labour. It would seem that the offence is felony, for stealing and embezzling compose an act which causes the offender to be deemed to have feloniously stolen the articles in question, and the Mutiny Acts speak of persons in trust who embezzle military stores as being liable to be transported as felons by the sentence of a court martial. Procurers, counsellors, aiders and abettors, are included within the provisions of the Act of 4 Geo. 4, just mentioned.²

By 55 Geo. 3, c. 108, s. 127, (and similar provisions are annually included in the Mutiny Acts,) persons intrusted with military stores and found guilty of embezzling them, may be tried by a court martial, and transported as felons for life, or for any certain term of years, or may suffer fine, imprisonment, dismissal from the king's service, or civil and military incapacity, at the discretion of the courts, according to the nature and degree of the offence. The loss and damage to the crown may be estimated by the court martial, and recovered in a court of law from the offender, but it is conceived that this latter proceeding applies only where the sentence is less than transportation, because the offence

¹ Penal servitude for life, or not less than three years: 20 & 21 Vict. c. 3, s. 2.

² See 2 Geo. 3, c. 28, s. 13.

is not directly made felony, but only subjected to transportation as felons are transported.

Under the old Act, 22 Car. 2, c. 5, an officer might have been convicted of larceny at common law, if the stores taken were of any value, even under 20s., although that Act made the stealing such stores felony when the amount reached 20s.

The prisoner was foreman of a storehouse containing naval stores, and was intrusted with receiving and delivering out the stores when the clerk was absent. The prisoner cut some kersey from a bale, and delivered it to an accomplice to be taken out of the yard. The court directed a verdict against him for larceny at common law, though the value was under 20s.¹

By 39 & 40 Geo. 3, c. 89, s. 4,² persons defacing or destroying wholly, or in part, the marks upon the king's stores, together with counsellors and procurers, are expressly declared to be guilty of felony, and are made punishable by transportation for fourteen years, in like manner as other felons are directed to be transported by the laws and statutes of this realm. This act of erasing marks is certainly not a receiving, but as it is done for the purpose of concealment, which is usually an accompaniment of receiving, it may be deemed excusable to mention it in this place. By sect. 7, the court before whom any offender is convicted may mitigate the penalty of transportation by ordering a public whipping, fine, and imprisonment,³ or all or any one or more of the said ways and means at the discretion of the court. And by the same section the offender may be imprisoned till payment. The stat. 55 Geo. 3 extends these Acts to all public stores.⁴

By 28 Geo. 3 c. 55, s. 3, receivers of stocking frames, machines, or engines unlawfully sold or disposed of, shall be punished by solitary imprisonment,⁵ in the common gaol or house of correction of the county, &c., where the offence has been committed, without bail or mainprise, for not less than three, nor more than twelve calendar months.⁶

Public stores.] By 39 & 40 Geo. 3, c. 89, s. 2,⁷ to sell or deliver or receive,⁸ or have⁹ unlawfully any public stores, if the same be

¹ *R. v. Thorne*, East, P. C. 622. See *Mann v. Owen*, 9 B. & C. 595; 4 Man. & Ry. 449.

² See 9 & 10 Will. 3, c. 41, and sect. 5 of this statute.

³ Without hard labour. *R. v. Bridgess*, 8 East, 53. *Silversides v. Reg.*, 3 Q. B. 406; 2 Gale & D. 617.

⁴ Cap. 108, sect. 127.

⁵ But the st. 1 Vict. c. 90, s. 5, enacts, that no such confinement shall exceed one month at a time, nor more than three months in one year.

⁶ Under the 2nd section of the same Act, persons hiring frames and unlawfully selling them, are subject to the like punishment.

⁷ Reciting 9 & 10 Will. 3, c. 41, s. 2; 9 Geo. 1, c. 8, ss. 3, 4; 17 Geo. 2, c. 40, s. 10.

⁸ There was a difficulty at one time respecting the connection of the offence of receiving and having in possession, which is now set at rest by 39 & 40 Geo. 3. *R. v. Cole*, East, P. C. 767.

⁹ See *R. v. Cole*, East, P. C. 767; S. C. 2 Russ. C. M. 276. And the

not new, or one-third worn,¹ is, if the party be not a contractor,² an offence punishable by a forfeiture of 200*l.*³ with costs of suit,⁴ besides whipping⁵ and imprisonment,⁶ or by any or either of these punishments, at the discretion of the court, but the penalty of 200*l.* may be mitigated by the judge or justices.⁷ The following evidence was deemed sufficient to convict the prisoner upon an indictment framed under 9 & 10 Will. 3, c. 41, s. 2:—Certain bags were sent to the goods' department of a railway. The prisoner telegraphed to deliver these bags to E. This was not done, but a letter written by the railway officer stating the arrival of the bags, and asking where they were to be delivered, was shown to the prisoner. He directed the clerk in the office to deliver to E. as before. The bags were opened, and were found to contain goods marked with the broad arrow. Bags had been thus forwarded and delivered on other occasions. The court at once affirmed the conviction.⁸ Possession is not sufficient without proof of knowledge.⁹ An allegation that A., on the 19th of May, 1843, not being a contractor, had naval stores in his possession, was sufficient. The date showed A. not to be a contractor, and likewise the illegal possession.¹⁰ The point of knowledge was considered still more recently, and very carefully, in a case reserved by the recorder of Plymouth. The judges of appeal held that mere possession was not sufficient, and *R. v. Cohen* was recognized.¹¹ But Martin, B.,¹² hazarded an opinion, in which some of the court did not concur, namely, that the goods must be *found* in the possession of the individual; in other words, that if he should have parted with them before the search, the offence could not be made out. Willes, J., was of another opinion, and, for an obvious reason, regretted that the point, which was not ripe for decision, had been made. But Cockburn, C. J., was entirely opposed to this doctrine, and cited *R. v. Santey* as precisely in point.¹³ For the prosecution, however, it was said that Wightman, J., had ruled it to be not necessary to show affirmatively that the prisoner had knowledge of the mark of the broad arrow.¹⁴ By 39 & 40 Geo. 3, c. 89, s. 7, there is a general power of

informer was held in this case to be a good witness, for the court might inflict a corporal punishment as well as a pecuniary penalty. S. C. *R. v. Peake*, 217.

¹ For if new, or not one-third worn, the offence is felony.

² And although he be a contractor, the stores must have come *bonâ fide* into his possession.

³ See *R. v. Haman*, 2 Ld. Raym. 1104.

⁴ See *R. v. Chapple*, 5 T. R. 371, n.

⁵ See *R. v. Bland*, Leach, 595; S. C. 5 T. R. 570; East, P. C. 760.

⁶ But without hard labour. *R. v. Bridges*, 1 East, 53.

⁷ Barges, boats, and other craft may be searched, and any person found in possession of *marked* stores may at once be committed for trial: sect. 12.

⁸ *R. v. Sunley*, Bell, 145; 8 Cox, 179.

⁹ *R. v. Cohen*, 8 Cox, 41. *R. v. Willmet*, 3 Cox, 281.

¹⁰ *R. v. Silversides*, 3 Q. B. 406; 2 Gale & D. 617.

¹¹ *R. v. Sleep*, 8 Cox, C. C. 472; Leigh & Cave, 44; 30 L. J. M. C. 170.

¹² Crompton, J., concurred.

¹³ 8 Cox, C. C. 179, *ante*.

¹⁴ *Maids. Sp. As.* 1861; 8 Cox, 477.

mitigation.¹ The 11th section of this Act speaks of another misdemeanor upon this head of public stores. Having given certain powers of search and commitment² to commissioners and justices, it goes on to say, that unless the commissioner or justice, on proof of the stores being found in the possession of the party, shall be satisfied, within a reasonable time to be fixed by the commissioner or justice, of their having been honestly come by, and not embezzled or stolen, or if embezzled or stolen, of the defendant's ignorance of the fact, such defendant shall be deemed guilty of a misdemeanor.³ Then follows the 12th section, enacting, that if upon search made under the authority of the commissioners of the navy or other departments, any *unmarked* stores should be found which might reasonably be supposed to belong to the king, the commissioner or justice may set a time in like manner as under sect. 18, for the defendant to show that the stores so unmarked were not embezzled, or if embezzled, that they were honestly come by, and in default of satisfying the commissioner or justice, the clause goes on to ordain, that the party found in possession of the stores in question shall be guilty of a misdemeanor,⁴ and the barge, &c., shall be forfeited. By sect. 13, the power of stopping suspected persons anywhere is conferred, and a general authority to apprehend offenders is given. By sect. 14, all the stores, &c., and things forfeited are to be returned into His Majesty's warehouses, unless proof be made within three months to the satisfaction of the commissioner or justice, that such stores or other things are the property of other persons. And sect. 15 provides for the sale of the forfeited craft, and for the distribution of the proceeds. The 16th section provides for the jurisdiction of these last-mentioned misdemeanors, (that is to say,) the offences comprised in sections 11 and 12, and inflicts a gradation of penalties. And it will be observed, that these are some of the cases which are recognizable by justices as misdemeanors *eo nomine*. The forfeiture for the first offence is 40s., for the second 5*l.*, for the third and any subsequent offence 10*l.*, to be levied, in case of nonpayment, by distress and sale; and if no sufficient distress can be found, the offender may be committed for three calendar months, unless the penalty be sooner paid. By sect. 17, the conviction is to be returned to the next sessions, and it is declared to be final. The 18th section, however, gives a summary jurisdiction to a commissioner or justice to dispose of cases of selling and receiving stores not exceeding the value of 20s. in a summary manner, provided that the proceeding takes place within

¹ The 8th, 9th, and 10th sections relate to rewards. But, by sect. 25, the buyer of stores may be protected by a certificate, the forging of which (sect. 26) is made punishable by a penalty of 200*l.*

² There could not be a commitment by the commissioners of the navy under 9 & 10 Will. 3, before an indictment had been preferred and

found. *R. v. Innell and another*, 1 Hawk. c. 89, s. 16.

³ And punishable with fine and imprisonment under sect. 16; see *post*. See as to a certificate, note (1) above.

⁴ And punishable with fine or imprisonment, under sect. 16; see *post*. But there might be a certificate authorizing the possession; see note (1) above.

three months after the commission of the offence. The fine upon such occasions, which, under sect. 19, may be mitigated to one-half by the commissioner or justice, is fixed at 10*l.*, to be levied by distress, and the offender may be imprisoned for three months in default of sufficient distress,¹ or he may be imprisoned with hard labour without a fine.² It seems that an appeal will lie, but the court will not discharge a person committed for the offence pending the appeal.³ The 19th section, however, provides for the costs. But the consent of the respective officers of the navy, &c., must be had before this summary jurisdiction can be exercised.⁴ Nevertheless, so that the offender be not twice punished for the same offence, it is provided by sect. 24, that nothing in the Act contained shall prevent the defendant from being prosecuted as a receiver of stolen goods. Sect. 27 provides for the security of prosecutors, if sued by the person whose barge or other craft has been seized. Other sections relate to the form of procedure, and extend the provisions of the statute to Scotland. And 52 Geo. 3, c. 12, extends the Acts upon the subject to Ireland, provided that the consent of the naval storekeeper of the port be had before a summary jurisdiction be exercised by the justice. All public stores were subsequently included within these laws by 55 Geo. 3, c. 127, the stat. 54 Geo. 3, c. 60, having previously extended them to certain descriptions of cordage. Likewise, by 1 & 2 Will. 4, c. 75, s. 12, knowingly and wilfully, and with intent to defraud and injure the true owner, &c., to purchase or receive any anchors, cables, or goods, or merchandise, which may have been taken up, weighed, swept for, or taken possession of, (whether the same shall have belonged to any ship, &c., in distress, or any wreck,) is punishable with transportation for seven years,⁵ or fine and imprisonment as for a misdemeanor, unless this statute of 1 & 2 Will. 4, c. 75, shall have been complied with.

Witness.] It has been decided by Lord Kenyon that an informer under these statutes may be a witness.⁶ Although the lord chief justice had once rejected such a person on the ground of his being interested in the prospect of a fine.⁷ Subsequently, however, Lord Kenyon came to the conclusion, that as it lay in the discretion of the court to inflict a fine or corporal punishment, the objection could only go to the credit, and not to the competency of the witness.⁸ Before this latter determination, the point had become of some importance, because questions were made as to the person who should be deemed to be the informer. Thus, it was held, that the party upon whose suggestion the seizure was made was the informer, and not the individual who, after the seizures, communi-

¹ Sect. 21 gives an appeal.

² *Ex parte Wilmott*, 30 L. J. M. C. 161; 2 Will. 4, c. 40, s. 11.

³ *Id.*

⁴ Sect. 20.

⁵ Penal servitude not exceeding

three years. As to accessories, see *Lonsdale*, 36, 229.

⁶ *R. v. Cole*, 1 Esp. 169.

⁷ *R. v. Blackman*, *Id.* 95.

⁸ *R. v. Cole*, *Id.* 169.

cated the fact to the admiralty.¹ So, a peace officer who first discovered the naval stores which were concealed, was considered to be the informer.²

Joinder.] It was said by Lord Ellenborough in giving judgment upon the case of *R. v. Johnson*, that counts for having in possession new stores, or stores not more than one-third worn, may well be joined with counts for possessing such stores when not new, or more than one-third worn.³

Evidence.] As to the proof of these offences, it is settled, that the fact of possession is not conclusive. And even although the person found to be in possession has not got the certificates which is pointed out by the statute as an indemnity to the buyer, yet other circumstances may still be called into consideration, in order to afford an explanation of the affair. As in the case of the widow who was found in possession of certain canvas which had originally been old sails belonging to His Majesty, and was accordingly prosecuted by the crown. She proved that the stores in question had become her husband's property by virtue of a purchase at a public sale; that her husband was no longer living, and that the canvas had been in use for table linen and sheeting in the family for a considerable time. The counsel for the crown insisted, that this evidence could not avail for want of the certificate, which was particularly mentioned as an excuse for possession of such stores. But Foster, J., left the evidence with the jury, and said that if they should think that the defendant had become possessed of this linen without any fraud or misbehaviour on her part, they should acquit her, and she was accordingly acquitted.⁴ And, upon the authority of this case, Lord Kenyon admitted a defendant to prove that he had purchased the stores mentioned in the indictment against him from a person who might well be presumed to have been possessed of the proper certificate, from the circumstance of that person having frequently been a purchaser at such sales. For it might be inconvenient for the buyer of a whole lot, and not consistent with his safety, to part with his certificate upon the mere sale of a portion of his purchase. The defendant was accordingly acquitted upon this evidence.⁵ Although the lord chief justice laid it down that the onus of proving an innocent possession lay on the defendant as soon as evidence of finding stores with the king's mark in his possession had been offered.⁶ And so, again, it lies on the defendant to show that he is within the exception in the statute concerning contractors, and the prosecutor, although he may have alleged that the defendant was not a contractor, is, nevertheless, under no obligation to prove the regular averment.⁷

¹ *R. v. Banks*, Id. 144, and the cases of bribery were cited, 4 Burr. 2284, 2464.

² *R. v. Blackman*, Id. 95.

³ 3 M. & S. 550.

⁴ Anon. East, P. C. 765.

⁵ *R. v. Banks*, 1 Esp. 145.

⁶ Id.

⁷ *R. v. Willis*, 1 Hawk. c. 80, s. 17.

By 2 & 3 Vict. c. 47, s. 26, every person who, within the metropolitan police district, shall knowingly take in exchange from any seaman or other person, not being the owner or master of any vessel, anything belonging to any vessel lying in the river Thames, or in any of the docks or creeks adjacent thereto, or any part of the cargo of any such vessel, or any stores or articles in charge of the owner or master of any such vessel, shall be deemed guilty of a misdemeanor.¹

¹ Punishable with fine and imprisonment.

CHAPTER II.

RECEIVERS OF STOLEN GOODS ON THE THAMES.

By 2 Geo. 3, c. 18, s. 12, to buy or receive any part of the cargo or lading of any ship, or any goods so belonging thereto, with a guilty knowledge, or privately to buy or receive the same by suffering any door, window, or shutter to be left open or unprotected, between sun-setting and sun-rising, for that purpose, or to buy and receive the same in a clandestine manner, is made punishable by transportation for fourteen years,¹ although the principal felon has not been convicted. It seems that this offence would have been deemed felony under 3 Wm. & M., c. 9, s. 4,² without this latter provision, if the principal felon had been convicted. But by sect. 14 the case is made still clearer, for upon discovering two other offenders, a receiver is, by that section, entitled to a pardon for all such felonies. And, agreeably to this construction, the Court of King's Bench refused to bail a person who was charged with receiving part of the cargo belonging to a vessel in the Thames, being of opinion that the offence amounted to felony.³ Nevertheless, the legislature, in passing the 39 & 40 Geo. 3, c. 89, treated this offence as a misdemeanor, reciting that, by the 2 Geo. 3, it had not been declared to be felony, and then enacting that persons charged under the Act of 2 Geo. 3 should plead to the indictment, without having leave to traverse the same, as is usual in cases of misdemeanors.⁴

Pilots, &c.] Frauds by pilots are dealt with by 17 & 18 Vict. c. 104, s. 365. By sect. 366 every pilot who shall endanger a ship wilfully or negligently, or through drunkenness, shall be guilty of misdemeanor.

¹ Penal servitude.

² Repealed.

³ *R. v. Wyer*, Leach, 480; 2 T. R. 77. By sect. 18 offenders may be apprehended without a warrant.

⁴ See East, P. C. 753; 1 & 2 Geo. 4, c. 75, s. 12; 2 & 3 Vict. c. 47, s. 26.

CHAPTER III.

POST OFFICE.

The next offence relating to matters connected with the public revenue which we shall mention, is that of stealing letters connected with the post office. The Act for consolidating the laws concerning offences against the post office is general and comprehensive, and avoids the numerous questions which were perpetually arising to embarrass the old repealed statutes.

By 1 Vict. c. 36, s. 26, Every person employed under the post office who shall steal a post letter shall be guilty of felony, and if any such post letter so stolen shall contain any chattel or money, the punishment is aggravated.¹ By sect. 27, every person who shall steal from or out of a post letter, any chattel, or money, or valuable security, shall be guilty of felony.² By sect. 28, the stealing of a post letter-bag, or a post letter from a post letter-bag, or a letter from the post office, or from an officer of the post office, or from a mail, and the stopping of a mail with intent to rob or search the same, is made felony.³ By sect. 29, whoever shall steal or unlawfully take away a post letter-bag sent by a post office packet, or a letter out of any such bag, or shall open any such bag unlawfully, shall be guilty of felony.⁴ As soon as the letter reaches the office, the protection of the law begins. A letter was brought to the postmistress containing a 10*l.* note; she took it and put it under a glass. The prisoner took it. This was a post letter within the statute.⁵ It was usual to put letters into pigeon-holes in the post office for private individuals. This happened at Liverpool, and thus, paying a fee, the merchants got their letters sooner than otherwise. These pigeon-holes were held to be still in the post office upon an indictment for larceny.⁶ It will occur to the reader that a charge may be made against a person employed in the post office, for the simple fact of stealing a letter, without reference to his occupation, and as the punishments are, or they were formerly the same, it might be questioned whether the indictment could be sustained:—*Expressio unius est exclusio alterius*. And it seems, that a person so intrusted cannot be charged under sect. 27, which affects the public at large, but that he may be indicted for offences under sects. 28 and 29, which, although they

¹ In England and Ireland. In Scotland, of a high offence. As to bail in Scotland, see sect. 38.

² See Embezzlement, first offence.

³ In England, &c.

⁴ See, as above.

⁵ *R. v. Rogers*, 5 Cox, 193.

⁶ *R. v. Brett*, 2 Russ. C. M. 220.

do indeed respect the people in general, yet contain offences independent of the 27th section. Thus, under the old law, a charge taker and letter carrier was charged with stealing a letter, but the court, referring to that section of the Act which more particularly referred to persons connected with the post office establishment, doubted whether such persons could be guilty of larceny, and the judges came to the same conclusion.¹ But as soon as the letters have passed into other confidential hands, the case will be reached by the 28th and 29th sections, and the servant of the post office will be guilty of larceny. As, under the 52 Geo. 3, c. 143, s. 3, a similar section to the 28th and 29th sections of 1 Vict. c. 36, where the prisoner in the employment of the post office was charged with stealing a letter; here, the carriers for hire employed by the government had possession of the letter, which had left the office; and the judges held, that the servant of the post office, who subsequently took this letter, was guilty of larceny.² The prisoner was engaged in sorting letters for the postmaster gratuitously, when he contrived to steal one containing 1s. This was no part of his business, he being merely the carrier: the judges were clear that he was, nevertheless, a person employed in the post office, and that he was rightly convicted.³ The prisoner was charged in one count with stealing, and in a second, with secreting a letter. The following verdict was submitted to the judges:—"The prisoner having committed a mistake in sorting the letters in question, secreted them in the water-closet, in order to avoid the supposed penalty attached to such mistake;" and it was held that the conviction was good on both counts, and *R. v. Cabbage*, Russ. & Ry. 292, and *R. v. Douglas*, 16 L. J. (N. S.) M. C. 116; 17 L. J. 176, were referred to.⁴ There must be a carrying away of the letter out of the office in order to sustain the charge; so that if the letter be opened, and the contents taken out in the room, it would not, probably, be protected by the 28th section of the Act.⁵ Though the stealing of the paper, or of the contents, or part only, would be larceny. As where an inspector put a letter containing a sovereign in the carrier's way to try his honesty, and the carrier took it, but the letter was not put into the office; the judges held the conviction wrong for stealing the letter, but good for larceny by stealing the sovereign.⁶ An inspector delivered a letter at the window of the office to another, and he handed it to two others, who kept it locked up all night, and on the next morning gave it to a sorter, who gave it to the prisoner to sort. The prisoner was held not to have received it in the ordinary course, and *R. v. Rathbone*

¹ *R. v. Pooley*, Russ. & Ry. 31; Leach, 904.

² *R. v. Brown*, Russ. & Ry. 32, n.

³ *R. v. Reason*, 23 L. J. M. C. 11; Dears. 226. And *R. v. Simpson* and *R. v. Milner*, 4 Cox, C. C. 275, 276, were referred to by Jer-

vis, C. J. Doubts had been raised in these cases as to there being an employment under the post office.

⁴ *R. v. Wynn*, Dears. C. C. 365; 18 L. J. M. C. 51.

⁵ *R. v. Pearson*, 4 C. & P. 572.

⁶ *R. v. Rathbone*, 2 Moo. C. C. 242; 1 Car. & M. 220.

was cited as an authority.¹ However, as soon as the letter is deposited in the bag, the 29th section protects it. The punishment is not so heavy as under sect. 28, but the objection as to the carrying away is at an end; and it has been said that the laying down of a letter on the counter of a shop at a receiving house, or the giving it to a person belonging to the shop, is a putting into the post office.² This fact must clearly appear, because, if the letter cannot be clearly traced into the office, it cannot be deemed a post office letter. As where the office was at an inn, and a party sent with a letter, placed it, with the penny to prepay it, upon a table in the passage of the inn: the letter-box was in the passage, and a female servant, who was not authorized to receive letters, said she would give it them. The servant stole the letter, but the offence was considered not to come within the 27th or 28th sections of the Act, because the letter had not become a post letter.³ Nevertheless, a larceny of the letter was committed. So, again, where it was intended to try the honesty of the postmistress, the prosecutor put a letter with some marked money into the bag, but the direction and address were quite fictitious. The postmistress took the money, and denied all knowledge of the letter. This was held not to be a post letter, and the stealing of it not within 1 Vict. c. 36, but it was larceny.⁴

However, the decision of *R. v. Gardener* has been repudiated by Pollock, C. B., who tried the case; and, accordingly, in a case where there was a fictitious address, with an enclosure of half-a-sovereign, and the letter was *dropt into the receiving box*, the judges held the conviction of the prisoner (who abstracted the money and kept the letter) right. The judges thought the objection, that the letter was not put in for a legitimate purpose, of no value, and Parke, B., said, that whether the letter could be delivered or not, was quite beside the question. And where a penny was put into a letter, and thence into an unpaid letter box, because the door of the receiving house was shut, it was held that a messenger of the post office might be convicted of stealing the letter, as a letter containing money, though it was not put into the letter for the purpose of being conveyed to the person to whom the letter was addressed.⁵ The post office marks, when proved, are evidence that the letters, at the dates specified, are in the office designated.⁶

Looking again at sect. 28 for a moment, the case of *Noah Pearce* may be mentioned. He pretended to be the mail guard, and thus obtained from the person who was at the office the bags of letters, which were let down to him by a string, from whence

¹ *R. v. Shepherd*, 25 L. J. M. C. 52. Verdict, guilty of larceny only, as the money in the letter was marked. Willes, J., acceded reluctantly to *R. v. Rathbone*.

² *R. v. Pearson*, ut supra.

³ *R. v. Harley*, Car. & K. 89, cor. Patteson, J.

⁴ *R. v. Gardener*, Car. & K. 628. *R. v. Young*, Den. 194; 2 Car. & K. 446.

⁵ *R. v. Mence*, Car. & M. 234.

⁶ *R. v. Plummer*, Russ. & Ry. 264.

he took them, and made off. And this conviction was held right, for his artifice in obtaining the delivery of them, was the same as if he had actually taken them out of the house.¹ So A. representing that he was sent by B. for a letter from the office, would be guilty of larceny, if the original intention be to steal.²

Indictment.] By 1 Vict. c. 36, s. 40, the stolen property may be laid in the postmaster-general, and it shall not be necessary to allege in the indictment, or prove upon the trial, that the post letter bag, or post letter, or valuable security, was of any value. The indictment does not materially vary from the ordinary case of larceny, but the particular kind of chattel, money, or valuable security, should be set out.

The form of the post office order is usually,—“Credit the person named in my letter of advice, the sum of £—, and debit the same to this office.” This document is a warrant or order for the payment of money, and does not require a stamp.³

Trial.] By 1 Vict. c. 36, s. 37, the trial for any offence against the Post Office Acts, may be in any county or place where the offence shall have been committed, or where the offender shall be apprehended or be in custody, and where the offence respects a mail, or a person engaged in the delivery of a post bag, or letter, or a chattel, money, or valuable security, sent by the post, the trial may be where the prisoner is apprehended or is in custody, or in any county or place where such mail, &c., shall have passed in due course, and in all cases where the side or centre, or other part of a highway, or the side, the bank, the centre, or other part of a river, or canal, or navigation, shall constitute the boundary of two counties, the trial may take place in either of the said counties, through or adjoining to which, or by the boundary of any part of which, the mail or person shall have passed in due course. And by the same clause, every accessory shall be dealt with as a principal, and his trial shall take place in any county or place in which the principal offender may be tried. By sect. 39, offences under the Act, committed within the admiralty jurisdiction, may be tried like any other offence committed within that jurisdiction.

By sect. 26, the stealing of a post office letter is made punishable by transportation for seven years,⁴ or by imprisonment, not exceeding three years, but if the letter stolen should contain

¹ *R. v. Pearce*, East, P. C. 603.

² *R. v. Gillings*, 1 Fost. & F. 36.

³ *R. v. Gilchrist*, 2 Moo. C. C. 233; Car. & M. 224. 1st count: Warrant or advice for the payment of money. 2nd count: Warrants, &c. (as above), commonly called

post-office money orders. 3rd count:

Four valuable securities, *i. e.*, four warrants, &c. (as above), commonly called post-office money orders. See also 3 & 4 Vict. c. 96.

⁴ Now penal servitude not exceeding nor less than three years.

any chattel, money, or valuable security, the punishment is transportation for life.

By sect. 27 of this Act, every person who shall steal from a post letter any money, or chattel, or valuable security, shall be transported for life.¹

By sect. 28, whoever shall steal a post letter bag, or a post letter from such a bag, or a post letter from a post office, or from an officer of the post office, or from a mail, or shall stop a mail, with intent to rob and search the same, shall be transported for life.² But, by sect. 41, every person convicted of an offence punishable under the Act with transportation for life, may be transported for a term not exceeding seven years,³ or imprisoned for a term not exceeding four years, with or without hard labour or solitary confinement. Provided, by 1 Vict. c. 90, s. 5,⁴ that such confinement do not exceed one month at a time, nor three months in one year.

By 1 Vict. c. 36, s. 29, the offence of stealing from a post office packet is made punishable by transportation for fourteen years, but by sect. 41, such persons may likewise be transported for a term not less than seven years,⁵ or be imprisoned, with or without hard labour, &c., for a term not exceeding three years. By sect. 35, in cases of felony under the Post Office Acts, every principal in the second degree, and every accessory before the fact, is punishable in the same manner as the principal in the first degree is punishable under these Acts, and every accessory after the fact (except receivers) shall be imprisoned for a term not exceeding two years.

Post Office embezzlement.] By 1 Vict. c. 36, s. 26, every person employed under the post office who shall steal, or for any purpose whatever embezzle,⁶ secrete, or destroy a post letter, shall be guilty of felony in England and Ireland, and in Scotland of a high offence.⁷ And if any such letter shall contain any chattel or money, a heavier punishment (as we shall see presently) is ordained. And by sect. 40, it shall not be necessary to allege, nor to prove upon the trial or otherwise, that any such post letter or valuable security was of any value. But the enclosure of a valuable security, or of money, or of a chattel, must be proved, if such be the case. And a mark of double postage on a letter was not, of itself, deemed evidence of such an enclosure.⁸ Formerly, money was not within the Acts,⁹ but a single bank note was.¹⁰ And an unstamped draft

¹ Penal servitude. Refer to 5 & 6 Will. 4, c. 81, and 6 Will. 4, c. 4, which abolished the capital punishment before this statute.

² Penal servitude.

³ Penal servitude not exceeding nor less than three years.

⁴ See 1 Vict. c. 36, s. 42.

⁵ See *n.* 2.

⁶ As to secreting, see *R. v. Wynn*, Den. 365.

⁷ As to bail in Scotland, see sect. 38.

⁸ *R. v. Plumer*, Russ. & Ry. 264.

⁹ *R. v. Skutt*, Leach, 106.

¹⁰ *R. v. Hassel*, Id. 1.

was formerly not such an order for the payment of money as would bring a servant of the post office within the Acts, because, without the stamp, it was of no value.¹ Although such a cheque was admitted in evidence for the purpose of showing that the prisoner stole the letter, being thus available for collateral purposes.² Again, where the prisoner was charged with secreting a letter containing sundry promissory notes for 5*l.* each, and it turned out that they were country bank notes *paid* in London, and not as yet reissued, seven judges against four held, that these were notes within the stat. 7 Geo. 3,³ for, on the face of them, they remained uncanceled, and, as against the makers of them, they were valid and obligatory, so that into whosoever hands they might come for a valuable consideration, they would be productive and available against the makers.⁴ But the particularities above mentioned are rendered needless by the stat. 1 Vict. c. 36, s. 40.

It is to be observed, that the stat. 42 Geo. 3, c. 81, s. 1 (now repealed), expressly mentioned any part or parts of any security or instrument designated by 7 Geo. 3,⁵ and that the present Act has no such words. Still, inasmuch as *Moore's case* (referred to in the note) was decided before the 42 Geo. 3, it is presumed that no difficulty can arise, because a charge of stealing two letters containing a bank note, would be sufficient to show the stealing of a valuable security. Should the person employed in the post office embezzle one half of a note, and not the other, he would still be liable to transportation for seven years, or rather penal servitude for three years, for stealing the letter. A letter carrier was sent with an unsealed letter containing money, being a post office order. He was employed at the time by a postmistress. He destroyed the letter, did not restore the order, and kept the money. He was held indictable under sect. 26 of this statute.⁶ It is, moreover, observable, that the clause has the words "for any purpose whatsoever," so that it is no longer an objection to say, that the intent was not to steal, but to defraud the revenue of the postage,⁷ and it will be remembered, that to advance the rate of postage to the person receiving the letter is embezzlement, if the demand be acceded to.⁸

¹ *R. v. Pooley*, Id. 887. Russ. & Ry. 12.

² *R. v. Pooley*, Russ. & Ry. 31; Leach, 900.

³ C. 50, s. 1.

⁴ *R. v. Ranson*, Russ. & Ry. 232; Leach, 1090. *R. v. West*, 26 L. J. M. C. 6.

⁵ See *R. v. Moore*, Leach, 575. Where the judges held, that a letter carrier who secreted two letters, each containing the half of a bank note, was guilty of a capital offence under 7 Geo. 3, and that an indictment alleging that he having

the said two letters containing the said bank note, did secrete the said letters, was good.

⁶ *R. v. Bickerstaff*, 2 Car. & K. 761.

⁷ *R. v. Sloper*, Leach, 81. *R. v. Howatt*, Id. 83, n. *R. v. Sharpe*, 1 Moo. C. C. 125.

⁸ *Ante*. See 5 Geo. 3, c. 25, repealed by 1 Vict. c. 32, except as to letters and packets conveyed by the post within the British dominions in America and the West Indies.

It has been held, that a person employed at a receiving house in the post office to clean boots, and assist in the tying up of the letter bag, was not a servant of the office under 52 Geo. 3, c. 143 (now repealed).¹ But a person employed by a postmistress as a receiver, whose weekly salary is repaid to the mistress of the office, is a person employed by the office.² Though, as to a missent letter, it would be otherwise.³ It is no ground for objection, that the officer has not taken the oath nor the declaration,⁴ for the appointment need not be proved.⁵ It lies on the prisoner to negative his appointment. The prisoner, by the orders of the postmaster, went to a magistrate with a paper, and took the oath, showing the paper. This was sufficient proof of his acting as a servant, whatever doubt there might have been otherwise.⁶ A post office letter-carrier was daily in the habit of receiving letters at a place with a penny on each to prepay the postage. He took the letters and pennies to the post office, but no evidence of any appointment was given. The prisoner embezzled some of these pence, and it was held, that there was evidence to go to the jury that the pence had been received by the prisoner by virtue of his employment as a letter-carrier.⁷

Embezzlement of printed papers.] By 1 Vict. c. 36, s. 32, for the protection of printed votes and proceedings in parliament, and printed newspapers sent by the post, it is enacted, that every person employed in the post office, who shall steal, or shall for any purpose embezzle, secrete, or destroy, any printed votes or proceedings in parliament, or any printed newspaper, or any other printed paper whatever, sent by the post without covers, or in covers open at the sides, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland, of a crime and offence; and being convicted thereof, shall suffer such punishment by fine or imprisonment, or by both, as to the court shall seem meet.

By 1 Vict. c. 36, s. 25, every person employed by or under the post office, who shall, contrary to his duty, open, or procure or suffer to be opened, a post letter, or shall wilfully detain or delay a post letter, shall be guilty of a misdemeanor, and be punishable by fine or imprisonment, or both, as the court may think fit: Provided, that nothing shall extend to the opening, detaining, or delaying of a post letter returned for want of a true direction, or by reason that the person is dead, or cannot be found, or shall have refused the same, or refused or neglected to pay the postage thereof;

¹ *R. v. Pearson*, 4 C. & P. 572.

² *R. v. Salisbury*, 5 C. & P. 155.

³ *R. v. Salisbury*, 5 C. & P. 155.

⁴ *R. v. Clay*, East, P. C. 580; Leach, 3, n.

⁵ *R. v. Borrett*, 6 C. & P. 124. *R. v. Rees*, Id. 606.

⁶ *R. v. Simpson*, 4 Cox, C. C.

275. And *R. v. Milner* was cited as an authority; Cent. C. C. 1850.

Whether a person quite unconnected with the post office, but merely assisting his master, is a person employed in the post office, qu. ? *Semble* not. 4 Cox, C. C. 276, Cresswell, J.

⁷ *R. v. Townsend*, Car. & M.

178.

nor to the opening, detaining, or delaying of a post letter in obedience to an express warrant in writing under the hand of one of the principal secretaries of state.

Receivers, Post Office.] By 1 Vict. c. 36, s. 30, with regard to receivers of property sent by the post, and stolen therefrom, it is enacted, that every person who shall receive any post letter, or post letter bag, or any chattel, money, or valuable security, the stealing or taking, or embezzling or secreting whereof shall amount to a felony under the Post Office Acts, with a guilty knowledge, shall be guilty of felony; and the party may be indicted and convicted, either as an accessory after the fact, for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice. And any such receiver, howsoever convicted, shall be liable to be transported for life,¹ or, by the 41st section of that statute, for any term not less than seven years,² or suffer imprisonment not exceeding four years, with or without hard labour, &c.

By 3 & 4 Vict. c. 96, s. 30, if any person not lawfully authorized, and without lawful excuse (the proof thereof shall lie on the person accused), shall purchase, or receive, or possess any paper used for postage covers, envelopes, or stamps, and for receiving the impression of the die, plates, or other instruments provided for that purpose, before such paper shall have been duly stamped with such impression, and issued for public use, he shall be guilty of a misdemeanor, and shall be imprisoned for a period of not more than three years, nor less than six calendar months.

Destroying letters.] The offence of destroying letters is punishable under 1 Vict. c. 36, s. 26. The offence of advancing the rate of postage, and not accounting, is an offence under 2 Will. 4, c. 4.³ And embezzling the postage will come under the same statute relating to clerks and servants.⁴

By sect. 31, every person fraudulently retaining a post letter or post letter bag, whether he shall have found it or not, shall be guilty of a misdemeanor, and punishable by fine and imprisonment, with or without hard labour, &c.⁵

Indictment—Embezzlement.] It is probably correct to state, in an indictment under this Act, that the prisoner was employed in the post office, and that a certain letter came to his possession whilst he was so employed, which letter he feloniously embezzled. And, where the letter contains property, it would be said to be a letter containing a bank note, or money, or a bill of exchange, &c., as the case may be, and would then go on to allege, that the

¹ Penal servitude.

² Penal servitude for three years.

³ *Ante.*

⁴ Sect. 47.

⁵ Letters and other effects detained by finders in hope of a reward.

prisoner feloniously did secrete, embezzle, or destroy the said letter, &c., according to the circumstances.

By 1 Vict. c. 36, s. 40, the property in letters, &c., sent by the post, or in post letter bags, shall be laid in the postmaster-general; and further, it shall be sufficient to state that the offender was employed under the post office, without mentioning the nature or particulars of his employment.¹ And, if by mistake the employment should be stated, it seems, that if the words "person employed in the post office" should occur independently, the unnecessary description of the prisoner might be rejected as surplusage. But the letter must be accurately set out, with reference to the direction, or other matters which may be relevant. However, where the indictment described the letter as "to be delivered to persons using in trade the name and firm of Messrs. B., N., & H.," and it appeared that the firm in question was not in the habit of using the style of "Messrs." before their name in matters of business, it was, nevertheless, held no variance, because the addition of "Messrs." was frequently added to their address in the direction of letters and other papers in their business.² And not only should the superscription of the letter be attended to, but the chattel, money, or valuable security should also be particularly mentioned, although there need be neither allegation nor proof of its being of value. For the prisoner should be acquainted as well with the nature of the property he is charged with embezzling, as with the fact of stealing the identical letter or letters. Where the prisoner was indicted for stealing a certain warrant for the payment of money from a letter, he being a clerk in the post office at Birmingham, it appeared that the thing abstracted was a bank post bill, and the judges held that the indictment was well laid, and that the bill in question might also have been called a draft.³ And if the instrument should, on the face of it, appear to be a note, the signature of the maker need not be proved.⁴ But, notwithstanding the averment as to the nature of the chattel, or security, if any one of the articles, such as promissory notes, be found to have been contained in the embezzled letter, it is sufficient, although the indictment charge the stealing of several such articles or notes.⁵ No purpose need be alleged in the indictment. The words and object of the Act make it clear that no purpose need be stated.⁶

Trial.] The venue with respect to post office offences has already been laid before the reader.⁷

¹ See *R. v. Shaw*, Leach, 79.
R. v. Ellis, Russ. & Ry. 188. The
old objections are thus removed.

² *R. v. Dawson*, East, P. C.
605.

³ *R. v. Willoughby*, East, P. C.
581.

⁴ *R. v. Ellis*, Russ. & Ry.
188.

Russ. & Ry. *ut supra*.

⁶ *R. v. Wynn*, Den. 365, 369,
Lord Denman, C. J.

⁷ See 1 Vict. c. 36, ss. 37, 39.

Judgment.] By 1 Vict. c. 36, s. 26, persons employed in the post office, and embezzling, secreting, or destroying a post letter, shall be transported for seven years,¹ or suffer imprisonment not exceeding three years, with or without hard labour, and solitary confinement (sect. 42), provided, 1 Vict. c. 90, s. 5, that the latter do not exceed one month at a time, nor three months in one year. If the letter shall contain any chattel, money, or valuable security, the punishment is transportation for life,² or, under sect. 41, a more mitigated sentence, as we have already seen.

¹ Penal servitude not exceeding,
nor less than three years.

² Penal servitude.

PART XV.

Of Nuisance.

CHAPTER I.

OFFENSIVE TRADES AND OCCUPATIONS.

We come now to the rather extensive head of nuisance. The common law professes to regard with jealousy the health, the comfort, and the morals of society. And hence a noisome smell, an outrageous noise, or an idle occupation, are alike obnoxious to its ordinances. And so likewise is an obstruction to any thoroughfare, whether by land or water. And it is not a defence to urge that the business carried on is advantageous to the community, or that the pastime complained of is an amusement. It is true that there is a principle which exonerates a tradesman from blame, if persons elect to live near the offensive employment which he pursues ; but, otherwise, it becomes the duty of an individual to exercise a noxious calling in an isolated situation ; and pleasurable enjoyments must be such as have no tendency to injure public morals.

Offensive trades and occupations.] By 26 Geo. 3, c. 71, s. 8, (the 7 & 8 Vict. c. 87, does not repeal the 26 Geo. 3, nor affect its provisions,) if any person keeping or using any slaughtering house or place, shall slaughter any horse, mare, or gelding, foal or filly, ass or mule, or any bull, cow, heifer, ox, calf, sheep, hog, goat, or other cattle, for any other purpose than for butcher's meat ; or shall flay any horse, mare, &c., brought dead to such slaughtering house, or other place, without taking out the licence required by that Act, or shall slaughter such cattle, at other hours¹ than those limited by the Act, or shall not delay to slaughter or kill the same according to the direction of the inspector authorized to prohibit the same, he shall be guilty of felony.

Judgment.] The judgment is transportation for any time not exceeding seven years,² or fine, imprisonment, and such corporal punishment by public or private whipping, as the court shall direct.

¹ See sect. 3.

² Now penal servitude not exceeding three years : 21 Vict. c. 3, s. 2.

By 26 Geo. 3, c. 71, s. 9, it is declared to be a misdemeanor punishable by fine or imprisonment, and public or private whipping, as the court shall direct, for any person keeping a slaughtering house to throw into any lime pit, or immerse in lime, or any preparation thereof, or to rub therewith, or with any corrosive matter, or destroy or bury, the hide or skin of any horse, mare, gelding, &c. slaughtered, killed, or flayed. And, likewise, if there be any other offence under the 26 Geo. 3, c. 71, (the Act which regulates the slaughtering of cattle,) not described as above, the same punishment shall be awarded.

The erection of a soap-boilery to the annoyance of the neighbourhood was adjudged to be a nuisance; because, however honest the trade, if the stench be an annoyance to the neighbours, it cannot be tolerated.¹ So the steeping of hides in water is a nuisance to the neighbouring inhabitants.² The same law was laid down in the case of a brewhouse on Ludgate Hill.³ So to erect a tallow furnace may be said to be a similar offence.⁴ Although if persons come to inhabit in the vicinity of such a business, the case will be different, or if the party should take up his abode at a reasonable distance from the vill, so as to cause only a moderate degree of inconvenience; because the needfulness of the candles may dispense with the noisomeness of the smell.⁵ So the owner of a glasshouse at Lambeth was convicted and fined; and a general pardon which the defendant urged was held to extend to the fine only, and not to the statement of the nuisance.⁶ The defendants erected works at Twickenham for making acid spirit of sulphur, oil of vitriol, &c., and they were compelled to remove their buildings, and submit to a fine of 6s. 8d.⁷ And it is worthy of remark, that if the smell complained of be offensive to the sense, it is sufficient proof for an indictment, without showing it to be injurious to health.⁸ So a steam engine, with a furnace for burning coals, whereby unwholesome smokes and smells arose, was considered to be a nuisance.⁹ So the works of a gas company, by which the fish in a water are destroyed, and the water rendered unfit to drink,¹⁰ are annoyances. So the burning of arsenic was held to come within the rule, for, although it emitted no smell, yet the cattle and the neighbouring trees were proved to have been poisoned by it, and a rule for a new trial was refused.¹¹ But the mere fact of fishermen being thrown out of em-

¹ *R. v. Pierce*, 2 Show. 327.

² *R. v. Pappineau*, 2 Str. 686.

³ *R. v. Jordan*, cited, 2 Show. 327.

⁴ *Morley v. Pragnell*, Cro. Car. 510. Action on the case. *R. v. To-hayles*, cited there.

⁵ *R. v. Rankett*, 16 Vin. Ab. 23.

⁶ *R. v. Wilcox*, 1 Salk. 458. *R. v. Brookes*, S. P. Trem. P. C. 195. See Vaugh. 333.

⁷ *R. v. White and another*, 1 Burr. 333. See 5 Geo. 2, c. 16, an Act for regulating buildings and trades in Blandford.

⁸ *R. v. Neil*, 2 C. & P. 485.

⁹ *R. v. Dewsnap and another*, 16 East, 194.

¹⁰ Of which the jury are the competent judges.

¹¹ *R. v. Garland*, 5 Cox, 165.

ployment is insufficient to sustain the indictment.¹ But a coke oven was held by Heath, J., not to be a nuisance, as it did not affect houses when the windows were shut, so that the general health of the inhabitants was not injured, nor were their dwellings rendered either uncomfortable or untenable.² And, if persons come to the nuisance, the defendant will be entitled to an acquittal,³ unless he be found to have increased the noisomeness of his undertaking. And the same rule prevails if particular trades have been carried on in the same place for a considerable time without interruption; for that which is a nuisance in one situation is not so in another. The defendant was charged with carrying on the business of a melter of kitchen stuff and other grease; but it appeared that much time had elapsed since manufactories equally disagreeable and noxious had existed in the neighbourhood, and Lord Kenyon observed, that the fact of enduring such smells for many years would operate as a consent on the part of the residents, though, had objection been made in time, the law might have considered the matter as a nuisance. The defendant had come into the neighbourhood about four years, and it was a question whether he had increased the unpleasantness of the atmosphere; and Lord Kenyon held, that although such increase might not amount to a nuisance by itself, yet that if the excess made the place disagreeable and uncomfortable, which before was only a little unpleasant, the defendant would be answerable. The jury found the defendant not guilty.⁴ It is, indeed, a proper question for the jury to say whether there has been any increase of nuisance. As, where the defendant carried on the business of a horse-boiler, Lord Tenterden observed to the jury, that there might be no increase of annoyance, although the business itself should have increased, because (as it appeared in evidence) of the improved method of carrying it on, whereas, if the annoyance had increased, the defendants ought to be convicted. Verdict guilty.⁵

Keeping gunpowder in an improper place, so as to be dangerous, is a nuisance at common law.⁶ The act of keeping hogs in

¹ *R. v. Medley and others*, 6 C. & P. 292, and it is no defence to urge that the directors were ignorant of the evil, or that the original plan was neglected.

² *R. v. Davey and another*, 5 Esp. 247.

³ *R. v. Cross*, 2 C. & P. 483. A case of slaughtering horses, where persons built close to the noxious trade.

⁴ *R. v. Neville, Peake*, 91. In this case Lord Kenyon admitted in evidence a bond from the defendant to the parish officers where he lived before, acknowledging his

trade to be a nuisance, and binding himself not to continue it. It was proved that his trade was carried on at the place where he really resided in the same manner as at his former abode.

⁵ *R. v. Watts and another*, Moo. & Malk. 281. The defendant is not entitled to any compensation if he carry on a trade indictable at common law. *R. v. Watts*, 2 C. & P. 486.

⁶ Holt's Ca. 499. See 3 & 4 Vict. c. 47, (Metropolis Police Act,) s. 35.

the back streets of London has been held to be a nuisance at common law.¹ If a person disobey a notice to extinguish or screen a light which may be mistaken for a lighthouse, he is guilty of a common nuisance, and besides other penalties may forfeit a sum not exceeding 100*l*.²

There has been an instance of an indictment for dividing a house in a town for poor people to dwell in, the court holding it to be a common nuisance by reason of infection in time of plague.³ But a building erected for the purpose of inoculation has been deemed no nuisance, for the fears of mankind, however reasonable, will not create that offence.⁴ And it seems that an indictment will not lie against a man for the mere act of affording entertainment to vagrants.⁵ Evidence was offered against the defendant of a conviction under 16 & 17 Vict. c. 128, for nuisance of the same character with that for which he was indicted, but the court would not receive it.⁶

CHAPTER II.

GENERAL ANNOYANCES.

Not only are trades and employments which threaten the health of inhabitants abateable as nuisances; such likewise as tend materially to diminish the comfort of a neighbourhood are equally objectionable. The case of the tinman of Clifford's Inn turned upon the fact of his trade being an annoyance to three houses only belonging to the society, so that the noise of his work, although very considerable, could not be called a general grievance.⁷ There would otherwise have scarcely been a question but that such a disturbance would have been held a nuisance. So a common scold is a nuisance, and punishable accordingly.⁸ Scolding once or twice is no great matter; for scolding alone is not the offence, but it is the frequent repetition of it to the disturbance of the neighbourhood which makes it a nuisance:⁹ and two may be charged jointly with scolding, but it must be as common scolds.¹⁰ So a defendant who was convicted of making great noises in the night with a speaking trumpet, and so disturbing the neighbourhood, was fined 5*l*.¹¹ So the placing of effigies in

¹ *R. v. Wigg*, 1 Salk. 460. *R. v. Record*, 2 Show. 216.

² 17 & 18 Vict. c. 104, s. 415.

³ 1 Hawk. c. 75, s. 11.

⁴ 3 Atk. 750; see *Id.* 21, 726. See *R. v. Sutton*, 4 Burr. 2116.

⁵ *R. v. Langley*, 2 Lord Raym. 790.

⁶ *R. v. Fairlie*, 8 El. & Bl. 486.

⁷ *R. v. Lloyd*, 4 Esp. 200.

⁸ *R. v. Forby*, 1 Salk. 266.

⁹ *Id.* per Holt, C. J. See also 2 Str. 849, 1246.

¹⁰ *R. v. Hoskins and others*, Holt's Ca. 352. *R. v. Taylor*, 2 Sess. C. 22.

¹¹ *R. v. Smith*, 2 Str. 704; 2 Sess. Ca. 6.

the street calculated to draw crowds is an annoyance, and liable to be suppressed.¹ It has been held, however, that the building of a house in a larger manner than before, whereby the street became darker, was not a public nuisance.²

Nuisances having a tendency to corrupt idle persons have been prohibited. Thus, it is said, that Noy came into court and prayed a writ to prohibit a bowling-alley erected near St. Dunstan's church, and had it.³ And a booth erected in the street for rope dancing was adjudged a nuisance, for that it occasioned broils and fightings, and drew rogues to the spot, so that the inhabitants lost things out of their shops every afternoon.⁴ Next, with regard to playhouses, it has been observed, that although not of themselves nuisances, they may become so by drawing persons and coaches and sharpers together.⁵ And it is now necessary to have a licence in order to legalize those places of amusement.⁶ And it is no defence that money is not taken for admission, or that the room is not kept exclusively for that purpose, although a mere temporary or occasional user may not be within the rules.⁷

So an inn may be a nuisance,⁸ and it is, again, the rule to apply for a licence in order to keep such a house of public entertainment.

Pigeon-shooting may be a nuisance, both on account of the shooting and the collection of idle people, as well as the group of persons waiting outside of the ground in order to shoot the pigeons which might fly off. Where such conduct caused great damage and apprehension in the neighbourhood, the defendant was held answerable for it as a nuisance.⁹

Any other acts which may not fall exactly within the cases above referred to, but which, nevertheless, are public annoyances, may be treated as nuisances. Thus, the lord chancellor considered, that to show a being of unnatural and monstrous shape for money would be a misdemeanor.¹⁰ Eavesdroppers, who loiter under walls or windows, or eaves, in order to frame tales of slander according to the discourse they may happen to overhear, are common nuisances.¹¹ So are night-walkers.¹² If a man keep a fierce dog, as a mastiff, and suffer him to go at large

¹ *R. v. Carlile*, 6 C. & P. 636.

² *R. v. Webb*, 1 Ld. R. 737.

³ Per Hale, C. J., 1 Mod. 76.

⁴ *R. v. Jacob Hall*, 1 Mod. 76; S. C. 1 Vent. 169. *R. v. Bradford*, Comb. 304. It is a nuisance *in se*, 5 Mod. 142, per Holt, C. J.

⁵ See *R. v. Betterton and others*, 5 Mod. 142; Skin. 625; S. C. Holt, 538, where a prohibitory writ was issued, but the court took time to advise.

⁶ See *R. v. Handy*, 6 T. R. 286; 1 Ro. Rep. 109, where Coke said that stageplayers were guilty of a

riot, and illegal assembly. 1 Hawk. c. 75, s. 7.

⁷ *Gregory v. Tuffs*, 6 C. & P. 271. *Gregory v. Taverner*, Id. 280. Under 25 Geo. 3, c. 36.

⁸ Palm. 374.

⁹ *R. v. Moore*, 3 B. & Adol. 184. As to pigeon-houses, see 16 Vin. Ab. Nuisance, (F. 2,) 1 Hawk. c. 75, s. 8.

¹⁰ 2 Chanc. Ca. 110.

¹¹ 4 Comm. 168.

¹² *R. v. Wheelhouse*, Bendl. 199; Poph. 208.

unmuzzled, it seems that he may be indicted for a misdemeanor, and the more especially if the dog be of a ferocious nature.¹ If a person put gunpowder on board of a ship without notice, he may, perhaps, be indicted for a nuisance.² But an indictment for laying timber so near a chimney as to endanger property was held invalid.³ There is likewise a case where a vicar was indicted for not repairing the fences of the churchyard, by which means swine and other cattle invaded the tombstones, and porch, and the paths leading thereto, to the nuisance of the inhabitants of the parish. The verdict, however, was for the defendant.⁴ So a refusal by the parish priest or minister to bury a dead body is a misdemeanor, punishable by indictment or information.⁵ A new trial being moved for, the court declined to make a precedent, observing that the defendant might be indicted again if the fences continued out of repair since the last indictment;⁶ but Mr. Serjeant Russell makes a *quære*, as it should seem, to the validity of the charge as a matter of nuisance.⁷ So is the leaving of a dead body unburied in a yard. But the prisoner is not indictable for a mere omission to bury his child, unless he has the means. Where the guardians of the poor offered to lend him 7s., requiring him to sign a document for repayment, which he refused to sign, the court said he was not bound to incur a debt. It was no crime to decline being responsible for money.⁸ So to bring a glandered horse into a public place is a nuisance. Upon a conviction for this offence, it was contended,—1st, that there was no averment in the first count that the defendant knew of the infectious character of glanders. But, by Lord Campbell, “the indictment states that the defendant knew the mare to be glandered; that is enough.”⁹ Furious driving is a nuisance,¹⁰ and so is the conveyance of passengers in boats or other vessels beyond the licensed number, in case one or more of them be drowned.¹¹ It is not a nuisance to inclose a common,¹² or make a dovecote;¹³ but to set up a fair or market illegally is indictable.¹⁴ Nor as it should seem to ring bells.¹⁵

¹ See 3 Ch. C. L. 643.

² See 3 East, 192.

³ *R. v. Parr*, 2 Sess. Ca. 6. The igniting of the wood, it was said, would endanger the village.

⁴ *R. v. Reynell*, Clk. 6 East, 315. See however, *R. v. Bingley*, 1 Sess. Ca. 84.

⁵ *R. v. Rev. Mr. Taylor*, Willes, 537, n., 538.

⁶ 6 East, 316.

⁷ 1 C. & M. 304, note (z).

⁸ *R. v. Vann*, 2 Den. & P. 325; 21 L. J. M. C. 39.

⁹ *R. v. Henson*, Den. & P. 24.

¹⁰ And where injury is inflicted, it is a misdemeanor. 24 & 25 Vict. c. 100, s. 35.

¹¹ 7 & 8 Geo. 4, c. 75, s. 38. Punishable as a common law misdemeanor.

¹² *R. v. Willoughby*, Cro. El. 90.

¹³ Poph. 141.

¹⁴ Anon, 6 Mod. 184. *R. v. Moor*, 12 Mod. 235. *R. v. Starkey*, 2 Nev. & P. 169.

¹⁵ 21 L. J. Ch. 158. *Kindersley*, V. C.

CHAPTER III.

PROCEDURE IN NUISANCE.

The proceedings usual in cases of nuisance are by indictment or information, but the Court of Queen's Bench may, by a mandatory writ, prohibit such an annoyance, and the party who disobeys their order to abate the nuisance will subject himself to an attachment.¹ And in the case of the rope-dancer, the court first sent for him, and ordered that he should be indicted, but as he forthwith continued making his booth, they ordered the marshal to bring him into court, and interrogated him. His answers being unsatisfactory, the court required a recognizance of 300*l.* from him that he should cease from building, which being refused, they, as upon their own view, caused a record to be made of the nuisance, committed the offender, and awarded a writ to the sheriff of Middlesex, commanding him to prostrate the building.²

*Indictment.*³ In all indictments for nuisance, the offence must be charged as having been done to the common injury of the king's subjects;⁴ and if the fact be so, the continuance of the nuisance should be stated. It is sufficient to say, that the offensive trade was carried on at the parish of A. near the common highway, without adding in the town or village of B.⁵ But some parish or place must be mentioned.⁶ So, "near the highway, and near certain dwelling houses," was esteemed a sufficient description.⁷ With regard to a common scold, Serjeant Hawkins says, it seems agreed that an indictment against such a person is good, without setting forth the particulars.⁸ And the distinction seems to be, that where the thing is unlawful in its nature, as the keeping of a bawdy-house, &c., the circumstances of the case need not be set forth, whereas if the nuisance be in respect of a fact lawful in itself, as the erecting of an inn, the matters which make the illegality must be stated.⁹ But where it becomes necessary to set out facts, they must be shown with sufficient clearness, else the indictment will be vitiated for generality.¹⁰ An alternation—as he raised, or caused to be raised, a hedge, &c.,—must be avoided.¹¹ And if the nuisance be continuing, it should be so mentioned.¹² If an indictment conclude, "against the form of the statute," in

¹ Bac. Abr. tit. "Nuisance."

² *R. v. Jacob Hall*, 1 Ventr. 169.

³ If a fact done in one county prove a nuisance to another, it may, as it seems by the common law, be indicted in either county. 2 Hawk. c. 25, s. 37.

⁴ *R. v. Cooper*, Cro. Jac. 382; 1 Ventr. 26; 2 Str. 1246. The

case of a scold, see 1 Hawk. c. 75, s. 4.

⁵ 1 Burr. 334, 337.

⁶ *R. v. Record*, 2 Show. 216.

⁷ *R. v. Pappineau*, 2 Str. 686.

⁸ 2 Hawk. c. 25, s. 59.

⁹ 2 Hawk. c. 25, s. 57.

¹⁰ *R. v. Taylor*, 2 Str. 849.

¹¹ *R. v. Stowton*, 1 Barnard. 425.

¹² *R. v. Stead*, 8 T. R. 142.

respect of a nuisance punishable at common law, the conclusion is merely surplusage.¹ And it may be said here, that a summary proceeding before justices,² or a forfeiture under any circumstances, affords no grounds of defence to an indictment.³ Nor again, will any length of time legitimate a nuisance.⁴

Costs.] Where the defendants had been convicted of working a steam engine so as to create a nuisance, it was objected, that the prosecutors were not parties grieved within 5 Wm. & M. c. 11. But Lord Ellenborough said, that although a nuisance might be public, a special grievance could well arise out of the common cause of injury which might press more upon particular individuals than upon others not so immediately within the influence of it, and the rule for setting aside the taxation was discharged.⁵

Moreover, by 1 & 2 Geo. 4, c. 41, considering that great inconvenience and injury have arisen from the improper construction and negligence of furnaces employed in working steam-engines, and the expenses attending the prosecution of indictments for such nuisances, it is enacted, that the court by which judgment ought to be pronounced in case of conviction on any such indictment, shall and may award such costs as shall be deemed proper and reasonable to the prosecutor, such award to be made either before or at the time of pronouncing final judgment. By sect. 3, however, this provision shall not affect the owners nor proprietors or occupiers of any furnaces of steam engines erected solely for the purpose of working mines of different descriptions, or employed solely in the smelting of ores and minerals, or in the manufacturing of the produce of such ores or minerals, on or immediately adjoining the premises where they are raised.

Judgment.] Besides the usual judgment of fine and imprisonment in cases of misdemeanor, there is likewise in this case a consequence that the nuisance must be abated or dejected. But it is clearly no error to omit this latter judgment when there is nothing to abate. As in the case of steeping sheep skins, where the annoyance was only temporary; and the court took occasion to observe that the house where an offensive trade is carried on must not be pulled down. So of a house, if a portion of it be the nuisance, that part may alone be abated; and if the whole be condemned, the materials must not be wantonly destroyed.⁶ So of a bank; the nuisance of three feet was abated, but no more, the rest of the

¹ 1 Salk. 460.

² *R. v. Gregory*, 2 Nev. & M. 478.

³ *R. v. Wigg*, 1 Salk. 460.

⁴ 3 Camp. 227, by Lord Ellenborough. A note of the several acts of nuisance intended to be proved must be furnished by the prosecutor. *R. v. Curwood*, 3 Ad. & El. 815; 5 Nev. & M. 369. But if the

nuisance be permanent, although a rule as to the particulars of the acts of nuisance themselves will be granted, the court will not allow a rule for particulars as to the dates. *R. v. Flower and others*, 7 Dowl. P. C. 665; 3 Jur. 558.

⁵ *R. v. Dewsnap and another*, 16 East, 194.

⁶ Sir Wm. Jones, 222.

bank being preserved.¹ The nuisance only need be abated, and there cannot be judgment to abate in the case of a transitory nuisance.² And although the indictment should state a continuing nuisance, and affidavits be produced in confirmation of that fact, the court will not give judgment of abatement, if they should be satisfied upon other grounds, and from other circumstances, that the annoyance has ceased.³ *A fortiori*, such a judgment will not be allowed if the indictment omit to allege such continuance.⁴ With the consent of the prosecutor, the court will even permit an acquittal, upon an understanding that the nuisance has been abated.⁵ The prosecutor's consent is necessary, because of the expense which he has incurred. So that the rule of the court is not to set a small fine, unless the defendant will consent to go before the master for the purpose of making satisfaction,⁶ unless the matter should relate to a private injury, for then an action might have been brought.⁷ Whilst, on the other hand, the consent of the defendant, when convicted, to pay the prosecutor's costs, will operate to mitigate the fine;⁸ but the court cannot compel a defendant to go before the master for the purpose.⁹

It being admitted, then, that there are occasions when there is something to abate, it may be remarked, that any person may abate a public nuisance,¹⁰ and that it is not necessary to show upon a justification of such an abatement, that as little damage was done as might be.¹¹ So that where a person threw certain materials into the sea, it was held, that he was not bound to abate the nuisance orderly, but that he might well roll away the walls, which were the subjects of annoyance, as he did, into the sea.¹² And where it is said that upon the abatement of a house, it is not lawful to destroy the materials, which remain for the use of the owners,¹³ the meaning is, that no wilful damage is to be committed, and thus the position is not inconsistent with that which has just been laid down. But it is not competent to abate any matter upon the ground of its being likely to become a nuisance.¹⁴ However, it is usual for the defendant to be called upon in the first instance to remove the mischief he has occasioned, at his own expense, and then, if he neglect to abate, a writ goes to the sheriff,

¹ 16 Vin. Ab. Nuisance (A. 2 a.)

² *R. v. Pappineau*, 2 Str. 686. Fortescue, Aland, J., *contra*, who thought there should have been judgment to prevent the defendant from steeping the skins again.

³ 13 East, 164.

⁴ *R. v. Stead*, 7 T. R. 467; 8 T. R. 142.

⁵ *R. v. Macmichael*, 8 C. & P. 755.

⁶ *R. v. Goodman*, Say. Rep. 19. S. P. *R. v. Dyke*. S. P. *R. v. Haddock*, cited there.

⁷ *R. v. Tew and another*, Id. 195.

⁸ *R. v. Grey*, 2 Ld. Keny. 307.

⁹ *R. v. Richardson*, 6 D. & Ry. 141. The defendant was fined 200l.

¹⁰ 1 Salk. 458; Cro. Car. 184. As a parishioner, who may abate a wall hindering his way to church, or an obstruction in the burial ground, &c., however long it may have remained. Sir Wm. Jones, 222; 16 Vin. Ab. Nuisance (W. 8).

¹¹ 1 Salk. 459; 1 Hawk. c. 75, s. 12.

¹² *Lodie v. Arnold*, 1 Salk. 458.

¹³ Sir Wm. Jones, 222.

¹⁴ 12 Mod. 510.

and the court will raise the fine accordingly, or there may be an attachment.¹ And it may be added, that a second indictment will lie, if the nuisance be not discontinued.² In the case, however, of a wall or other thing which is capable of an easy removal, the sheriff, upon the defendant's default, will abate at once, without an increase of fine.³

By 1 & 2 Geo. 4, c. 41, s. 2 (in the case of steam engines), if it shall appear to the court by which judgment ought to be pronounced, that the grievance may be remedied by altering the construction of the furnace, the court may, without the consent of the prosecutor, make such order as they may see fit for preventing the nuisance in future before final sentence shall be passed.

CHAPTER IV.

NUISANCES—HIGHWAYS.

Highways.] We come now to the consideration of nuisances in public thoroughfares; and first, of obstructions to highways, whether arising from want of repair or otherwise.

An obstruction, in the ordinary sense of the word, signifies an opposition to the passage of the king's subjects along the highway; and whilst the common law visits this offence with an indictment, the Highway Act gives, in many cases, a more summary proceeding before justices for the recovery of penalties.⁴ For it being once admitted that a particular road is a thoroughfare, the proceeding for an obstruction follows of necessity, whence it is that the question of dedication to the public has occasionally arisen as a ground for removing or abating the impediment complained of. On the other hand, the public have been subjected to a qualification of their rights, as in the case of a prescription, fair, or market. The law exercised its functions very early with jealousy with reference to nuisances in the public way. As where a person placed logs of wood, so as to narrow the passage;⁵ and it was considered no excuse to say that the people might have windings and turnings

¹ 1 Hawk. c. 75, s. 15. S. C. *R. v. Gower*, 3 Jur. 1076; 8 Dowl. P. C. 102.

² 1 Hawk. c. 76, s. 157; 2 Ro. Ab. (B. 4). *R. v. Austin*, 1 Ventr. 183, does not seem to militate against this position, because there was not a clear proof that the defendant had set up the posts and rails, so that there could not be a continuing nuisance in respect of what had not been stamped with the legal character of a nuisance.

³ Comb. 10. In addressing the court in aggravation, the provisions of an Act of parliament relating to a private company may be referred to if it be declared to be a public Act, although it be not referred to in any of the affidavits.

⁴ And it is to be noted, that the summary procedure does not invalidate the common law process. *R. v. Gregory*, 2 Nev. & M. 478.

⁵ 16 Vin. Ab. (B. 1); 1 Hawk. c. 76, s. 144; Cro. Jac. 446.

through the logs.¹ But it is not a nuisance to exercise a right, which is, of necessity, as the unloading of billets in the street, provided the wood be not allowed to remain there for an unreasonable time.² So to unload beer with a similar restriction.³ As soon, however, as a due portion of time has elapsed, the party becomes clearly guilty of nuisance. And, *a fortiori*, a person cannot defend himself upon an indictment for placing timber in the street on the ground of the narrowness of his premises. The defendant had large pieces of wood sawed into smaller, and then had them carried into his yard. His counsel pleaded that it was an act of necessity, but Lord Ellenborough expressed himself satisfied of the correctness of the charge, and observed that the defendant must remove to a more commodious situation if his premises were too inconvenient for his business.⁴ The same principle of law prevails throughout the decisions. The waggoner at Exeter, who persisted in keeping several waggons during the day and night before his warehouse, in a street thirty-seven feet wide, was deemed guilty of a nuisance. The waggons occupied one-half of the street, so that no carriage could pass on the opposite side, the gutter being in the middle, and through the constant loading and unloading even foot passengers were driven across the way. It seems that the coachmakers in Long Acre had endeavoured to set up a claim similar to this made by the defendant, who was said to be the principal waggoner in the west of England,⁵ but the court declared that he could not carry on any part of his business in the public street to the annoyance of the public.⁶ So again, the proprietor of a Greenwich coach was convicted of a nuisance for permitting his carriages to remain for an unreasonable time in Charing Cross. The length of time during which this practice had prevailed was held to make no difference, for no length of time can legitimate a nuisance.⁷ So a hackney-coach stand may be a nuisance, and the commissioners for paving may remove it if they have the power of directing and regulating the stands.⁸ Every unauthorized obstruction is a nuisance.⁹ Gigs may not be put in the open street on fair days.¹⁰ The stell fishery across the river at Carlisle had been established for a vast number of years, but Mr. Justice Buller held its continuance unlawful, and gave judgment that it should be abated.¹¹ So, if persons were to crowd the footway with poles and handbills in an unreasonable manner, it would be a nuisance, although the mere act of setting one individual on a

¹ 1 Hawk. c. 76, s. 145.

² Id.

³ 3 Camp. 236, per Lord Ellenborough.

⁴ *R. v. Jones*, 3 Campb. 230.

⁵ 6 East, 429.

⁶ *R. v. Russell*, Id. 427.

⁷ *R. v. Cross*, 3 Campb. 224.

The counsel for the defendant urged the case of a rout, but Lord Ellenborough at once observed, that a

rout would be a nuisance if coaches were to wait in the street for an unreasonable time.

⁸ *R. v. Rawlinson*, 4 D. & Ry. M. C. 186.

⁹ 3 Campb. 226; so that ploughing up a footway may be indictable; 6 Mod. 145.

¹⁰ 3 Nev. & M. 580.

¹¹ 3 Campb. 224, by Lord Ellenborough.

footway to distribute bills is not an offence by the general law.¹ So it is to make a noise accompanied by an obstruction.²

So it was held, that throwing skins into a highway, by which a person lost his eye, was not indictable;³ but if the skins had been thrown constantly, or for an unreasonable time, it might have been otherwise. So to make a hoard for the purpose of building or repairing, in such a manner as to encroach unreasonably, would be a nuisance.⁴

To dig a ditch, or to make a hedge across a highway, is clearly an illegal act;⁵ or to inclose a common lane in a forest;⁶ or to build a wall, whereby the way would be straitened;⁷ (as where parishioners pulled down a wall in order to go to church;⁸) or to use such a way unwarrantably, so as to "plough it," according to an expression once used by the court.⁹ So to carry an unreasonable weight upon the road.¹⁰ So to place a gate on the way where no gate was before.¹¹ But if the gate has been time out of mind upon the way, the case has a different complexion;¹² for it might have been so, of necessity, to keep cattle within bounds,¹³ or by composition with the owner of the land when he consented to the thoroughfare,¹⁴ or by licence from the king, and upon a writ of *ad quod damnum*, and no nuisance found.¹⁵ And although the defendant in *James v. Hayward* might have opened the gate, yet it was held, that he might lawfully cut it down,¹⁶ a circumstance which shows how amply the public may set themselves free from an impediment to their passage. The defendant placed a five-barred gate with a step in the room of a stone stile two feet high. This was an obstruction.¹⁷ Projections over public ways are obstructions, but local provisions and summary proceedings supersede indictments.¹⁸

By 8 & 9 Vict. c. 141 (The Manchester Improvement Act), s. 30, no houses shall be built with fronts facing each other unless the space separating them be twenty-four feet wide. An exception, however, was made of sites of houses built prior to the Act, one of vacant plots in streets partially built upon on both sides. The owner of land in Manchester built up to his boundary, which was not in a street; afterwards the defendant, owner of the land in

¹ *R. v. Sarmon*, 1 Burr. 516.

² *Webster v. Watts*, 17 Q. B. 73; 11 Q. B. 311.

³ *R. v. Gill and others*, 1 Str. 190.

⁴ 1 B. & Pul. 407, by Eyre, C. J.

⁵ 1 Hawk. c. 76, s. 144; 16 Vin. Ab. Nuisance (A. a.) (10); and anybody may break down the hedge; 16 Vin. Ab. Nuisance, (W. 6).

⁶ *R. v. Taylor*, W. Jo. 269.

⁷ *R. v. Browne*, W. Jo. 277.

⁸ *Id.* 222.

⁹ 6 Mod. 145.

¹⁰ *R. v. Egerly*, 3 Salk. 183; 1 Freem. 100.

¹¹ *James v. Hayward*, Cro. Car. 184; S. C. W. Jo. 221.

¹² 1 Hawk. c. 75, s. 9.

¹³ *R. v. Bliss*, Cro. Car. 184, per Croke, J.; 1 Jurist, 960. S. C. See 2 Nev. & P. 464.

¹⁴ 1 Hawk. *ut supra*.

¹⁵ Cro. Car. 185, per Jones, J.

¹⁶ *Id.* 184; 2 Salk. 459.

¹⁷ *Bateman v. Burge*, 6 C. & P. 391. It was urged, but in vain, that gates had been put on other parts of the way.

¹⁸ Woolrych on Ways, 2nd Edit.

front of A.'s houses, built a stable in front of A.'s houses within twenty-four feet. It was argued for the defendant that this section (30) pointed at the erection of new streets. The one in question was not a street. And of that opinion were the court. The statute applied to streets, and this was never, in any acceptation of the term, a street.¹

So, if a bridge be built in a slight or incommodious manner, it is a nuisance, for no person can impose such a burden upon the county as the repair of such an insufficient structure.² It would be making a colourable use of the doctrine of repair.³

Any other act savouring of obstruction or encroachment, or even damage to the way, is the subject of a prosecution. As where a carrier, by overloading, injured the road in consequence of the extraordinary weight of his goods.⁴ So where the defendant removed the gravel and soil upon a brick culvert.⁵ So where an Act forbade the erection of buildings within ten feet of the road, and directed that the footpaths should be deemed part of the road, it was held, that a building erected within ten feet of the footpath was a nuisance and encroachment within the Act.⁶ So to erect pens for pigs or other cattle in the street is a nuisance, unless the fact can be justified under a prescription or grant in respect of a fair or market, or otherwise.⁷ So where an Act gave authority to lay waggon-ways along or across certain roads, provided the roads were kept in repair for twenty yards on each side of the waggon-way, it was held, that where there were not twenty yards of waggon-way on each side, no waggon-way at all was authorized. And where one clause of an Act directed proprietors of a railway to make new roads in lieu of such as their railroad might injure, and another subsequent section gave them a general power of constructing railways without reference to any former limitation, it was held, that this general power was, nevertheless, controlled by the former clause, so that it became necessary for such proprietors to leave a space for the public to use; and it was considered, moreover, that the benefits which the railroads conferred upon trade were not such as could justify the obstruction of the highway.⁸

By an Act an ancient highway was made turnpike. One S. worked collieries by the side of it, and made ways to convey the coals. A new Act passed imposing a penalty on such as should make or continue any tramroad without the consent of the trustees. S. was found guilty of a nuisance, and the verdict was sustained.⁹

¹ *R. v. Sidebotham*, Bell, 171.

² 2 East, 348, by Lord Ellenborough.

³ *Id.* 352, by Grose, J.; and see 54 Geo. 3, c. 59, s. 5. And the justices have jurisdiction over it under 1 Edw. 3, c. 16; 6 Mod. 255.

⁴ March. Rep. 135, pl. 215; Jenk. 284.

⁵ *R. v. Knight and others*, 7 E. & C. 413; S. C. 1 M. & Ry. 217.

⁶ *R. v. Gregory*, 2 Nev. & M. 478.

⁷ *R. v. Cotterill*, 1 B. & Ald. 6. See *R. v. Starkey*, 7 Ad. & El. 95.

⁸ *R. v. Sir J. Morris*, 1 B. & Adol. 441.

⁹ *R. v. Charlesworth*, 16 Q. B. 1012; 5 Cox, 174.

It is no answer to an indictment for obstruction, that the state of the earth rendered it impossible to make a new road. It was so held where a railway company were bound by their Act to make as convenient a road as any which they might happen to meddle with.¹ A trench was opened in a public street for gas; the permission of the highway board and of the lighting commissioners had been obtained. It was admitted that reasonable despatch had been used; this act was, nevertheless, held to be a nuisance.² A tramroad was made on a highway, with the groove sunk in the road, but it did not rise anywhere above the level. Still this was an obstruction.³ An encroachment by inclosure to within fifteen feet of the centre of the way cannot be justified if there has been user by the public or repair by the surveyor, without interruption.⁴

But the frightening of horses, in consequence of the movement of the locomotive engines, is not ground for an indictment, although the railroad be parallel to the road, and, in some places, within some few yards of it. Here the great public utility of the railway obtains its due consideration, and the interference with the rights of the public must be taken to have been contemplated by the legislature.⁵ Still, the public must be allowed free passage. Sir John Morris was indicted for obstructing a road by means of an iron railway. This railway ran for 400 yards along the road, and, in some parts, did not leave space for two carriages. This was deemed an obstruction, notwithstanding the argument of public convenience.⁶

Dedication.] It has, however, been said, that the question of dedication occasionally arises upon these indictments for obstruction, and that the rights of the public are sometimes narrowed, so as to preclude them from preferring indictments which would certainly lie under other circumstances.

First, then, with regard to dedication; it seems that if a person manifestly shows his intention to throw open a street or way to the public, an obstruction of such an easement will be indictable. As where a passage had been left for several years without either a bar or a chain across it, and had been lit at the expense of the city of London: the defendant was convicted of an obstruction.⁷ So where the public had used a footway for fifty years, during the occupation of successive tenants, and with notice to the landlord's steward, which was notice to the landlord.⁸

But if a bar or chain be put up, or any other mark of interruption be exhibited, the presumption of dedication is much lessened,

¹ *R. v. Scott*, 3 Q. B. 543; 2 Gale & D. 729.

² *Ellis v. Sheffield Gas Consumers Company*, 23 L.J. Q. B. 42.

³ *R. v. Charlesworth*, 16 Q. B. 1012.

⁴ *R. v. Johnson*, 1 Fost. & F. 657.

⁵ *R. v. Pease*, 4 B. & Adol. 30; 1 Nev. & M. 690.

⁶ *R. v. Morris*, 1 B. & Adol. 441.

⁷ *R. v. Lloyd*, 1 Campb. 260; see also 11 East, 375, n.

⁸ *R. v. Barr*, 4 Campb. 16. See also *R. v. Allanson*, 1 Lew. C. C. 158; 3 Bing. 447.

if not destroyed,¹ and so likewise if the owner of land evince his determination to allow a qualified right only, a party will become a trespasser for the excess.² And if there be no intention to dedicate visible on the part of the owner, or the public have enjoyed the way for a short time only, the presumption is rebutted.³ These facts are, for the most part, questions for the decision of the jury.⁴

Secondly, as to the limitation of the public right in consequence of a prescriptive privilege elsewhere, it was held, in the case of *Rag Fair*, that if the place said to have been obstructed were subject to the franchise of a fair and market, or appeared openly to be so, as, for instance, by an enjoyment of twenty years, a man could not be deemed criminal who should come there under a belief that the fair or market was legally instituted. The defendants were accordingly acquitted.⁵

It is no objection to an indictment that other remedies may be had at common law.⁶ The remedy by indictment is positive.⁷ Upon an indictment for nuisance, if it be laid as continuing, the judgment is that it be abated; but if the complaint be merely of the fact, the abatement is not necessary, for *non constat* that it had not been discontinued at the time of the indictment.⁸ Otherwise, the nuisance must be judicially abated,⁹ and at the loss of the defendant.¹⁰

Indictments for not repairing a highway.] We proceed to another class of obstructions or nuisances, the remedy for which is by indictment. The non-repair of a road is the cause of such a grievance. And it may be safely affirmed, that wherever a way acquires the character of a thoroughfare, this principle of law will apply. And the parties who lie under the obligation to repair, and are thus the subjects of prosecution, are, in the first instance, the inhabitants of the parish or township in which the particular road is situate.¹¹ From this common law liability, unless the burden can be satisfactorily shown to belong to others, or the road be shown to be in good repair, there is not any appeal; so that if through the default of commissioners, or from any other cause, a *turnpike road* should become ruinous, the necessity for

¹ 5 Taunt. 126; 1 Campb. 263, n.; 5 B. & Ald. 454; 4 B. & C. 474; and it is no defence that the bar has been knocked down without further evidence of dedication; 1 Campb. 262, n.

² 7 B. & C. 257; see also 4 Campb. 189.

³ *R. v. Hudson*, 2 Str. 909.

⁴ *R. v. Wright*, 3 B. & Adol. 681.

⁵ *R. v. Smith and others*, 4 Esp. 111.

⁶ *R. v. Scott*, 3 Q. B. 543; 2 Gale & D. 729.

⁷ Carth. 194; Bull. N. P. 26 (a).

⁸ *R. v. West Riding, JJ.*, 7 T. R. 467. *R. v. Stead*, 8 T. R. 142. *R. v. Incledon*, 13 East, 164.

⁹ 8 T. R. 144.

¹⁰ 14 Vin. Ab. 395.

¹¹ Mar. 26, p. 62. Not the overseers. *R. v. Dixon and another*, 12 Mod. 198.

repair lies upon the parish. Even where an Act of parliament placed the care of a particular street in the hands of commissioners, and another Act which was passed for paving the streets of the parish excluded the former street from its provisions, the parish was still deemed liable. The tolls constitute an auxiliary fund, and the parish having seen that the road is in good repair, would then be in a condition to seek a remedy even against the commissioners.¹ After conviction, the inhabitants may apply to the court upon motion, under 3 Geo. 4, c. 126, s. 110.² Nothing short of an express exemption will discharge a parish or township. But if there be such an exemption in an Act of parliament, it must prevail; and it was so held in a case where a township successfully resisted a claim made on them by the remainder of a parish, in consequence of a particular provision in a local Act.³ Yet the following clause in a local Act was held insufficient to discharge the township of Little Bolton: "Every person rated or assessed, for the purposes of that Act, in respect of any messuage, &c. within Little Bolton, shall be in respect thereof exonerated from all rates and assessments and performance of statute duty or composition with respect to the repairs of the highways in Little Bolton, or any costs, charges," &c. Judgment was given, though with hesitation, for the crown.⁴ So, where commissioners were authorized to stop up old ways and make new, which, when certified by the justices, were to be repaired by the parish, there being neither order nor certificate, the parish was held liable. The commissioners had, in fact, ordered an inclosure of the common where the way was, and set out a way thirty feet wide *with the same terminus, and in the same line as the old way*. This was, in effect, the same way.⁵ But where no steps had been taken by the commissioners for putting the road into complete repair, and no declaration of justices appeared as to the repair, nor had any proceedings been taken under 5 & 6 Will. 4, c. 50, s. 23, it was held, that the parish was not liable, although they had repaired the way both before and since the award.⁶ This case was, in fact, founded upon *R. v. Hatfield*,⁷ where the principle of declaration by justices in sessions was laid down. No agreement with other persons will discharge

¹ *R. v. St. George, Hanover Square*, 3 Campb. 222. *R. v. Netherthong*, 2 B. & Ald. 179; 1 Ld. Raym. 725.

² Which enables the court to apportion the fine and costs between the trustees and the parish, so as not to endanger the security of the creditors who have advanced their money upon the credit of the tolls. And although the indictment be removed by *certiorari*, after having been preferred at the assizes, the Court of King's Bench will exercise

this jurisdiction of apportionment. *R. v. Upper Papworth*, 2 East, 413.

³ *R. v. Sheffield*, 2 T. R. 106.

⁴ *Little Bolton v. Reg.* 12 L. J. M. C. 104.

⁵ *R. v. Cricklade*, 14 Q. B. 735.

⁶ *R. v. East Hagbourne*, Bell, 135.

⁷ 4 Ad. & El. 156. See further, as to liability of a township under an Inclosure Act, *R. v. Gate Fulford*, 7 Cox, 230.

the parish.¹ Hence it follows, that if the parish will endeavour to release themselves, they must find out some parties or person who ought to stand in their stead,² or they must be in a condition to prove that the road indicted is not a public highway. These two lines of defence are the most usual upon indictments for non-repair. Thus, the inhabitants of Ecclesfield pleaded a prescriptive obligation under which certain districts and divisions were bound by immemorial usage to repair the road in question, "except a certain common highway in the said district of W." This excepted road was proved to have been made under an Inclosure Act about twenty-five years since. It was objected, that the defendants ought to have shown that this way had existed immemorially, being pleaded as an exception to an immemorial obligation, but Wood, B., held the statement sufficient, although it might have been more explicit, and a motion to enter up judgment for the crown, *non obstante veredicto*, was not successful.³

The inhabitants of Hatfield, on the contrary, being indicted as a township, for non-repair, pleaded not guilty, instead of showing in particular the parties whom they sought to charge, presuming upon the distinction between a township and a parish. But the court held, that as the evidence showed an immemorial custom on the part of Hatfield, to repair all roads within the township, which but for the prescription would be repairable by the parish at large, the township stood in the light of a parish, and could not be discharged without pointing out in a plea the persons who were to take upon themselves the duty which the public required.⁴ And Holroyd, J., noticed a diversity between cases where the indictment charges a special prescription to repair a particular road, and a general prescription to repair all roads. In the former case, the plea of Not guilty might serve; but, in the latter, a more particular designation is indispensable. And the learned judge added, that he remembered the distinction to have been taken in a case before Chambre, J.⁵ So, in charging the township, the immemorial usage is set forth, because it is against common right to call upon a section of the parish; but as soon as the obligation is fixed upon the township commensurately with the parish, the township must bear the burden equally, or show cause why they should be relieved. And hence it was, that where the division of Great Broughton, in the parish of Bridekirk, was indicted in the common form, judgment was arrested for want of a reason upon the face of the record why the special obligation had accrued.⁶ Nevertheless, where an Act of parliament imposes the burden of repair, the parish, although not delivered from their common law

¹ 1 Ventr. 90. *R. v. Mayor of Liverpool*, 3 East, 86.

² *R. v. Eastington*, 5 Ad. & El. 765; 1 Nev. & P. 193.

³ 1 Stark. 393. *R. v. Ecclesfield*, 1 B. & Ald. 348.

⁴ *R. v. Hatfield*, 4 B. & Ald. 75.

⁵ Id. 80.

⁶ *R. v. Great Broughton*, 5 Burr. 2700. *R. v. Linkfield Street*, 2 T. R. 514, cited. *R. v. Penderryn*, Id. 513.

liability, may take advantage of this mode of defence under the general issue.¹

It is, however, to be noticed, that the consideration for the liability incurred by parties foreign to the parish at large, need not be set out in the special plea by the parish. It is only when the road is without the boundary of the parish or township indicted, that a consideration should appear on the record. Thus a plea charging a particular district or division was held good without the mention of consideration.² And it is no objection that the words "which but for such a custom would be repairable by the parish at large," are left out.³ The road needs not to be shown to be an ancient highway if a custom be proved against a township of repairing *all* the roads within it.⁴ But where the inhabitants of a parish pleaded that the inhabitants of another parish had been accustomed to repair, the plea was held bad for want of consideration.⁵ Although by prescription one parish may certainly be bound to repair the way in another.⁶

Repair ratione tenuræ, &c.] A parish, however, may discharge itself in other ways than by imputing repair to another township, or denying the existence of the highway. For it may be suggested, that a party is liable by reason of his tenure of certain lands to do the required amendment, or showing a consideration, by prescription; or again, by reason of his having at some time encroached upon the road. And a consideration evidently appears upon the face of these pleas which charge the repair *ratione tenuræ* or *clausuræ*. The person thus called upon by reason of tenure,⁷ cannot defend himself upon the ground of allowing his land to lie fresh,⁸ or of opening an inclosure, for he is bound in perpetuity.⁹ And where the abbot of S. charged *all* his lands for the repair of a way, it was held, that not only those which had

¹ *R. v. St. George, Hanover Square*, 3 Campb. 222; see 4 B. & Adol. 109.

² *R. v. Ecclesfield*, 1 B. & Ald. 348.

³ *R. v. Heage, Inhabitants*, 2 Q. B. 128; 1 Gale & D. 548.

⁴ *R. v. Barnoldswick*, 4 Q. B. 499; 3 Gale & D. 455.

⁵ *R. v. St. Giles's, Cambridge*, 5 M. & S. 260. See *R. v. Bp. Auckland*, 1 Ald. & El. 744. *R. v. Scarisbrick*, 1 Nev. & P. 582; S. C. 6 Ad. & E. 509. It is, however, no objection that three townships are charged conjointly. *R. v. Bp. Auckland*, ut supra. If a highway should be in two parishes, the justices at a special sessions

shall apportion the part to be repaired by each parish or person liable *ratione tenuræ*, or otherwise. But the person so liable may appear and make his objection before the justices, if he shall not be satisfied, and they shall determine upon the same. 5 & 6 Will. 4, c. 50, ss. 58, 59; see also sects. 60 and 61, and likewise sect. 92. See as to a highway in two counties, 5 T. R. 498, and *post*, in this section.

⁶ 12 Mod. 409.

⁷ See instances of indictments for non-repair *ratione tenuræ*, Palm. 389.

⁸ Palm. 389; 5 Esp. 219; 3 Campb. 444, &c.; 1 Str. 187.

⁹ 2 Saund. 160.

been set apart originally for the purpose were liable, but likewise *all* lands which the abbot might have since acquired.¹

Where it is sought to enforce the claim of repair by prescription, a consideration must be shown, or by the receipt of toll, or other profit; and this, although the ancestor may have done the repair, for the act of the ancestor cannot charge the heir without profit.² And the road must be of public utility. For occasional repairs done by an adjoining occupier will not make him liable to repair the whole road along his line, any more than an individual would be bound by repairing the road before his gate.³ Moreover it is to be remarked, that this liability by tenure is not extinguished by an alteration in the line of road, so as entirely to discharge the individual. But under recent statutes it may be changed for a pecuniary compensation to the parish. As under the Turnpike Act,⁴ where it is ordained, that two justices shall apportion the amount of road which has been widened, altered, diverted, or turned, and with the consent of the parties liable, shall discharge their liability altogether, upon payment of a gross or annual sum, as may be found convenient. Under the new Highways Act⁵ this conversion of liability is made absolute. For roads repairable *ratione tenuræ* are placed at once under the care of the surveyor, when such roads come to be widened, enlarged, turned, or diverted. The roads, however, are to be viewed by two justices, who are to report to the special sessions, and the justices at special sessions shall fix an annual sum in gross, to be paid in lieu of the repairs formerly due by the individual.

And by a previous clause, (sect. 62,) any person liable *ratione tenuræ* or otherwise, may, with the consent of the inhabitants in vestry, obtain the opinion of justices at special sessions, as to the propriety of exchanging his obligation for an annual payment, or the payment of a sum in gross. And if the justices decide for the changing, the road shall be repaired by the parish for the future. Should the gross sum exceed 100*l.*, it is to be vested in the funds, and the interest applied to the repair of the roads within the parish. If under 100*l.*, the gross sum, or any part thereof, is to be applied at once towards the repairs, with the consent of the vestry, and of such justices at special sessions. An encroachment by the sea will, for the time, suspend the liability to repair *ratione tenuræ*.⁶

Repair by reason of encroachment.] A liability to repair may, again, arise by reason of encroachment. The rule seems to be, that if one inclose land on one side, the other side being anciently inclosed, he shall be compelled to repair all the way; but only half the way, if there should be no ancient inclosure; and clearly, if he

¹ *R. v. Buckeridge*, 4 Mod. 48.

² 13 Rep. 33; Sty. 400.

³ *R. v. Allanson*, 1 Lew. C. C. 158, Hullock, B.

⁴ 4 Geo. 4, c. 95, s. 68.

⁵ 5 & 6 Will. 4, c. 50, s. 93.

⁶ *Bamber v. Reg.* (in error), 5 Q. B. 279; Dav. & M. 367. *R. v. Hornsea*, 23 L. J. M. C. 59; Dears. 291.

inclose both sides, he becomes liable to the reparation of the whole way. Still, the obligation endures only so long as the inclosure is continued.² Although, as we have seen, a person cannot discharge himself from an obligation *ratione tenuræ* by opening an inclosure.³ And, therefore, if the party would seek to be relieved from his burden by reason of his inclosure, he must restore the land he has acquired, to the road. So that, in order to carry out his object, he would put the way into repair, so far as it had been interfered with by the encroachment, and would then leave it to the trustees or parishioners. But where, not content with throwing open the inclosure, and repairing the road once, the defendant continually did acts of repair for twenty-five years, Heath, J., held that he had manifested a sense of liability by his act, and he was found guilty upon an indictment.⁴

During the continuance of the inclosure, the state of the road must not only be no less useful than before, but there must likewise be a good and sufficient way. So that, where the defendant had made the passage better than before, but it was still so narrow as that neither a cart nor a carriage could pass, but horses only, the court decided, that he must put the road into a perfect and ample condition.⁵ However, the law above set forth does not apply in cases of inclosure by virtue of an Act of parliament, or where an inclosure takes place in consequence of the writ *ad quod damnum*, unless, in the latter case, it be in respect of lands in another parish than that in which the road originally lay. For the inclosure under an Act of parliament cannot be likened to a voluntary inclosure, but may rather be called a parliamentary *ad quod damnum*.⁶ And under the writ *ad quod damnum*, as the parish can bear no further expense in respect of the old road, the inhabitants ought, for the future, to repair the new. Whereas, if the road were in another parish, the inhabitants of that other parish would not be relieved from the repair of the old way, because they could never have been liable to the repair of it, and in that case, the party inclosing under an *ad quod damnum* must be subjected to the burden. The heir may be indicted for the continuance of an encroachment, although he do no new act, the continuance being a new nuisance.⁷ However, where all traces of a highway were lost, proof of that fact was held to be a good answer to an indictment.⁸

Defence.—No highway.] Secondly, a parish may allege as a defence, that the way in question is not a highway, and that, of course, is an ample answer to an indictment. So, that a church

¹ 1 Sid. 464.

² 2 Saund. 160.

³ *Ante*.

⁴ *R. v. Skinner*, 5 Esp. 219.

⁵ *R. v. Sir E. Duncomb*, Cro. Car. 366.

⁶ *R. v. Flecknow*, 1 Burr. 461;

² Ld. Keny. 261. See to the same effect, *Ex parte Vennor*, 3 Atk. 772.

⁷ 16 Vin. Ab., Nuisance, B. 4.

⁸ *Anon.* Midland circuit, Dears. 304.

path "for all the parishioners of D." cannot be the object of an indictment.¹ And here, again, questions as to dedication have arisen, because in the event of an insufficient dedication, and, *à fortiori*, if there were none at all, the parish could not be charged with the non-repair of that which, at best, must be deemed but a private way. Before the late Act for consolidating the law upon the subject of highways, contradictory decisions had taken place as to the necessity of acquiescence on the part of the parish in a dedication or adoption by the parish of a road so dedicated. For some time it was considered, that acts of adoption or acquiescence must appear on the side of the parish,² but upon a subsequent occasion, two judges against one³ held that a way was repairable by the parish when used by and dedicated to the public, without any other sanction.⁴

Now, however, by 5 & 6 Will. 4, c. 50, s. 23, circumstances which constitute a public road repairable upon a dedication, or under an Inclosure Act,⁵ by the inhabitants at large of each parish, are set forth. First, the person intending to dedicate must give three months' notice in writing to the surveyor of such his intention, describing the situation and extent of the way. He must then show that the way is made in a substantial manner, and of the width required by the Act, and to the satisfaction of the surveyor and any two justices of the division where the highway is situate. The justices then certify as to the substantial state and width at the expense of the party requiring the view, and the certificate is enrolled at the quarter sessions. Upon which, after the public have used the road, and the person dedicating it has kept it in repair for twelve months, it shall thereafter be repaired by the parish. Nevertheless, the surveyor must previously, upon the receipt of the above notice, summon a vestry, and if such vestry shall be adverse to the dedication, any one justice may summon the party proposing to make the new highway to the next special sessions, and the question shall be there determined by the justices. A parish, therefore, may defend itself on the score of undue dedication. The words in the section "made or hereafter to be made" mean roads framed or made, but not entirely dedicated. Roads fully dedicated at the time of the passing of the Act are not within its operation.⁶ If the way be stated to be immemorial, and

¹ *R. v. Thrower*, 1 Ventr. 280. But if "for all the parishioners of D." were omitted, and the sentence were "a common footway to the church of —," it would be good. *R. v. Hebborne*, 1 Hawk. c. 76, s. 238; Poph. 206.

² *R. v. St. Benedict*, 4 B. & A. 447. *R. v. Paddington Vestry*, 9 B. & C. 456. See also *R. v. Edmonton*, 1 M. & Rob. 24. *R. v. Mellor*, 1 B. & Adol. 32.

³ Denman, C. J., Parke, J., — *Diss.*—Littledale, J.

⁴ *R. v. Leake*, 2 Nev. & M. 583.

⁵ The Act embraces roads or occupation ways, *made or to be made*, or roads *set out or to be set out* as private driftways or horse-paths under Inclosure Acts.

⁶ *R. v. Westmark*, 2 Moo. & Rob. 305.

it turns out that it was extinguished sixty years before an indictment under an Inclosure Act, the indictment is not supported, although the public may have used the way since.¹

So, again, it is a sufficient answer by the parish to say that commissioners of inclosure have set out the road indicted as a private road.² And under an Inclosure Act, the words "poor and other rates" were held not to include highway rates.³ So, it would be quite sufficient to allege that a road had not been finished according to the provisions of the Act of parliament under whose authority it had been commenced.⁴ And, clearly, where a way is stopped by an order of justices, the public liability in respect of it is at an end.

So, where the road intended was from A. to C., but an intermediate part from A. to B. had been finished and repaired for twenty or thirty years, it was held that no indictment would lie till the whole should be complete. And it made no difference, that the road joined another public road at B., which last road was complete.⁵ So, in the case of a branch road to C. from a road marked A. B., the branch must be finished before the public can be called upon to repair.⁶ And it may be a defence to allege that there is another road in good repair equally convenient to the public, although the distance be somewhat greater, provided the public make little or no use of the way indicted.⁷

But it would not be a defence to urge the existence of an inclosure award which placed the road in another parish, unless proof be given that the notices required by the Act had been given by the commissioners, especially where the usage has not been according to the award. For the continuance of repair by the inhabitants of the indicted parish where the road originally was, would raise a presumption that the due notices had not been given.⁸

Nor again, that a water, being an ancient highway, had changed its course; for the highway continues in the new channel as it did in the old.⁹ Nor can the public be deprived of a highway except by express words. So, that an old towing-path was considered to remain liable to public user, although some alteration had been made in the use of it by an Act of parliament for private purposes.¹⁰

And where a road is changed or in any way altered by an Act

¹ *R. v. Westmark*, 2 Moo. & Rob. 305.

² *R. v. Cottingham*, 6 T. R. 20. *R. v. Richards and others*, 8 T. R. 634. *R. v. Enfield*, 3 Chit. Burn, 82.

³ *R. v. Midville*, 4 Q. B. 140; 3 Gale & D. 522.

⁴ *R. v. Cumberworth*, 3 B. & Adol. 108, Littledale, J., *dub.* As that eleven miles and a half only were completed out of twelve.

⁵ *R. v. Edge Lane*, 4 Ad. & El. 723; 6 Nev. & M. 81.

⁶ 1 *R. v. Cumberworth*, 4 Ad. & El. 731; 1 Nev. & P. 197.

⁷ *R. v. Steyning*, Say. Rep. 92.

⁸ *R. v. Haslingfield*, 2 M. & S. 558.

⁹ 1 Hawk. c. 76, s. 4.

¹⁰ *R. v. Tippet*, 3 B. & Ald. 193.

of parliament, it is usual to designate it as a public highway after such alteration, and, consequently, it is repairable by the parish.¹ And by sect. 92 of the Highway Act, where a highway shall have been turned or diverted under the provisions of that statute, the parish, or other party liable to the repair of the old highway, shall repair the new without reference to its parochial locality.

There is one other defence which has occasionally been brought forward,—that a parish need not make a road better than its immemorial condition. But this mode of meeting an indictment must, of necessity, become less and less applicable by reason of the improvements required by recent Acts of parliament. As that public ways should be of a certain width,² and that justices should order narrower ways to be widened upon compensation made to the owners of adjoining lands.³ These two clauses seem to give full authority to improve a road so as virtually to make the defence above mentioned of rare occurrence. For, instead of indicting the parish for not maintaining a sufficient width of road, (a proceeding which might probably fail), the surveyor would be indicted for disobedience to the Act of parliament, unless it were thought proper to resort to the general clause of 5 & 6 Will. 4, c. 50,⁴ for the recovery of a penalty against him.

Nevertheless, where the road cannot be widened by reason of the interposition of private property, and the justices do not perform their duty by requiring the widening of highways under the 82nd section of the above Act, it is impossible that an indictment might be adventured, and in such a case, the defence of an immemorial condition might still be interposed. As, where a parish was indicted for allowing a road to be so muddy and narrow that people could hardly pass along.⁵ So it was said, that a person need not repair beyond the original state of the road.⁶ So, where a public way crossed the bed of a river which washed over it at every tide, leaving a deposit of mud, it was held, that the parish could not be bound to make it good, if from the nature of things the repair would be ineffectual, but the jury thought otherwise, and found a verdict of guilty.⁷

Fences.] The fences adjoining to a road must be repaired by the owners of land, and trustees who had turned a road through an inclosure, and had repaired the neighbouring fences for many

¹ See the Highway Act, 5 & 6 Will. 4, c. 50, ss. 85, 86.

² 5 & 6 Will. 4, c. 50, s. 80.

³ Id. s. 82.

⁴ Sect. 20.

⁵ *R. v. Stretford*, 2 Ld. Raym. 1169.

⁶ 1 Salk. 359; 6 Mod. 163.

⁷ *R. v. Landulph*, 1 M. & Rob. 393. "Where two parishes are separated by a river, and there is no positive evidence of the boundary line between them, it is to be presumed to coincide with the middle line of the channel." By Patteson, J., 1 M. & Rob. 393.

years, were held not liable to continue such repairs.¹ If no such fences previously existed, the parish is not liable to be called to account for not putting up guard fences, upon an allegation that the king's subjects could not pass, "as they were wont to do."²

Proceedings.] It has been sufficiently apparent from the matters already laid before the reader, that the proceeding by indictment is the more ordinary remedy employed to compel a parish to repair. But an information may likewise be applied for,³ and the court will grant it under certain circumstances. As, where there is a difficulty in procuring persons to take necessary steps against the parish. So, again, where the grand jury refused to find a bill for the non-repair of a road.⁴ But the grand jury must be shown to have been guilty of a gross misbehaviour in not finding the bill, and, therefore, where it appeared that the road in question was but of little value to the public, the court refused an information.⁵ And *per cur.*: "There is another reason why the court ought never to give leave to file an information for not repairing a highway, unless it be a case of great enormity, namely, that the fine set on a conviction upon an information for not repairing a highway, cannot be expended in repairing the highway, whereas the fine set on a conviction upon an indictment for not repairing a highway, is always to be expended in the repair of the highway."⁶

So, again, where the trustees of a road exceed their power, although not from corruption or partiality. And here the information will go not to punish them criminally, since the fine would be nominal, but for the purpose of making them rectify the mistake.⁷

The 94th and 95th sections of 5 & 6 Will. 4, c. 50, however, have pointed out a method of compelling the repair of highways. For by sect. 94, in case of a want of reparation, the surveyor or other person liable is to be summoned before the justices at special sessions,⁸ and the justices may convict such surveyor or other person, and proceed accordingly to order the repairs. But by sect. 95, if the obligation to repair be disputed, the justices may order a bill of indictment to be preferred at the next assizes or sessions, and the necessary witnesses to be subpoenaed, and the costs shall be directed by the judge or justices to be paid out of

¹ *R. v. Llandilo*, 2 T. R. 232; *S. P. Winter v. Charter*, 3 Y. & Jer. 308. See also *R. v. Whitney*, 7 C. & P. 208. With respect to highways at the end of bridges, see *post*, "Bridges." See further as to highways, 1 Hawk. c. 76.

² *R. v. Whitney*, 7 C. & P. 208.

³ See *Anon.* 2 Barnard. 54.

⁴ *R. v. Walbourne*, W. Kel. 63.

⁵ *R. v. Steyning*, Say. Rep. 92.

⁶ *Id.* 93.

⁷ *R. v. Rogers and others*, 2 Ld. Keny. 373.

⁸ Who, as it seems, must be the surveyor of the district, or some person so locally connected. See *R. v. Fylingdales*, 1 M. & Ry. 176.

the highway rate,—provided that such indictment may be removed into the Court of Queen's Bench by *certiorari*.¹

Sometimes, though very rarely, the Court of Chancery has interfered. As where the attorney-general filed an information in that court in order to settle a right. The lord chancellor, upon this, directed that proceedings upon an indictment should be stayed, until the question as to the right had been determined in chancery.²

Indictment for non-repair against parish.] It is usual in an indictment against a parish to state that there was and is a common king's highway leading from A. towards and unto B. for all persons to pass with their horses, coaches, carts, and carriages. It then alleges that a portion of this way is out of repair, stating the length and breadth of the bad road, so that the horses, &c., cannot pass without danger; to the great damage, &c.³ The indictment concludes by averring that the parish of C. ought to repair and amend the same.

In observing for a moment upon this form, it may be said, that the highway need not be alleged as having existed from time immemorial.⁴ But it is of consequence to state the termini of the way with much correctness, if, indeed, it be judged right to mention them at all, for, strictly speaking, as a highway is infinite, the omission of termini would not be fatal.⁵ Still, having set them out, a misdescription may be dangerous. It has been held, that an indictment for stopping a way at D., leading from D. to S. was faulty, because D. was excluded by the word "from".⁶ So the words "from Roxeth-place house to Stroud gate," exclude both these places.⁷ So, where the road was stated as leading from Hatley towards and unto Gamlingay, the court made the rule absolute for arresting the judgment against the inhabitants of Gamlingay.⁸ It is true, that in a much more modern case than the above, Lord Tenterden declared, that his mind was not satisfied with the decision of the court in *R. v. Gamlingay* to the effect that the words "from" and "to" were necessarily exclusive.⁹ But, nevertheless, a speculation upon the probable opinion

¹ The court will not grant this writ, however, upon an affidavit that difficult questions of law may arise at the sessions. *R. v. Leeds*, 5 Dowl. N. P. C. 123. Some specific difficulty must be pointed out. *R. v. Jowl*, 1 Nev. & P. 28; 5 Dowl. N. P. C. 435.

² 9 Mod. 273.

³ Not of all the inhabitants, but of all the king's liege people. *R. v. Thorowgood*, 1 Mod. 107. *R. v. Hayward*, Cro. El. 148.

⁴ Say. Rep. 167.

⁵ And see 3 T. R. 514, Lord Kenyon.

⁶ *R. v. Halsey*, 2 Ro. Ab. 81; Latch. 183; S. C. Noy. Rep. 90.

⁷ *R. v. Harrow*, per cur., 4 Burr. 2092. And in the same case it was deemed no good objection that the indictment described the way as leading from a *hamlet*, instead of from a vill or town.

⁸ *R. v. Gamlingay*, 3 T. R. 513; Leach, 528. S. P. *R. v. Botfield*, Car. & M. 151, in the case of obstructing a road.

⁹ 7 B. & C. 415. See also *Phillips v. Davies*, 2 Anstr. 572, where the Court of Exchequer held that "from" might be taken inclusively. 12 Mod. 109.

of future judges would hardly justify the hazard of departing from the usual accuracy required in indictments of this nature. The case just referred to was where a culvert had been damaged, and the statement was, that the culvert passed along the highway in the parish of S., opposite to S. mill, in a certain king's common highway there, leading from S. to H. It was contended, that it did not sufficiently appear that the road obstructed was in the parish of S., and *R. v. Gamlingay* was relied upon. But the court said, that there was a distinct allegation of the nuisance having been committed in the parish of S., and to construe "to and from" as exclusive in this case, said Lord Tenterden, "would be to make an allegation inconsistent and insensible, which otherwise is perfectly consistent and sensible."¹ On the other hand, it has been again holden on the circuit, that the words "from and through" exclude the terminus.²

Again, to pursue the subject of variance where the termini are expressed in the indictment. A road was described as leading from D. to C. and thence to R. But the proof was that a person must turn back a quarter of a mile from C. before he got into the road indicted, so that the way in question did not lead from D. and C. to R., and accordingly the defendants were acquitted.³ So where it was alleged that a gate had been erected, thereby obstructing a way "from the town of C. to a place called H.," and the obstruction was charged to have been "between the town of C. and H.," it was held that the words from and between excluded the town. Consequently, as the *locus in quo* was within the limits of the town of C., the indictment could not be sustained.⁴ A way was described as leading from Abingdon to East Hendred. It appeared in evidence that a person intending to reach these termini must go four miles along the Chorlton road, cross the Wantage turnpike road, and then go along another road from the Wantage road and East Hendred. It was objected that the way should have been described as leading from C. road to W. turnpike road. But Erskine, J., held the description right, because by this way a person would go from Abingdon to East Hendred.⁵ But where A. was one terminus and B. the other, it was not considered a valid objection that the road turned backwards at an acute angle, though the part from A. to the angle was an immemorial way, and that from the angle to B. recently dedicated.⁶ It must, nevertheless, be understood, that if the same description will apply to more than one highway, advantage only can be taken of the circumstance by a plea in abatement. As where the road indicted was stated to lead from H. towards and unto U. It was said, that many roads might as well have been stated as leading from Hammersmith to Uxbridge. "But is it not true," said Lord Ellen-

¹ *R. v. Knight and others*, 7 B. & C. 413.

² *R. v. Upton on Severn*, 6 C. & P. 133.

³ *R. v. Great Camfield*, 6 Esp. 136.

⁴ *R. v. Fisher*, 8 C. & P. 612.

⁵ *R. v. Steventon*, 1 Car. & K.

⁶ *R. v. March. of Downshire*,

4 Adol. & El. 232; 5 Nev. & M. 662.

borough, "that it does lead from H. to U., as alleged: had there been five other roads to which the description would have equally applied, you should have pleaded an abatement: the objection cannot be taken under the plea of not guilty.¹

County.] Some county should be mentioned, although it need not be shown in which of two vills of a parish the nuisance exists.² Upon an indictment for stopping a road leading from S. to M. in the county of D., the court quashed the indictment, because it did not appear in what county S. was, as the county of D. referred to M. only.³ But where, upon a charge for erecting a gate at Hornsey, in Middlesex, in a highway leading to Highgate, it was not added that Highgate was in Middlesex, the court said that the venue in the margin, which was Middlesex, should extend to Highgate.⁴

Highway.] The place must be called a highway, not a horse-way,⁵ although it need not of necessity be designated a *common* highway.⁶

Nature of the way.] The indictment proceeds to describe the nature of the way. And here, again, whatever may be the course of procedure in actions for obstructing a private right of way,⁷ it seems that the omission of the particular right claimed, as for horses, &c., would not be fatal, and more especially if it be a general right.⁸ Whilst, on the other hand, an incorrect description may be productive of a fatal variance. As where the allegation was of a right to pass on foot, or horseback, and in carriages, and the evidence disclosed a right to a footway only; there being no separate count for obstructing a *footway*, the defendants were acquitted.⁹ And this case differed entirely from *Allen v. Ormond*, referred to above, because in that case there was a claim of a foot and horse way unto and into a certain public king's highway, and there was a general verdict for the plaintiff, and the court deemed the *terminus ad quem* sufficiently proved, because here was a public highway for foot passengers.¹⁰ So again, where a way was

¹ *R. v. Hammersmith*, 1 Stark. 357.

² *R. v. Blower*, Say. Rep. 119.

³ *R. v. Raymond*, Noy. Rep. 122.

⁴ *R. v. Springal*, 1 Bulst. 203.

⁵ *R. v. Madox*, Cro. El. 63; 4 Leon. 121.

⁶ *R. v. Hammond*, 10 Mod. 382; Str. 44. Formerly a party was discharged for want of the word "*king's*" highway. *R. v. Keen*, 4 Leon. 121.

⁷ See *Allan v. Ormond*, 8 East, 4.

⁸ *R. v. Hatfield*, Ca. Temp. Hardw. 316. "I do not remember any authority," said Lord Hard-

wicke, "that holds it necessary to say it is highway, for this or that particular carriage; for, if it is a common highway, it is a highway *for all manner of things*," *Id.*—not merely for carriages; for it had been objected, that it ought to have been shown whether the way were a footway or for carts, or horses, &c., *Id.*

⁹ *R. v. Burgess*, Say. Rep. 169.

¹⁰ 8 East, 4. Though it was added, that such a description might be bad upon special demurrer, as not pointing out with certainty what sort of a highway was meant. *Id.*

mentioned as one for carriages, and the proof was that persons on horseback had gone along it, but there was no proof as to carriages having gone along the whole length, the defendants were acquitted upon a verdict of "not guilty as to carriages," because there should have been a count for horses in order to have supported the indictment.¹ The same parish was again indicted, and the road was called a pack and prime way, in corroboration of which statement the evidence showed a right for carriages to pass along, but this proof was insufficient, and the defendants were acquitted.²

An indictment for obstruction charged that the way interrupted was for *all* the liege subjects, &c., to go, return, &c., with their horses, coaches, carts, and carriages, in and along the way. It turned out, however, that the road passed under an archway nine feet broad and ten feet high, through which carts of a particular description, loaded in a particular way, could not pass. Upon objection taken, Littledale, J., expressed a doubt on account of the generality of the word "*all*," but allowed the case to proceed, and a verdict of guilty was found. Upon motion, the court held that the indictment was well sustained, for it was not alleged that there was a way for *all* carriages, and the rule was refused.³

Length and breadth.] Then as to the statement of the length and breadth, it seems not now to be necessary,⁴ although it is usual to mention these facts, and it might likewise be added, that such precision only would be required in such a statement as might acquaint the parish with the nature of their supposed liability.

"*Was and still is at the parish of A., very ruinous,*" &c.] It must be stated that the way in question is within the indicted parish, otherwise the parish is not bound to repair.⁵ But the court will not quash the indictment.⁶

The indictment concludes by naming the inhabitants in particular who are bound to the reparation of the way, and here care should be taken to mention rightly the persons liable. For where the inhabitants of part of a parish only were charged, because the parish was situate in two counties, and those persons only were proceeded against in whose county the want of repair existed, the

¹ *R. v. Weonard's*, 5 C. & P. 579.

² *R. v. St. Weonard's*, 6 C. & P. 582.

³ *R. v. Lyon and another*, Ry. & Moo. N. P. C. 151; 1 C. & P. 527; 5 D. & Ry. 497.

⁴ *R. v. Smith*, Say. Rep. 98. *R. v. Brookes*, Id. 167. *R. v. East Lidford*, Id. 301, overruling *R. v. All Saints*, Ca. Temp. Hardw. 105, and other more ancient decisions.

See also Id. 316, where Lord Hardwicke said that the length and breadth must be ascertained in indictments. Formerly the court would estimate the fine according to the length and breadth of the road out of repair, which occasioned the necessity of setting out these matters.

⁵ *R. v. Hartford*. Cowp. 111.

⁶ *R. v. Shelderton*, 2 Keb. 221.

court held that the rule for arresting the judgment for the crown must be made absolute, the whole parish being responsible.¹

Where a road lies in two parishes, the indictment should charge the proportionate repair required to be *ad medium filum viæ*. So that a count, stating a road three miles long and fifteen feet broad to be out of repair, was held insufficient where it turned out that the road was situate in two parishes.²

Indictment against a township, or hamlet, or tithing, &c., for non-repair.] The indictment against a particular division of a parish differs principally from that against the parish itself in the statement of the obligation, which, in the case of the township or other division, is said to be immemorial by virtue of a prescription or custom. For it is not enough to say, that the inhabitants of the district ought to repair and amend, but that they are bound to do so by reason of this custom or prescription.³ Wherefore it is that an averment is universally introduced, alleging that the inhabitants of the district indicted have been from time whereof the memory of man is not to the contrary used and accustomed to repair, &c. An extra-parochial hamlet was indicted for non-repair, but no immemorial obligation was mentioned, nor was it alleged that the hamlet did not form part of a larger district, the inhabitants of which might have been bound to repair. The court accordingly reversed the judgment against the hamlet upon a writ of error brought, for all the facts contained in the indictment might be true, and still there might be a larger district, including the hamlet, liable to repair the road in question.⁴

It is also said that an advantage may be gained by alleging a general custom within the parish for each subdivision to repair, as well as a custom simply for the individual subdivision indicted to repair its own roads, since evidence thereof is admitted in support of the general custom.⁵ However, should there be any exceptions to the rule, they should be alleged, and having made the exception it becomes necessary to show further that the highway in question is not such an exception.⁶ The corporation of Liverpool were indicted for not repairing a highway, and an immemorial usage

¹ *R. v. Clifton*, 5 T. R. 498. *R. v. Cripplegate*, Id. 500, cited there, overruling *R. v. Weston*, 4 Burr. 2507.

² *R. v. St. Pancras*, Peake, N. P. C. 219. It is hardly necessary to advert to the omission of *contrà pacem*. After verdict, outlawry, confession, default, or otherwise, no judgment shall be stayed on this account. 7 Geo. 4, c. 64, s. 20. It used to be holden that in the case of a non-feasance, *contrà pacem* was not necessary, but where there

was a misfeasance it ought to appear. *R. v. Lady Gresham*, Godb. 59, for setting up a gate in Osterley Park. *R. v. Leyton*, Cro. Car. 584. Setting up a dam.

³ 5 Burr. 2700. *R. v. Marton*, 2 T. R. 514; Andr. 276.

⁴ *R. v. Kingsmoor*, 2 B. & C. 190; 3 D. & Ry. 398.

⁵ Stark. Cr. Pl. 698, in the note.

⁶ The pleading, however, need not go on to state by whom the excepted way ought to be amended. *R. v. Ecclesfield*, 1 Stark. 395.

was laid in the township of Liverpool to repair all ways within their township, except such as ought to be repaired according to the form of the several statutes in that case respectively made. The second count included the highways and public streets. The third count charged the liability as being within the town and parish of Liverpool. The fourth count charged the corporation by virtue of their tenure of an ancient port.¹ The fifth count was for repair *ratione tenuræ* of lands.² And the sixth contained a similar allegation in respect of a market.³ All these counts contained the same exception mentioned in the first, but in not one of them was it averred that the highway indicted was not within the exceptive clauses of the Acts of parliament. And for this cause justice was arrested. And besides, it was not distinguished whether these statutes were public or private, for if they were the latter, it was necessary to have pleaded them specially.⁴ But the court did not decide upon this point, deeming the other objection to be quite fatal.⁵ So where a plea charged the inhabitants of seven townships with the repair of a highway, and went on to say, that part of the way was in Great Broughton, and the residue in Little Broughton, and that the respective portions ought to be repaired by Great and Little B., independently of the rest of the parish, a special demurrer showing for cause that the plea had failed to distinguish what part of the highway lay within Great B., and what part within Little B., was allowed.⁶ So where an indictment charged three townships with an omission to repair a way situate in a fourth township (all being in the same parish), it was held faulty, and the judgment was arrested for want of showing that the road was not within the defendants' district.⁷ But it was not deemed a good objection that the inhabitants of the three townships were jointly indicted.⁸ There would have been another objection—that no consideration was laid, the law being, that it is not competent to charge a parish or township with the amendment of a road not within the respective boundary of either without laying such a consideration.⁹ So, likewise, it must be stated that the road is one which, but for the custom, the parish would be bound to repair.¹⁰

Trustees.] An indictment will not lie against the trustees of a turnpike road.¹¹

¹ But inhabitants cannot be charged as holding lands by tenure.
² B. & C. 166.

³ Id.

⁴ Id.

⁵ See 1 M. & S. 435, upon this point.

⁶ *R. v. Liverpool*, 3 East, 86.

⁷ *R. v. Bridekirk*, 11 East, 304. But leave was given to amend.

⁸ *R. v. Bishop Auckland*, 1

Adol. & El. 744. *R. v. Upton*, 6 C. & P. 133.

⁹ 1 Adol. & El. *ut supra*.

¹⁰ See Id.

¹¹ *R. v. Eastington*, 1 Nev. & P. 192; 5 Adol. & El. 765. See as to non-repair of a road under an Inclosure Act, Stark. Cr. Pl. 698.

¹² 2 B. & A. 183, by Abbott, C. J.

Indictments ratione tenuræ, clausuræ, &c.] The indictment against A. *ratione tenuræ* concludes by saying that A.,¹ "by reason of his² tenure of certain lands situate, &c., ought to repair the said highways, &c." The tenure, therefore, is a necessary ingredient,³ and the charge must be in respect of some property.⁴ But a title of prescription need not appear in case of a liability by tenure, there being a plain distinction between tenure and inhabitation, or residence.⁵ And the nature of the estate is also immaterial,⁶ although it was once said that lessee for years would not be liable.⁷ If several parties be indicted for non-repair, as for not keeping the road amended before their doors, the charge must be several, and not joint.⁸ In an indictment for encroachment, the defendant was charged with having, at the township of W., at a highway *there*, leading from a highway, &c., towards L., by a wall *there*, encroached, &c. It was objected that the indictment was not sufficiently certain, but the court were of opinion that the words "*there*," and "*said*," could only be referred to the highway first mentioned, and the judgment was affirmed.⁹ It has been made a question, whether upon an indictment of this nature, it is sufficient to aver that the inclosure was made whilst the party was in possession of the land assigning.¹⁰

Pleading.] Under the general issue, the parish can only affirm that the place mentioned in the indictment is not a highway, or that there is no foundation at all for the charge, as that there has been sufficient repair done, or that the highway is not in the parish. But a township or particular division of a parish may give evidence of the obligation of other places, or particular persons, under not guilty. And so likewise may an individual indicted for non-repair by reason of tenure or encroachment.¹¹ It follows, that if a parish will seek to deliver its inhabitants from the burden, there must be a special plea, showing in particular who ought to repair,¹² and so if a township choose unnecessarily to

¹ It should be said, late of —, &c. *R. v. Lucy*, Noy. Rep. 87; but see Cro. El. 148.

² "His" is not now an indispensable word as it was formerly. 1 Str. 187; 1 Ventr. 331, overruling *R. v. Corrott*, Noy. Rep. 93; 11 Mod. 302.

³ Sty. 400.

⁴ Godb. 400.

⁵ 2 Saund. 158, note (9).

⁶ 1 Salk. 357; 7 Mod. 55.

⁷ 3 Salk. 182. See the note by Evans. An award made under a submission by a tenant of the premises cannot be received as an adjudication, being binding only upon

the party making the submission, nor as evidence of reputation, being *post litem motam*. *R. v. Cotton*, 3 Campb. 444, by Dampier, J. ⁸ Mar. 45, pl. 71.

⁹ *R. v. Wright* (in error), 1 Adol. & El. 434; 3 Nev. & M. 892.

¹⁰ *R. v. Mawgan*, 3 Nev. & P. 502.

¹¹ 2 Saund. 159, note 10.

¹² Which confesses, of course, the fact of the highway, so that the defendant cannot give evidence after pleading thus, that the *locus in quo* is not a highway *R. v. Brown*, 11 Mod. 273.

plead special matter, instead of being contented with the general issue, the plea will be void, if it do not specify the persons liable in lieu of such township.¹

Moreover, the special plea must conclude with a traverse of the party's own liability, in the case of a township or particular individual. But a parish should not traverse in this manner, because it would be to traverse matter of law. So, where Sir N. S. was presented for not repairing by reason of the tenure of lands he was said to have encroached upon and inclosed, it was held sufficient for him to traverse his liability by tenure; for had he traversed the encroachment, it would have been matter of law, the tenure being the principal matter.² Under special circumstances an information will be granted.³

View.] On an indictment for not repairing a highway, the court cannot grant a view by consent, though a private person prosecutes.⁴

Costs.] Under the general Act for regulating highways,⁵ the court before whom any indictment shall be preferred,⁶ shall award

¹ See 2 Saund. *ut supra*.

² *R. v. Stoughton*, 2 Saund. 158. As to the competency of inhabitants, trustees, &c., to give evidence in cases connected with the repair of highways, see 5 & 6 Will. 4, c. 50, s. 100; 3 Geo. 4, c. 126, s. 137; 4 Geo. 4, c. 95, s. 84; collectors, 3 Geo. 4, c. 126, s. 59. A witness happening to be in court was held bound to answer questions upon an indictment for stopping up a footway, although it were in the form of a civil proceeding. *R. v. Sadler and others*, 4 C. & P. 218. It is to be observed that a submission upon a matter relating to an indictment for non-repair is revocable at common law, the 9 & 10 Will. 3, c. 5, and 3 & 4 Will. 4, c. 42, s. 39, applying to civil proceedings only. *R. v. Bardell*, 1 Nev. & P. 74; 5 Ad. & El. 619. The court will not grant a new trial in cases of misdemeanors, unless it be for a misdirection of the judge; and, therefore, where the defendants had been acquitted upon an indictment for a nuisance, the court refused the rule moved for on the ground of the verdict being against evidence. *R. v. Mann*, 4

M. & S. 337; *R. v. Burbon*, 5 M. & S. 392; *R. v. Sutton*, 5 B. & Adol. 52. 2 Nev. & M. 57; see 1 Wils. 298; 1 Stark. 516; 1 Ch. Rep. 354. But the judgment in favour of the defendants may be stayed. See *post*.

³ *R. v. Upton St. Leonard's*, 10 Q. B. 827.

⁴ *R. v. Kingsmill*, 1 Sess. Ca. 87. See *R. v. Tradgeley and others*, *Id.* 180.

⁵ 5 & 6 Will. 4, c. 50, s. 98. Costs at the discretion of justices are given by other sections, in cases within the jurisdiction of such justices.

⁶ Application need not therefore, of necessity, be made to the judge who tries the indictment, as formerly. *R. v. Chadderton*, 5 T. R. 272. A certificate that the defence was frivolous has been deemed sufficient, without expressly awarding the costs. *R. v. Clifton*, 6 T. R. 344. And a rule for arresting the judgment will not retard the operation of the certificate. *R. v. St. John's, Margate*, 6 M. & S. 130. See also *R. v. Salwick*, 2 B. & Adol. 136.

costs to the prosecutor, to be paid by the person indicted, if it shall appear to the court that the defence made to the indictment was frivolous or vexatious, whether removed or not by *certiorari*.¹ And the Court of King's Bench may, under this section, award costs incurred before the removal of the indictment, if it appear to the judge that the defence has been frivolous or vexatious.² By sect. 95, the costs of the prosecution are to be paid from the highways rate. And it seems imperative upon the judge to make the order;³ but Patteson, J., refused to do so, in a case where the defendants were acquitted, on the ground of there being no highway as charged in the indictment.⁴ So, again, where a wall over which a road once passed was washed away by the sea.⁵ And, again, where there had not been a sufficient dedication,⁶ in which cases there was an acquittal, there being no highway. Tindal, C. J., however, disapproved of these cases, and said, that the term "highway" was not to be understood in its strict sense, but as including a road considered to be a highway.⁷ The court would not go into the question of highway or no highway upon the matter of costs.⁸ And, as the certificate in *R. v. Heanor* was set aside by the Court of Queen's Bench, it may be considered as settled that the opinion of Patteson, J., is the best authority, and that it is not imperative for the judge to award costs. The amount of costs ought to be specified in the order made under sect. 95. If the judge does not ascertain this before the trial, nor subsequently, the Court of Queen's Bench will not enforce it by *mandamus*.⁹ Perhaps the surveyor might be indicted. The funds out of which the costs should issue ought to be specified, if not the court will set aside the order.¹⁰ The order for the indictment must appear to have been at the special sessions for the division where the highway is situate. If not, an order for costs thus made by the judge¹¹ will be set aside.¹² That it was really so, and that the order of the quarter sessions especially recited it, made no difference.¹³ Yet there needs not to be any express averment on the order, if the fact can be gathered fairly by implication.¹⁴ An order to pay

¹ *R. v. Pembridge*, 3 Q. B. 901; 3 Gale & D. 603. *R. v. Downholland*, 2 New. S. C. 177. The court certified for a special jury.

² *R. v. Preston, Inhabitants*, 7 Dowl. P. C. 593. See *R. v. Upper Papworth*, 2 East, 413. Alderson, B., had refused these costs at the assizes, thinking that the court where the indictment was preferred, which was the court of quarter sessions, had the sole power of giving costs. S. C. 2 Moo. & Rob. 137.

³ *R. v. Yorkill*, 9 C. & P. 218.

⁴ *R. v. Chedworth*, Id. 285.

⁵ *R. v. Paul*, 2 Moo. & Rob. 307.

⁶ *R. v. Challicomb*, 2 Moo. & Rob. 309, n.

⁷ *R. v. Heanor*, Id. 445, n.

⁸ *R. v. Downholland*, 2 New. S. C. 177.

⁹ *R. v. Clark*, 5 Q. B. 887; Dav. & M. 687. Whether the amount can be ascertained after the expiration of the commission, *qy.*?

¹⁰ *R. v. Watford*, 4 Dowl. & L. 593.

¹¹ *R. v. Watford*, *supra*.

¹² *R. v. Hickling*, 7 Q. B. 880, 899. *R. v. Martin*, Dav. & M. 386; 2 Q. B. 1037, n.

¹³ *R. v. Martin*, *ut supra*.

A., the prosecutor, or his attorney, is not bad because A. was dead when the order was made.¹ The writ of *certiorari* is, however, saved to the defendant by 5 & 6 Vict. c. 50, s. 95.² After much expense had been incurred in carrying forward a prosecution at sessions, the defendant, who had previously sued out this writ, gave notice of his having done so, and likewise notice of trial, upon which the prosecutor applied for the sessions' costs, under sect. 98 above. But the court were unable to comply with the motion, although these costs had been rendered useless by reason of the defendant's conduct.³ But a *procedendo* was subsequently awarded in this case.⁴ However, where one inhabitant had removed the writ by *certiorari*, and entered into the usual recognizances to pay costs, the other inhabitants were not allowed to plead guilty.⁵ If there should be a plea of guilty, the prosecutor will lose the costs, because the indictment is not tried.⁶

Costs, certiorari.] Then, with regard to costs upon the writ of *certiorari*, the prosecutor is a party grieved within the statute of 5 Wm. & M. c. 11, in this respect: as the constable of the manor within which the highway was situate.⁷ Or inhabitants who have suffered inconvenience from the circumstance of their way being out of repair.⁸ Or a justice of peace.⁹ But where the prosecutor did not apply for these costs until two years after judgment, and so far from having used the way, he declared he did not care about it, the court refused him costs as a party grieved under 5 Wm. & M. although the prosecution had been at his instance and expense.¹⁰ Again, persons dwelling near a steam engine, whose smoke had caused them considerable annoyance, were considered to be parties grieved, so as to be entitled to their costs under this statute of 5 Wm. & M.¹¹ The writ of *certiorari*, however, cannot be had after conviction. The defendants must not take their chance of succeeding at the sessions, and then come to the court for the purpose of objecting to the indictment.¹² In the case of a private road, it seems that the court cannot entertain the writ, even with consent.¹³

¹ *R. v. Watford*, ut supra.

² The rule for this purpose is *nisi* in the first instance. *R. v. Leeds*, 5 D. P. C. 123. The prosecutor was always considered to be entitled to his writ of *certiorari*, even without affidavit or recognizance. Cowp. 78; 2 Str. 1209. But see now 5 & 6 Will. 4, c. 33, s. 1, which requires that the prosecutor shall have the leave of the court for this purpose. But the crown, whether prosecutor or defendant, is entitled to it. See Say. Rep. 128.

³ *R. v. Higgins*, 5 D. P. C. 375.

⁴ 5 Ad. & El. 594; S. C. 1 Nev. & P. 50.

⁵ *R. v. Luxborough*, 1 D. P. C. 527.

⁶ *R. v. Vowchurch*, 2 Car. & K. 393.

⁷ *R. v. Taunton*, 3 M. & S. 465.

⁸ *R. v. Williamson*, 7 T. R. 32. *R. v. Taunton*, 3 M. & S. 465.

⁹ See *R. v. Kettleworth*, 5 T. R. 33.

¹⁰ *R. v. Incledon*, 1 M. & S. 268. The prosecutor was, moreover, a minor when the obstruction commenced, and his name was not on the back of the indictment. See *R. v. Commerell and another*, 4 M. & S. 203.

¹¹ *R. v. Dewsnap and another*, 16 East 194.

¹² *R. v. Pennegoes*, 1 B. & C. 142.

¹³ *R. v. Micklethwaite*, 4 Burr. 2522.

Staying the judgment.—Judgment.—Consequences of judgment as to the record of convictions and acquittal becoming evidence for and against the parish and others.] It having been found the rule not to grant a new trial in cases of an acquittal for misdemeanor, and it being much doubted whether, even in cases of misdirection, such a proceeding can be adopted,¹ the Court of King's Bench has resorted to the expedient of suspending the judgment in favour of the defendant. As where the county of Middlesex was indicted for the non-repair of a bridge, and the corporation of Kingston were also indicted for the same non-repair. Both cases stood for trial at the same time, and the indictment against the corporation was taken first. The indictment on the one hand, however, and the plea on the other, alleged an immemorial obligation on the part of the bailiffs of Kingston, who were modern officers, so that the corporation were acquitted on their indictment, and the county found guilty on theirs. Had the verdicts been respectively entered up, they would have concluded the county, and therefore the court suspended the judgment until a second indictment against the corporation could be tried. And upon this latter indictment the corporation were convicted.² So, where the inhabitants of Wandsworth were charged with the non-repair of a highway, and a verdict was found in their favour, entirely at variance with the weight of evidence, the court suspended the judgment, in order that the prosecutor might try the question again, without the balance of a judgment against him.³ They, however, imposed a condition upon the prosecutor, that the inhabitants of Wandsworth should be examined at the next trial.⁴

Again, the judgment will sometimes be suspended if the verdict be adverse to the parish or county. As in the case of an indictment for the non-repair of a bridge, where the plea of liability on the part of Mr. Marsack, *ratione tenuræ*, was not maintained.⁵ But Lord Ellenborough added, that the county must repair without prejudice to their case before the second trial, if the public should require it; and Le Blanc, J., said that the county might proceed to indict the parishes they considered liable.⁶

The judgment is, that the defendants should pay a fine. And the amount of this fine must depend upon the opinion which the court entertain of the state of repair in which the road is, or is likely to be in a short time. For as there cannot be more than one fine upon each indictment, the prosecutor must have recourse to writs of *distringas*, or to another indictment, if the way be not put into repair.⁷ Should the court be assured of the repair, they

¹ See *ante*.

² *R. v. Middlesex*, 1 B. & Ald. 64, n.

³ *R. v. Wandsworth*, Id. 63. But this, as Lord Ellenborough observed, was indirectly granting a new trial. Id. 65; 2 Ch. Rep. 282.

⁴ 1 B. & Ald. 66.

⁵ *R. v. Oxfordshire*, 16 East, 223. *R. v. Southampton*, 2 Ch. Rep. 215. *R. v. Sutton*, 5 B. & Adol. 52; 2 Nev. & M. 57. It was refused in *R. v. Chigwell*, 1 B. & Ald. 67, n.

⁶ 16 East, 225.

⁷ *R. v. Old Malton*, 4 B. & Ald. 470, n.

will set a nominal fine.¹ Otherwise there will be a *distringas in infinitum* until such amendment be certified.² And one of the tests of repair is that the repaired way is ascertained to be in a condition to stand the winter.³

It would seem from an old case, that an accident on a bad road, as the loss of a horse in consequence of the want of repair, might operate in aggravation of the fine. And thus Roll, C. J., set a fine of 20*l.*, observing that the county suffered by the neglect of the convicted parish.⁴ Moreover, in cases of inclosure, the court will give judgment to abate the encroachment until the ancient way be sufficiently repaired.⁵

The application of the fine imposed after a conviction is declared to be towards the repair of the highways in the indicted parish. No prior repairs by third persons can be indemnified by the fine. Thus, where the defendant repaired the road before payment of the fine, they were held entitled to a stay of proceedings upon the order, and the prosecutors were not allowed to claim on behalf of third parties.⁶ It is to be levied by and paid into the hands of such persons residing in or near the parish as the justices or court shall order. These persons are to account for the money thus delivered to them, or, in default, to forfeit double the sum received. And if any fine, &c., shall be levied on any inhabitant of such parish, he may complain to the justices at a special sessions, and the justices shall make an order upon the surveyor for the payment of the same to the applicant out of the highway rate, within two months after the service of the order.⁷ An application for relief should, however, be made in a reasonable time by the inhabitants. For where eight years had been allowed to elapse before a *mandamus* was applied for commanding the justices to make a rate for reimbursing certain persons, the court observed that the lateness of the application was fatal to the claim.⁸ This decision was come to, notwithstanding that applications had been made to the magistrates during the interval, that they had ordered an account of the money expended upon repairs only one year before the application, and that it had been the opinion of the justices that the parish had been improperly indicted.⁹

The record of a conviction against the parish is binding upon

¹ See 6 Mod. 163. Sty. 163. But they will not quash an indictment. The defendants must come in and plead guilty. *R. v. Lincombe*, 2 Ch. Rep. 214. *R. v. Loughton*, 3 Smith, 575, overruling Palm. 389. And upon a conviction for not repairing *ratione tenuræ*, the court would not set a small fine until the prosecutor's costs had been paid. *R. v. Wingfield*, 1 Sir Wm. Bl. 602.

² *R. v. Cluworth*, 6 Mod. 163; S. C., 1 Salk. 358.

³ *R. v. Witney*, 5 D. P. C. 728.

⁴ *R. v. Stoneham*, Sty. 366.

⁵ *R. v. Hillarsden*, 1 Keb. 894.

⁶ *R. v. Barnard Castle*, 5 Jur. 799.

⁷ 5 & 6 Will. 4, c. 50, s. 96. See *R. v. Townshend and another*, Dougl. 420.

⁸ *R. v. Justices of Lancashire*, 12 East, 366.

⁹ *Id.*

the parish,¹ unless fraud should have intervened, or some other circumstance which would imply that the parish had been surprised. Thus, where the parish of E., consisting of three townships, was indicted for the non-repair of a highway, and C. one of the townships, pleaded an immemorial custom for each township to maintain its own roads, it was held, that C. might adduce evidence to show that upon a former trial and conviction of the parish for not repairing ways in A. township and B. township, pleas of not guilty by A. and B. were pleaded generally for the whole parish with the privity of the inhabitants of C. Subject, however, to this evidence denying knowledge on the part of C. records of convictions against the parish of E. were deemed sufficient *prima facie* evidence to disprove the custom claimed by the township of C. There was a verdict of guilty.²

But a record of acquittal is not such conclusive evidence, although it is a millstone, to use the words of Lord Ellenborough, the weight of which it is impossible to resist.³ For other parties might indict the parish, and these persons cannot be bound by the former record. The acquittal, indeed, might have proceeded upon the want of proof that the road was out of repair.⁴ An order of justices under 34 Geo. 3, c. 64, as to the division of repair, has been deemed conclusive.⁵

CHAPTER V.

NUISANCES—BRIDGES.

The non-repair of public bridges being a nuisance, is an indictable misdemeanor, and the county is liable in the first instance;⁶ and each county in which a bridge is situated stands in the same position with reference to the repair of bridges, as the parish with reference to highways within its limit. Consequently, if a bridge be out of repair, the county cannot discharge itself without showing that it is not a public bridge, or that it has not been built in a proper manner, in conformity with the provisions of 43 Geo. 3, c. 59, or that some other body of persons or an individual is liable to the reparation demanded. And so strict is this principle, that although trustees be empowered to make and repair bridges, laying out their tolls for this purpose, yet the common law liability attaches no less upon the county, so that al-

¹ *R. v. St. Pancras*, Peake, N. P. C. 220. in order that the prosecutor might go to a second trial without pre-

² *R. v. Eardisland*, 2 Campb. 494. judice.

⁴ Mann. Ind. 215.

³ *R. v. Wandsworth*, 1 B. & Ald. 63. And therefore it was that the court suspended the judgment,

⁵ *R. v. Hickling*, 7 Q. B. 880.

⁶ 13 Rep. 33; 2 Inst. 700.

though there may be a remedy against the trustees, the county must repair in the first instance.¹

These exceptions, on the part of a county, may be made available, either by way of defence, or at once by indictment against the persons liable.

What a public bridge.] Hence it follows, that a main test of the liability to repair consists in the public nature of the bridge. And in order to satisfy this term of general utility, it is of course necessary that the place in question should be actually a legal bridge. So that if there be no *flumen* or *cursus aquæ*, this definition of bridge cannot be sustained, and the county or other persons charged cannot be liable. As where certain supposed bridges mentioned in an indictment appeared to be arches in a causeway adjoining to Chislehampton bridge, and that the arches were more than 300 feet from the main bridge. It was contended for the crown, that the additional arches thus indicted as bridges, were necessary to carry off the floods, and that water needed not at all times run under such arches in order to make them bridges. But the court directed that a verdict should be entered for the defendants. The arches might have been erected, not to improve the passage along the road, but to benefit the owners of the adjoining land. And it was not found as a fact that the arches were built as a highway. Had they been erected at the same time as the main bridge, or had the inhabitants of the county repaired 300 feet beyond these arches, there might have been a strong ground for believing that the arches were part of the main bridge. Judgment for the defendants.² From this, it appears, that the term "bridge" will be satisfied by a flow of water at certain periods, as during gales or otherwise. The case was however brought forward again, when it appeared that there were five arched openings. Two of these were within 300 feet of the bridge, and the county had always repaired them. But the other three were beyond that distance, and these last were the arches concerning which the dispute had arisen. These were of value to the road, by reason of their carrying off the floods, but they were placed over low meadow ground, in a line with the main bridge. The court, again, gave judgment for the defendants. They said that the rule ought to be to hold the words, "*flumen vel cursus aquæ*," to be water flowing in a channel between banks, more or less defined, although such channel might be occasionally dry. This was not the case with the arches in question, which adjoined low meadow ground, and accordingly, the verdict was entered in favour of the county.³ Whereas, when the county had repaired from time immemorial, and in obedience to several presentments, and there was a constant flow of water under one of the arches, and stagnant water under the other arches, the county was held liable, and *R. v. Oxfordshire*

¹ *R. v. Oxfordshire*, 4 B. & C. 194; 6 D. & Ry. 231. S. P. *R. v. West Riding*, 2 East, 342.

² *R. v. Oxfordshire*, cited, 1 B. & Adol. 297.

³ *R. v. Oxfordshire*, 1 B. & Adol. 289.

was distinguished.¹ It is, therefore, a question of fact in each case, whether an arch thrown over the *cursus aquæ* be a bridge or not. The want of parapets to the arch will not prevent its being considered as a county bridge.²

Again, a bridge will not be the less a public bridge, because its utility is confined to certain periods of the year. As if it be necessary to keep such a structure in repair during times of flood.³ So when a bridge was only used with carriages in times of flood, or frosts, when it was unsafe to pass through the neighbouring river, Lord Ellenborough said, it was not necessary that the bridge should have been open at all times, in order to support the indictment. There might have been a highway through the ford, and the people might have gone upon the adjoining land, to the great detriment of the owner when the road was bad. The bridge, therefore, might have originated in the convenience and for the protection of an individual, but still it may be of public right.⁴ So where there were a causeway and bridge, which were only used in case of floods, but which, nevertheless, were always open to the public, Abbott, C. J., held, that the county must repair. The bridge had neither parapets nor rails, nor did it appear that, for the sixty or seventy years of its existence, it had ever been repaired. In very high floods the bridge itself as well as the ford was impassable. Verdict guilty.⁵ Moreover, a change of situation, or of size, or of the nature of the bridge, will not destroy the liability to repair. On the contrary, in some cases, if the alteration should have tended to the convenience of the public, it will rather induce that liability; and even if a bridge altogether new were erected, it was formerly the law, that if such a bridge contributed to the public convenience, the county must repair it. This rule, however, has been altered by an Act of parliament, to which we shall presently invite attention.

Certain townships enlarged a foot bridge to a horse bridge,⁶ and soon afterwards to a carriage bridge, at their own expense. The West Riding, however, was indicted for the non-repair of this bridge. It had never been repaired by the West Riding, and there was another bridge which served for the same road; the issue was, whether these townships had immemorially repaired a carriage

¹ *R. v. Derbyshire (Inhabitants)*, 2 Q. B. 745; 2 Gale & D. 97. *R. v. York and North Midland Railway Company*, 7 Rail. Ca. 419. Can there be an indictment for not completing a bridge authorized to be built by Act of parliament?

² *R. v. Whitney*, 4 Nev. & M. 594; S. C. 3 Ad. & El. 69; S. C. 7 C. & P. 288. If a judge at *nisi prius* be asked whether a particular structure is a bridge, and he say, that according to *his view of the facts*, he is of opinion that it is

not, the verdict cannot be impeached on the ground of misdirection, if that opinion be incorrect. 3 Ad. & El. 69.

³ See 4 Campb. 189.

⁴ *R. v. Northamptonshire*, 2 M. & S. 262.

⁵ *R. v. County of Devon*, Ry. & M. N. P. C. 144. See also, *R. v. Surrey*, 2 Camp. 455.

⁶ It seems that an ancient horse and foot bridge is a bridge which comes within the general obligation to repair. *R. v. Salop*, 13 East, 95

bridge, and the jury found for the defendants. But the court granted a new trial, for the townships could never be said to have repaired immemorially a carriage bridge, which was of modern construction. And by Buller, J.,—It is true, that by enlargement, a party may not extinguish his liability, but he shall only repair *pro rata*, otherwise the county must repair all bridges of public utility.¹ So again, where a parish had been liable by prescription to repair an ancient wooden foot bridge, and the trustees of a turnpike road had built a bridge of brick in its room, which had been used by carriages ever since, it was held that the county could not set up a plea of immemorial repair by the parish of this bridge, and a verdict passed against the county.²

Even where it was pleaded by the inhabitants of a riding, that a township had immemorially repaired a certain foot bridge till it was taken down, and that they had since repaired the new bridge erected in lieu thereof, which new bridge was the subject of the indictment, judgment was given for the king against the inhabitants of the riding; for the bridge was of public utility, and constantly used by all persons passing by that road.³

So where a bridge had been built by a private individual, whose tin works could not be carried on without the use of the bridge, but it likewise appeared that the public had constantly used it, Lord Kenyon directed the jury to find for the crown, and no motion was made for a new trial.⁴ So where a party was bound, *ratione tenuræ*, to repair a carriage bridge, but certain trustees constructed a foot bridge by the side of the carriage bridge, to which it was fastened, and by which it was principally supported, it was held that the county must maintain this foot bridge.⁵ But it seems that it would not be so in the case of a bridge widened, as far as the widened part is concerned. The widening seems to be in the nature of repair, and thus the character of the bridge would not be altered so as to shift the obligation.⁶

It follows, *à fortiori*, that the destruction of a useful bridge cannot deliver the county from its obligation. Queen Anne built a bridge at Datchet in lieu of a ferry, and the crown repaired this bridge till 1796: It was at length taken down, and the materials were converted to the king's use.⁷ The county of Bucks was then indicted for the non-repair of this bridge, and the court were clearly of opinion that this was a public bridge, and as such repairable by the inhabitants of the shire.⁸

It being admitted then, without reference to any bridge in particular, that it is of public utility, and it being shown, moreover,

¹ *R. v. West Riding*, 2 East, 353, cited, 2 East, 356. *R. v. West Riding*, Id. 342; 1 Salk. 359.

² *R. v. Surrey*, 2 Camp. 455.

⁵ *R. v. Middlesex*, 3 B. & Adol.

³ *R. v. West Riding*, 5 Burr. 201.

2594; Sir Wm. Bl. 685. *R. v.*

Glusburne Bridge, S. P. *R. v.*

Lancashire, cited, 2 East, 352.

⁴ *R. v. County of Glamorgan*,

⁶ *R. v. East Adderbury*, 5 Q.

B. 187; Dav. & M. 324. Lord

Denman, C. J.; Patteson, J.

⁷ See 6 East, 154.

⁸ *R. v. Bucks*, 12 East, 192.

that a limited user according to the season, or a change in its nature, size, or situation, will not make it the less a public structure, but that, on the contrary, its enlargement or other improvement will rather have a tendency to throw the burden of repair upon the community who use it, we will proceed to set forth what, in reality, may be successfully urged as a defence to an indictment against the county, and, afterwards, who shall be said to be the inhabitants of such county subject to the reparation in question; and lastly, what is the nature of the repair required.

By 22 Hen. 8, c. 5, s. 1, the condition of bridges in the highways was placed under the oversight of justices at their general sessions, who were to take care that the same were reformed, and that the parties liable to repair should be pointed out.¹ By sect. 3, where it cannot be known what hundred, town, parish, or person ought to repair, the inhabitants of the county shall repair, unless the bridge be within a city or town corporate, in which case the city, &c. shall repair. If part of the bridge be in one shire, or city, &c., and the other part in another, the respective shires, cities, &c. shall repair within their several limits.² The statute 1 Anne, s. 1, c. 18, confirms this Act of 22 Hen. 8.

By 14 Geo. 2, c. 33, s. 1, justices may, at their sessions, agree with any person for the purchase of land, in order the more conveniently to enlarge or rebuild a bridge, provided the purchase do not extend beyond one acre of land. The charge³ is to be defrayed from the county rate. Similar provisions will be found in 43 Geo. 3, c. 59, s. 2, together with a provision for impannelling a jury, and assessing compensation in case the owners of such land cannot be treated with; and by 54 Geo. 3, c. 90, s. 1, the powers of 43 Geo. 3, c. 59, were extended to any buildings which might be necessary to be purchased for the purposes of the Act.

By 43 Geo. 3, c. 59, s. 5, no bridge thereafter to be erected at

¹ See 2 Inst. 701, 702.

² See *R. v. Essex*, Tho. Raym. 384. It was a new provision, that a hundred could be charged by prescription. By Powell, J., 2 Ld. Raym. 1251. Where a new district was added to a city, it was held, that the inhabitants of the city generally must nevertheless repair the bridges in the new district. *R. v. Justices of St. Peter's Liberty, York*, 2 Ld. Raym. 1249. In this case, the writ of *mandamus* was quashed, because the rate for repair was not rightly made by the justices of the particular district. It ought to have been made by the justices of the city generally. See 2 Inst. 697. It seems, also, that if there be no bridge within the limits of a corporation, they may be charged to-

wards the county repairs. 1 Keb. 687; Skin. 254. See 1 Hawk. c. 77, s. 25. If a bridge be partly within a franchise, and the residue be within a guildable, the repair shall be done in proportion, and so *mutatis mutandis*. 2 Inst. 701. Supposing that a corporation were dissolved, it has been said, that if the inhabitants were named, the lands would still be chargeable. *R. v. Colchester*, 2 Keb. 43, indicted for non-repair of a bridge. The rest of this Act relates to the mode of taxation, to the process, and the costs and charges.

³ Not only the purchase money of the land, but likewise the contingent expenses of an abstract of title, the draft of conveyance, &c. By Buller, J., 4 T. R. 596.

the expense of an individual, private person, or corporation, shall be deemed to be a county bridge, or bridge which the inhabitants of a county are liable to repair, unless it be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, or other person appointed by justices at their sessions.¹

This Act of 43 Geo. 3 is extended by 54 Geo. 3, c. 90, to bridges and roads at the end thereof, repairable by the inhabitants of hundreds and other general divisions in the nature of hundreds, in like manner as if the same were repairable by counties.² Taking a view, therefore, of these statutes, it appears that more than one line of defence is open to a county indicted for the non-repair of a bridge.

It may, however, be observed in passing, that the statute 22 Hen. 8 was, for the most part, only declaratory of the common law, and, consequently, if any bridge were not to come under the provisions of that Act, and were not excluded by 43 Geo. 3, c. 59, it would still be indictable at common law.

No surer mode of defence could be suggested than that the bridge indicted is not a public way.³ And since the 43 Geo. 3, c. 59, it is an equally good ground of defence that the structure has not been erected under the superintendence of a competent authority. It is, nevertheless, very evident that the statute contemplated new bridges only. Certain trustees built a bridge across a stream, where a culvert would have sufficed. They widened it after the passing of 43 Geo. 3, c. 59, and upon an indictment against the county, it was contended, that this alteration in the width had created a new bridge, so that the intervention of the county surveyor became necessary. But Lord Tenterden remarked, that the case of a bridge widened did not appear to have occurred to the legislature, and the rule prayed for to show cause why a verdict of acquittal should not be entered was refused.⁴ So where a county bridge, which had been washed away, was rebuilt, since the 43 Geo. 3, partly with the same materials, and in the same line of passage as before, without notice to the county surveyor, the court held that it was not a new bridge, and that the county must do the repair.⁵ Trustees having built a bridge, it was contended that they could not be considered as individuals or private persons within the 43 Geo. 3, c. 59, but the court entertained a different opinion, and the county was convicted.⁶

¹ The 7th section excepts bridges, repairable by reason of tenure or prescription, from the provisions of the Act; and adds, that nothing in the Act shall alter or affect the right to repair roads or bridges liable to that obligation.

² See *post*, 52 Geo. 3, c. 110; 55 Geo. 3, c. 141.

³ Although the bare fact of the bridge having been repaired by private persons, is not of itself entitled

to much weight,—*R. v. Northamptonshire*, 2 M. & S. 262,—“it might, however, be a link in the evidence to show that the passage over the bridge was not of public right, but of sufferance.” *Id.* 265.

⁴ *R. v. Lancashire*, 2 B. & Adol. 813.

⁵ *R. v. Devonshire*, 2 Nev. & M. 212.

⁶ *R. v. Derbyshire*, 3 B. & Adol. 147.

Another ground of discharge might be, that the bridge in question is absolutely unnecessary, or that there is another bridge equally commodious, although this line of defence would be viewed with jealousy. But where a bridge had been made where a culvert would have been sufficient, the court would not discharge the county, especially as it appeared that the bridge was better for the public.¹

But the chief topic of defence on behalf of a county is the obligation which another body of persons or another individual has encountered to repair the bridge. No one can be compelled to make a bridge where none existed before,² unless it be by Act of parliament. But there may be an immemorial liability to repair it when built; and thus a section of a county, as a hundred, may be charged; or a township, by a similar obligation. Or an individual *ratione tenuræ*. It was said, indeed, upon one occasion, that a hundred was a limited district, and, therefore, not liable by prescription; but the court paid little attention to this objection. It was added, however, that a township was annexed by statute to the hundred of Oswestry in the time of Hen. 8, (which was the district indicted,) so that the unity being broken, it could not be affirmed that the hundred was liable immemorially. The court, however, repudiated this objection also, for the statute which annexed the township directed that the inhabitants thereof should do everything which the inhabitants of the hundred were bound to do. Judgment was accordingly given for the crown.³

If an abbot and his predecessors have, time out of mind, repaired a bridge, of alms, they are liable to repair.⁴ The lord of a manor may be chargeable by prescription, or by reason of tenure.⁵ And if the lands of the manor come to be divided into several parcels, each alienee, being a tenant of the demesnes or services, is liable to the whole charge in the first instance, although there shall be a contribution afterwards.⁶ A corporation may be liable by prescription, or *ratione tenuræ*.⁷ But it is scarcely necessary to observe that the respective tenements must be immemorial. Where documents were produced in evidence, showing that a mill, in respect of which the obligation to repair a bridge was said to have arisen, did not exist before the reign of Hen. 8,

¹ *R. v. Lancashire*, 2 B. & Adol. 813.

² Magna Charta, 9 Hen. 3, c. 15; 2 Inst. 701.

³ *R. v. Hundred of Oswestry*, 6 M. & S. 361. See *R. v. Norwich*, 1 Str. 177.

⁴ 10 Edw. 3, 28; 44 Edw. 3, 31; 13 Rep. 33.

⁵ *R. v. D. of Bucklugh and others*, 1 Salk. 358. 2 Ld. Raym. 792, 804. Nom. *R. v. Bucknall*.

⁶ 1 Salk. 358; S. P. Sir Wm. Jones, 273, case *de Loddon Bridge*.

And the lord cannot discharge those who purchase of him from the obligation due to the public, although he himself may be bound. 1 Salk. 358.

⁷ 2 Inst. 709. *R. v. Mayor, &c. of Stratford-upon-Avon*, 14 East, 348.

A corporation may be bound by usage and prescription, being local, and having a perpetual succession; but a private person cannot be bound by the act of his ancestor without a lien or binding and assets. 2 Inst. 700.

Tindal, C. J., directed an acquittal.¹ And the occupier is liable, in the first instance, for repair *ratione tenuræ*, although he may demand reimbursement from the owner.²

A person or company may, moreover, be chargeable under an Act of parliament. As, where the proprietors of a navigation were permitted by a special statute to amend and alter any bridges or highways which might hinder their navigation, provided they should leave in the room thereof others as convenient. Forty years since they accordingly destroyed a ford across the river, and built a bridge; and it was contended on their behalf, that as this bridge was of public utility, they could not be held liable to repair it. But the court were of a contrary opinion, and ordered that a verdict should be entered for the county, for the condition originally imposed upon these proprietors was a continuing condition. They could not leave another convenient passage in the highway without making and keeping up a bridge.³

The case of *R. v. Kent* was forthwith acted upon. A canal company was authorized by Act of parliament to make the river Bain navigable, and, amongst other works, to build bridges. They deepened a ford in pursuance of these plans, and thereby rendered a bridge necessary, which they built at their own expense. They repaired the bridge in the only instance in which it needed repair, and the county had never done any repairs to it. The court, upon an indictment being preferred against the county, could not distinguish this case from *R. v. Kent*, and a verdict was entered for the county.⁴ The Act, it was observed, only authorized and empowered the company to execute works, it did not compel them;⁵ and they were likewise enabled to *discontinue* any bridge, amongst other things; whence it at once followed, that the inhabitants of a county could not have by law a permanent burden thrown upon them to repair a bridge of which they had not the permanent use and enjoyment secured to them.⁶ Upon a similar occasion it was contended on the part of the defendants, that in *R. v. Kent* and *R. v. Lindsey* it had been found that the respective companies had first built the bridges in question, whereas, in the present case, it did not follow that those who made the Act, although for their own benefit, had likewise built the bridge. Moreover the Act then under consideration neither mentioned bridges nor conditions, but, on the contrary, supposed that the concern might not be beneficial to the undertakers, by reason of the words "in case they shall undertake the same" being introduced. But the court gave judgment for the crown upon an indictment against an individual for non-repair;⁷ for if occasion required that a public highway should be cut through, the duty of those who interrupted

¹ *R. v. Hayman*, Moo. & M. 401.

² *Baker v. Greenhill*, 3 Q. B. 148; 2 Gale & D. 435.

³ *R. v. Kent*, 13 East, 220.

⁴ *R. v. Lindsey*, in Lincoln, 14 East, 317.

⁵ *Id.* 322.

⁶ *Id.*

⁷ *R. v. Kerrison*, 3 M. & S. 526.

the way was to furnish a substitute to the public by means of a bridge.¹ Indeed, the case might be said to be stronger in favour of the county, for here the highway itself had been cut through, whereas in *R. v. Kent* the inconvenient ford had been exchanged for a good bridge; but what benefit does the country derive from passing over a bridge instead of the solid highway?² The defendant in the last case had been convicted upon a former trial for the non-repair of this bridge, but the judgment against him was reversed upon error for defects in the indictment, which we shall have an opportunity of noticing hereafter.

A distinction, however, was at one time supposed to exist upon this head with reference to cases where the public convenience coincided with private benefit, independently of any Act of parliament. And it was thought that if the benefit were continuing, the private person would be liable. As, if one should make a cut for the use of his mill, and build a bridge.³ The party might have been guilty of a nuisance in making the cut, which the public might have prevented; but as he continued it for his own benefit, he must be held liable to repair.⁴ Still it was said, that if the public lie by without objecting, and use a bridge, it is evidence of their being willing to adopt it as their own; so that, if it were of public benefit, the burden of sustaining it should be public likewise.⁵ But it is now settled that the repairs of a bridge built by a private person without reference to 43 Geo. 3, c. 59, shall be borne by the county. A miller, about forty years before the trial, erected a mill, by which he deepened the ford. The miller subsequently built a bridge. The ford was inconvenient and even unsafe before the building of the mill, and the water rather increased after the building. The public used the bridge as soon as the miller had built it. And the court held, upon these facts, that the county was liable. Here was no Act of parliament, and the authorities were uniform that if a private person built a bridge, which afterwards becomes of public convenience, the county is bound to repair it.⁶ The court, moreover, cited the case mentioned by North, attorney-general, in an old case to the same effect, with approbation.⁷ It is evident, nevertheless, that if a bridge be not of public utility, or if it be erected in a place where a solid highway or another useful structure existed before, the burden of repair or of any extra improvement must not rest on the county, but upon those who have caused the innovation.

The liability of a county may be suspended under the pro-

¹ *R. v. Kerrison*, 3 M. & S. 531, Lord Ellenborough.

² *Id.* 532, Bayley, J.

³ 2 East, 350, citing 1 Ro. Ab. 368.

⁴ 2 East, 350, Lord Ellenborough.

⁵ *Id.* 348, Lord Ellenborough.

⁶ *R. v. Kent*, 2 M. & S. 513,

where the court said they had referred to the record mentioned in Rolle's Abridgment, and found it had no relation to the right of the mill-owner and the public, as supposed by Lord Rolle. See an extract of the record, 2 M. & S. 520.

⁷ In *R. v. Wilts*, 1 Salk. 359.

visions of an Act of parliament. As where trustees were authorized to take down and rebuild a bridge over the Tone, taking tolls in respect thereof, which tolls were to cease as soon as the purposes of the Act should be fulfilled. It was held, that the county could not be liable to the repair of the bridge during the continuance of the powers of the Act, which vested the bridge in the trustees.¹

Consideration.] The question of consideration sometimes arises in the case of bridges as well as of ordinary highways. No consideration need appear in the case of those who are bound by a primary obligation, as a county, or a hundred or a township where the liability has arisen beyond time of memory, because the hundred and township stand in the situation of the county in a legal view. But an individual must be charged by virtue of some consideration which appears on the record, or by a legislative enactment which must be set forth. Inasmuch, however, as the obligation in all these instances extends no further than to repair such bridges as are within the county or township, a consideration must be shown if it be sought to impose on them the amendment of a foreign structure. Therefore, where the inhabitants of two parishes were indicted for not repairing a bridge in Wales, and an immemorial obligation by reason of tenure was set forth, it was objected upon a writ of error brought to reverse the judgment against these inhabitants, that there was no averment in the indictment of the bridge being within the town, or that the inhabitants, being charged by reason of tenure, were a body corporate; and the objection was holden fatal. For first, here was no special consideration, supposing that the bridge were without the town; and next, if the bridge were *within* the town, the defendants could not be liable in their character of inhabitants, by reason of the tenure of lands.²

*Who are inhabitants liable to repair.*³] Every person dwelling in any shire, riding, city, or town corporate, and having lands, &c., where the bridge is, is a person liable to contribute to the repair of it.⁴ So, if he dwell in a foreign county, but have lands in the county where the bridge is situate.⁵ So any corporation or body politic residing in any county, or having lands in a county where the bridge is.⁶ And the corporation may be indicted for

¹ *R. v. County of Somerset*, 16 East, 305. "If the trustees are dilatory in executing the powers of the Act, I am inclined to think that the court, upon application, would lend its aid to expedite their functions." *Id.* 308. By Lord Ellenborough. See as to the exoneration of New Sarum from the repair of a bridge, although the bridge was brought by statute within the new limits of

the borough. *R. v. New Sarum*, 7 Q. B. 941.

² *R. v. Machynlleth and Pennegoes*, 2 B. & C. 166.

³ Inhabitant is the largest word of the kind. 2 Inst. 703; 4 B. & C. 778.

⁴ 2 Inst. 703. See 4 B. & C. 778.

⁵ 2 Inst. 702.

⁶ *Id.*

misfeasance, *ex. gr.*, for a neglect to repair, or for a breach of duty.¹ It is one of the limited instances in which a corporation is liable by indictment, and not inconsistent with the general principle that it is not so liable.² So the husband of a *feme covert* is liable to repair.³ So an infant who hath house or lands by descent or purchase.⁴ But this must be interpreted as in the person of his guardian in socage, who is liable if he be in possession.⁵

Nature of the repair required.] The power of justices at sessions, as the representatives of the county in matters of this nature, may be considered with regard to the common law and the statutes which have been made concerning the repair of bridges. First, as to changing the situation of the bridge, there might at common law have been an *ad quod damnum* writ to do this, or it might have been altered by authority of parliament, but the justices could not effect it by virtue of their authority until the 14 Geo. 2, c. 33.⁶

At common law the county is not even obliged to widen an ancient bridge. Lord Kenyon, indeed, mentioned a case in Cumberland, upon the consideration of which the court strongly intimated, that a bridge, though formerly adequate to the purposes intended, ought to be widened, if the public exigencies required its enlargement.⁷ The case then went to the House of Lords, but Macdonald, C. B., who delivered the opinion of the judges, said, it must be presumed, after verdict, that the over narrowness of the bridge had been occasioned either by some addition having been made to the inside of the battlements, or from some other cause, by which the ancient width of the bridge had been contracted, and, consequently, the general question of liability to widen a bridge could not be entertained upon that record.⁸ However, this obligation to widen was discussed and decided in the negative upon a later occasion; and the court noticed, that the only authority in favour of the proposition was the dictum of Lord Kenyon: Bayley, J., also observing, that, as in *R. v. Stretford*, the inhabitants of a parish could not be compelled to enlarge a way, so the inhabitants of a county were under no obligation at common law to widen a bridge. Judgment was therefore given for the defendants.⁹

¹ *R. v. Birmingham and Gloucester Railway Company*, 3 Q. B. 223; 1 Gale & D. 451. *R. v. Great Northern Railway Company*, 16 L. J. M. C. 16.

² *The King of the Two Sicilies v. The Oriental Steam Packet Company*, 19 L. J. Ch. 491. Though a corporation was held not to be answerable under the Foreign Enlistment Act. *Id.* 488.

³ 2 Inst. 702.

⁴ *Id.*

⁵ *R. v. Sutton*, 5 Nev. & M. 353; 3 Ad. & El. 597. See likewise 8 Ad. & El. 516. If the guardian be not in possession—*quære?*

⁶ See 6 Mod. 307; 5 T. R. 283.

⁷ *R. v. Cumberland*, 6 T. R. 194.

⁸ *The County of Cumberland v. The King* (in error), 3 Bos. & P. 354. See 2 Campb. 457.

⁹ *R. v. County of Devon*, 4 B. & C. 670; 7 D. & Ry. 147. *R. v. Lincoln*, cited, 4 B. & C. 676.

However, although this widening is not compulsory, we have seen that the stat. 14 Geo. 2, c. 33, speaks of enlarging and rebuilding bridges. And Buller, J., observed, upon that Act, that it impliedly gave the power even of altering the position of a bridge to suit the convenience of the public.¹ And by 43 Geo. 3, c. 59, after placing the county surveyor of bridges on the same footing with the parish surveyor of highways with respect to his power of getting materials,² it was enacted by sect. 2, that wherever any bridge repairable by the county should be found to be narrow and incommodious, the justices at quarter sessions might order and direct such bridge to be widened, improved, and made more commodious; and that where any bridge should be found so much decayed as to render the taking of it down expedient, the justices might order it to be rebuilt, either on the old site or elsewhere, provided it were contiguous to or within 200 yards of the former bridge. The 7th section excepts bridges repairable by any person or corporation by reason of tenure or by prescription. The stat. 54 Geo. 3, c. 90, s. 2, extends the powers of the Act 43 Geo. 3, c. 59, to bridges repairable by the inhabitants of hundreds, and other general divisions in the nature of hundreds, except in respect of bridges thereafter to be erected and built. Further, by 55 Geo. 3, c. 143, after giving power to the surveyor to take stones for materials, under certain restrictions, (sect. 1,) and regulating the summoning of juries in case of inability to treat, (sects. 2, 3, 4,) it is enacted by sect. 5, that justices may contract for the repair of any county or hundred bridge for seven years, but not for less than one year, and may order sums of money to be paid for such repair accordingly, without giving public notice at their sessions of such intention to contract; and although no presentment of insufficiency, decay, or want of repair shall have been made. Nevertheless, before any such contract be made, the justices shall cause notice to be given in some public paper circulated in the county, city, riding, hundred, division, town corporate, or liberty, of their intention to contract.³

By 7 & 8 Geo. 4, c. 27, s. 17, when any bridge upon a turnpike road ought to be repaired by any particular person, body politic or corporate, by reason of tenure or otherwise, or where any composition has been entered into or made in lieu thereof, such bridges shall be repaired, or composition paid, in such manner as the same were respectively maintained and kept in repair, or paid, before the passing of 3 Geo. 4, c. 126, and 4 Geo. 4, c. 95, or under the provisions of any local turnpike Act.

Highways at the ends of bridges.] The next point to which we invite attention is the repair of that portion of the road which

¹ 5 T. R. 283.

² See also sect. 3.

³ See also 12 Geo. 2, c. 29, s. 14; 52 Geo. 3, c. 110, s. 5; see also *Id.* ss. 2, 3, 4, as to the superintend-

ence of the repairs, and payment of the money required for them, which is to be paid out of the county rate. 12 Geo. 2, c. 29, s. 1; see 4 T. R. 595.

adjoins a bridge at either end of it. Three hundred feet of road at each end are repairable by the county,¹ or other parties liable to repair the bridge itself, and not by the parish, in the case of all bridges erected before the passing of the late Highways Act, 5 & 6 Will. 4, c. 50.

This provision of 22 Hen. 8, c. 9, was only declaratory of the common law.² It was, indeed, endeavoured upon one occasion, on the part of the West Riding of York, to deny this liability;³ and the case was carried up to the House of Lords, the Court of King's Bench having given judgment against the riding, but, after considerable argument, the judgment below was affirmed.⁴ Indeed, all the statutes recognize this liability, as pointed out by 22 Hen. 8, c. 9. Thus the Act 1 Ann. st. 1, c. 18, speaks of the highways at the ends of bridges. The 12 Geo. 2, c. 29, unites the highways adjoining bridges to the mention of bridges. The 43 Geo. 3, c. 59, speaks of roads at the ends of bridges. So, likewise, the 52 Geo. 3, c. 110. The 54 Geo. 3, c. 90, has similar words. And the 55 Geo. 3, c. 143, takes in these roads at the ends of bridges. It is, in fact, an intendment of law, in the absence of evidence to the contrary, that the liability extends to 300 feet.⁵ So that a party who is by prescription liable to repair a bridge, must likewise repair the highway at each end to the extent of 300 feet. And it was held to make no difference that the party had only repaired the fabric of the bridge, and that the commissioners under a Turnpike Act had done the only repairs which had been known.⁶ This obligation rests upon the county where the bridge is, although the end of the road may be in another county. But it is worthy of remark, that if a new bridge were built upon the 300 feet of road in the stranger county, the same liability which compelled the repair of the road would not attach to the bridge. There was a bridge in Dorset, and, as it divided that county from Devon, the inhabitants of Dorset repaired the 300 feet on the Devon side. About 150 feet from this bridge, however, was a ford, and an individual built a small bridge over the ford, which was considered as having been adopted by the county of Devon, and as soon as it required repair, the inhabitants of Devonshire were indicted for the omission. But they said that it was an appendage to the bridge in Dorset, and that as Dorset repaired the one, they must take this also, as being within the 300 feet of road. The court, however, were clearly of another opinion, and a rule for setting aside a verdict for the crown was refused.⁷ And Lord Ellenborough said, that in this case each bridge was a substantive bridge in a different county. While the place continued to be a road, it was repairable as part

¹ 22 Hen. 8, c. 22, s. 9; see 2 Inst. 705.

² 43 Ass. pl. 37.

³ *R. v. West Riding*, 7 East, 588.

⁴ 5 Taunt. 284; 2 Dow. 1.

⁵ *R. v. Mayor of Lincoln*, 3 Nev. & P. 273; 8 Ad. & El. 65.

⁶ 8 Ad. & El. 65. S. C.

⁷ *R. v. County of Devon*, 14 East, 477.

of the old bridge [in Dorset], but as soon as a substantive bridge was built on the Devonshire side it became, according to the statute, repairable by the inhabitants of the county in which it was situate.¹

This liability resembles that of highways and bridges in almost all other respects. Thus, a township, when liable from time immemorial to repair this amount of road, stands in the same light as a county; so that no consideration need be stated upon the record. It was once attempted to impeach a plea by the county casting the burden upon a township, on the ground of there being no averment of consideration. But the court was quite clear upon this point, and judgment was given in favour of the plea, and for the defendants.² By the new Act respecting highways,³ however, this obligation is removed from the county or hundred, or township, &c., and placed upon the parish. By sect. 21, if any bridge shall hereafter be built, which by law may be repairable by the county, or by any part thereof, all highways leading to, passing over, and next adjoining, shall be repaired by the parish, person, or corporation, or trustees of a turnpike road, who were before bound to repair the highways. Then follows a proviso, that nothing therein contained should discharge any county, or part of any county, from repairing, or keeping in repair, the walls, banks, or fences of the raised causeways and raised approaches to any such bridge, or the land arches thereof.

Hence it follows, that whilst the hundred or township becomes exonerated, as well as the county, from these repairs, a person liable *ratione tenuræ*, or otherwise, or a corporation, remains under the obligation. Were it otherwise, a party who ought to repair a portion of ground by reason of his tenure would have been enabled to relieve himself of a liability for which a consideration originally existed, and impose it upon the parish.

Proceedings.] The usual proceeding against defendants for non-repair of bridges is by an indictment, or a presentment.⁴ But presentments are at an end with respect to all bridges except county bridges,⁵ the Highways Act having expressly abolished that mode of proceeding against inhabitants, or other persons, on account of any highway or turnpike road.⁶ Although it should be said that where the stat. 43 Geo. 3, has incorporated the 13 Geo. 3, c. 78, the provisions of the latter Act are preserved, and suffer no repeal by the 5 & 6 Will. 4, c. 50.⁷ And it should be noticed, that the interpretation clause⁸ of that statute includes

¹ *R. v. County of Devon*, 14 East, 478.

² *R. v. West Riding*, 4 B. & Ald. 623.

³ 5 & 6 Will. 4, c. 50.

⁴ See 2 Inst. 701.

⁵ *R. v. Breconshire*, JJ., 18 L. J. M. C. 127.

⁶ 5 & 6 Will. c. 50, s. 99. See *R. v. Mawgan*, 3 Nev. & P. 502. S. C. 8 Ad. & El. 496.

⁷ *R. v. Merionethshire*, JJ., 6 Q. B. 313. See 3 New. S. C. 434.

⁸ 5 & 6 Will. 4, c. 50, s. 5.

bridges (except county bridges) within the term highways. It might certainly be made a question, whether the words "county bridges" would comprehend such bridges as a hundred or township standing in the place of a county by virtue of immemorial usage ought to repair. Probably the legislature intended that the hundred or other division should be included, and if it be so, the presentment would chiefly be in force in the case of corporations and private individuals.

As to the indictment, it may still be entertained at common law. Moreover the statute 5 & 6 Will. 4, c. 50, s. 95, enacts, that justices shall direct a bill of indictment to be preferred where the duty or obligation of the repair of a highway is denied. And as the interpretation clause includes bridges, except county bridges, within the term "highways," those which are repairable by persons or corporations will seem to come within this 95th section.

An information will also be granted by the Court of King's Bench under particular circumstances.¹

But an action will not lie.² The plaintiffs brought an action against the county of Devon for an injury done to their waggon by reason of the non-repair of a bridge, which the county ought to have repaired, but the defendants demurred, and the court, after hearing the argument of counsel, gave judgment for them.³

The high constable sometimes presents a public bridge as being out of repair. If, however, he do so, he must go before the grand jury, and give his evidence upon oath. He is not like a justice, whose presentment has, by statute, in some cases, the force of a presentment by a grand jury. Therefore, although it was stated upon affidavit that this practice had prevailed upon the western circuit for forty years, the court made a rule absolute for quashing a presentment made without oath.⁴ A writ of prohibition to justices, commanding them not to pull down an old bridge until the completion of the new, is not a proceeding which the court will sanction. Although it was stated that much inconvenience would ensue from such a removal of the old structure under the circumstances mentioned, the court refused a rule, for there was a remedy by indictment, and they put the case of an order of the magistrate, directing a new bridge to be built on the old site, when the old bridge could not have been continued.⁵

By 22 Hen. 8, c. 5, s. 5, supposing the bridge to be in one shire, and the persons or lands charged in another, or if the bridge be in a city or town corporate, and the persons liable are not within such city or town, the justices of the shire, city, or town may

¹ See *R. v. Surrey*, 8 Mod. 119. 514; for a nuisance by erecting a swing bridge across the highway. *R. v. Norwich*, 1 Str. 177. S. C. nom. *R. v. Justices of Somerset*, 1 M. & Ry. 272.

² Vaugh. 340.

³ *Russell v. The Men of Devon*, 2 T. R. 667.

⁴ *R. v. Bridgwater and Taunton Canal Company*, 7 B. & C.

⁵ *R. v. Dorset Justices*, 15 East, 594.

hear and determine such annoyances, if within the limits of their commissions. And if the annoyance be presented, they may make process into every shire within the realm against such as should repair, and act in every respect as though the persons or lands chargeable had been in the same shire, city, or town where the annoyance existed.

The matters necessary to be presented are, that the bridge is a public bridge, and that it is out of repair, which must be shown in the order for the rule.¹ But where the liability to repair cannot be fixed conveniently, it is said that inquiry should be made by the great inquest for the body of the county at the general quarter sessions, and then, if no person in particular be found liable, a general presentment that the bridge is in decay may be made.²

Indictment.] It is usual to say, upon indicting a public bridge, that a certain bridge called——, &c., in the highway leading from A. to B., being a common highway for all the liege subjects, &c., with horses, carts, and carriages to pass and repass, &c., at their free will and pleasure, on, &c., was and still is in great decay, so that the liege subjects, &c., cannot pass and repass as they have been accustomed, to the great damage, &c.³ and that the inhabitants of the county are liable to repair the bridge in question. If the prosecution be against an individual *ratione tenuræ*, it must be alleged that the bridge has existed from time immemorial,⁴ and that the person charged by reason of his tenure⁵ of certain lands lying in A., in the said county, is bound to repair and amend the same.⁶

The words, “at their free will and pleasure,” must be omitted or modified, if the right to pass over the bridge be qualified. As where a bar across a bridge was kept locked, except in times of flood. It was attempted by the counsel for the prosecution to justify the indictment, because the words “at all times of the year” were not introduced, and these words, “at their free will and pleasure,” must mean when need and occasion required. But Lord Ellenborough was clearly of opinion, that as the public had only a right to use the bridge in times of flood, the statement contradicted the right proved. The meaning of “free will and pleasure” was, that the public might, at all times and seasons, prefer crossing the bridge with their carts and carriages, to crossing the ford. The defendants were, consequently, acquitted.⁷ This is very different from the case where the bridge was *open at all times* to the public, but they only used it during floods. In

¹ Andr. Rep. 285.

² 2 Inst. 703. See also 1 Ann. st. 1, c. 18, with respect to the order of justices for making a rate. *R. v. Middlesex*, Andr. Rep. 101, 285.

³ See 2 Leon. 183.

⁴ See *R. v. West Riding*, 2 East, 353, n.

⁵ These words are necessary, Godb. 346.

⁶ See Stark. C. P. 701.

⁷ *R. v. Marquis of Buckingham and others*, 4 Campb. 189.

this case the county was held liable.¹ However, it does not seem necessary to say that the bridge is in the highway,² nor that it is a common highway.³ Although the county where the bridge is situate must be stated,⁴ and the nature of the passage, as for horses, carts, or carriages, should be mentioned.⁵ For if the indictment describe the bridge as a public carriage bridge, and likewise for persons to pass and repass on foot, and the proof be that although passengers may use the way on horseback and on foot, they cannot do so with a carriage, the defendants cannot be convicted.⁶ But if the charge be for not repairing a bridge, and it turns out that the bridge has been widened, there is no variance.⁷

The ruinous condition of the bridge forms an essential averment.⁸ But the length of way out of repair is not of so much consequence. So, that where the indictment charged that half of the bridge was out of repair, the court held it sufficient without saying so many feet in length and in breadth.⁹

From the sketch above set out it may be collected that a county may be charged as of common right, but that a hundred, parish, or other section must be stated as under an immemorial obligation to repair. Care must be taken not to encumber this immemorial allegation with facts of modern creation. As a new office,¹⁰ or a bridge of different character from the old one.¹¹ But no other ground of liability than immemorial usage need be brought forward against a parish,¹² and no consideration need appear upon the record unless it be in the case of a corporation or private person, or where the bridge is not within the county or division charged with the repairs.

If a person be charged by virtue of a private Act of parliament, it seems proper to set forth the Act.¹³

In pleading to an indictment, it becomes necessary to show who in particular is bound to fulfil the obligation demanded;¹⁴ and

¹ *R. v. Devon*, Ry. & M., N. P. C. 144.

² *R. v. Spiller*, Sty. 108.

³ 6 Mod. 256, note (a). See *R. v. Sainthill*, 2 Ld. R. 1174.

⁴ *R. v. Spiller*, Sty. 108.

⁵ *R. v. Sainthill*, Id.; 2 Ld. Raym. 1174. And in the same case it was added, that if Sir H. Spiller was charged with repair *ratione manerii*, there should have been an averment of his having been the owner of the manor.

⁶ *R. v. Lancashire*, 2 Stark. on Ev.

⁷ *R. v. East Adderbury*, 5 Q. B. 187; Dav. & M. 324. In this case the declarations of inhabitant householders were held admissible for the

crown, although the inhabitants were not shown to be rated nor rateable, and without calling them or showing them that they had refused to be examined.

⁸ *R. v. Bridges and Nicholls*, Godb. 346.

⁹ *R. v. Sainthill*, 1 Salk. 359. See where there is a limit as to the extent of repair upon the same bridge. *R. v. Norwich*, 1 Str. 177.

¹⁰ *R. v. Middlesex*, 1 B. & Ald. 64, n.

¹¹ *R. v. Surrey*, 2 Campb. 455.

¹² *R. v. Hendon*, 4 B. & Ald. 628.

¹³ *R. v. Kerrison*, 1 M. & S. 435.

¹⁴ *Case of Langforth Bridge*, Cro. Car. 365. *R. v. Nottinghamshire*, 2 Lev. 112.

if a bridge lie in two parishes, it is of course necessary to cover the whole of the bridge in the plea tendered. Where the county of Essex, therefore, pleaded, that a bridge in D. was out of repair, and that Sir T. F. had been convicted for not repairing it, it was held that judgment must pass for the crown, because the indictment charged the non-repair in two parishes, whereas the plea stated the bridge as being in one parish only. Sir T. F. might, indeed, be bound to repair so much of the bridge as lay in D. parish, but the county might have been bound to the other part.¹

Certiorari.] The statute 1 Ann. st. 1, c. 18, s. 5, has taken away the writ of *certiorari* from defendants in the case of county bridges, and with regard to this the prosecutor must now apply to the court for leave to sue out this writ under 5 & 6 Will. 4, c. 33, s. 1. We have said that this abolition of the *certiorari* applies to county bridges only, for it has been determined, that where a private person or parish is charged, and the right to repair will come in question, the Act 5 & 6 Wm. & M., c. 11, has allowed the granting of such a writ.² And after much argument and consideration, the Court of King's Bench, upon another occasion, gave judgment that the statute of Anne had not taken away the writ from the prosecutor,³ and their opinion upon this point was subsequently confirmed by the House of Lords.⁴ But by 5 & 6 Will. 4, c. 50, s. 107, the *certiorari* in cases of highways is taken away, except in certain cases,⁵ and the interpretation clause of that Act declares that "highways" shall include "bridges," except county bridges, so that the writ may here be said to be at an end in this instance, unless where it is saved by the 5 & 6 Will. 4. And in cases of misdemeanor generally, the statute 16 Vict. c. 30, s. 4, ordains, that except in the case of bodies corporate, no indictment shall be removed by *certiorari*, unless an affidavit be made that a fair and impartial trial cannot be had, or that some question of law of more than usual difficulty and importance is likely to arise. This clause, however, does not affect the *certiorari* with regard to highways, because its pre-

¹ *R. v. Essex*, Tho. Raym. 384. As to the evidence see *R. v. Sutton*, 3 Nev. & P. 569. S. C. 8 Adol. & El. 516. Presumption of repair, *R. v. Lincoln*, 8 Adol. & El. 65. With respect to witnesses see 5 & 6 Will. 4, c. 50, s. 100. Likewise, sect. 5 of the same statute. *R. v. Hayman*, Moo. & Malk. 401. *R. v. Bishop Auckland*, 1 M. & Rob. 286. A county having been indicted for non-repair, and wishing to throw the burden on a parish, the court would not compel the inhabitants of that parish to allow their parish

books and bridge documents to be inspected by the county. *R. v. Justices of Buckingham*, 8 B. & C. 375; 2 M. & Ry. 403. See *R. v. E. Cadogan*, 5 B. & Ald. 902. 1 D. & Ry. 559, and likewise the case of *Dr. Purnell*, 1 Sir Wm. Bl. 37.

² *R. v. Inhabitants of Hamworth*, 2 Str. 900.

³ *R. v. Cumberland*, 6 T. R. 194.

⁴ 3 B. & P. 354. 2 Dow. 1. See also 1 Salk. 146; 1 Str. 183.

⁵ Sect. 95.

amble speaks of the establishment of a court of criminal appeal when matters concerning the repair of highways are not cognizable. Where upon an indictment for throwing down a gate, an affidavit stated that the question was, whether the defendants were liable to repair, and that the right to repair would come in issue, Erle, J., refused the writ.¹

Verdict.] If more than one be indicted, and the verdict pass against one only, it shall be sustained. As where Sir T. F. and others were charged *ratione tenuræ*, and the verdict was, that Sir T. F. only ought to repair.² So where the issue was whether the county should repair a bridge, and the jury found that they ought to repair two arches and-a-half only, the verdict was held good according to 43 Ass. pl. 37, although it was suggested that a bridge was an entire thing.³

Judgment.] The judgment is a fine for non-repair,⁴ which will be proportioned according to the prospect which the court sees of the fulfilment of the obligation. It is to be paid to the treasurer of the county, and applied by the justices towards the building or repairing the bridge.⁵ But one fine only can be imposed upon the same indictment. An order of sessions was made, increasing a fine to the amount of 200*l.* beyond that which had been before imposed. Upon this, a rule was moved for to quash the order, and the court held that the power of sessions was at an end after the first fine, and *R. v. Old Malton*,⁶ where the same point was determined with reference to a highway, was referred to, and the order was quashed.⁷

Consequences of judgment.] A judgment against the county will be nearly conclusive evidence against them upon another occasion. So, likewise, a judgment against a hundred or parish would have a similar effect, and, therefore it was, that where a plea had been tendered by a county, throwing the onus of repair upon a person *ratione tenuræ*, but which plea was irregularly set forth, and consequently unavailable, the court decided to stay the judgment upon payment of costs, in order that the county might have an opportunity of bringing forward their case.⁸ But by Lord Ellenborough, the county must repair, without prejudice to their case, if the public exigency require it;⁹ and Le Blanc, J., remarked, that the county might proceed to indict the parties whom they contended to be liable.¹⁰ But if reasonable speed be not used to try the second indictment, judgment will be entered

¹ *R. v. Fulford (Inhabitants)*, 6 Cox, 510.

² *R. v. Sir T. Fanshaw*, 1 Ventr. 331.

³ Poph. 192.

⁴ Vaugh. 340.

⁵ 1 Ann. st. 1, c. 18, s. 4.

⁶ 4 B. & Ald. 470, in the note.

⁷ *R. v. Machynlleth and Pen-negoes*, Id. 469.

⁸ *R. v. D. of Bucklugh*, 1 Salk. 358.

⁹ *R. v. Oxfordshire*, 16 East, 223.

¹⁰ Id. 125.

up upon the verdict, and, therefore, the court will not suspend the judgment generally, but only until they shall make further order.¹

Fraud or surprise will form an exception to the rule as to this almost conclusive evidence. As where an information was moved for against a county, and it appeared that a parish had obtained a verdict against the county for not repairing a bridge, but though a surprise, the court made the rule absolute for discharging the information. The charge against the parish was that they had immemorially repaired the bridge, that they had been fined for not repairing, and had acquiesced under the charge for many years, and the proof of this was to be found by certificates and other records of the sessions.²

Costs.] By 5 & 6 Will. 4, c. 50, s. 95, costs are expressly awarded in cases of indictments directed by justices. The judge of assize or the justices at quarter sessions may direct them to be paid out of the highways rate. But this clause does not extend to county bridges, which are excepted by sect. 5.³ Still the 43 Geo. 3, c. 59, having adopted the 13 Geo. 3, c. 78, respecting costs, *i. e.* awarding costs against a frivolous defence, all the provisions of that Act as to penalties, impositions, and other matters, and the power to certify for costs in the case of a county bridge, continue,⁴ and the certificate may be given after the assizes in a case removed by *certiorari*,⁵ for the Act extends to county bridges. Moreover, by sect. 98, the court before whom any indictment shall be preferred for not repairing highways,⁶ shall award costs to the prosecutor, to be paid by the person indicted, if it shall appear to the said court that the defence made to such indictment was frivolous and vexatious. The costs, upon the removal of an indictment by *certiorari*, are payable by virtue of 5 & 6 Wm. & M. c. 11.

So, in the case of an information, the Court of King's Bench can direct the payment of costs.⁷

Contribution.] It is a general principle, that where several are liable to a burden, and one or more are charged with the expenses, they shall have contribution from the rest. Therefore, where a manor is held by the service or tenure of repairing a bridge, the tenants who have any portion of the demesne lands in possession are liable to the public for the whole, and are contributory amongst themselves.⁸ And we have seen that the lord cannot discharge the tenants, as far as the public are concerned, although he may bind himself.⁹ But the ancient freehold tenants and copyholders

¹ *R. v. Oxfordshire*, 16 East, 125.

² *R. v. Southampton*, 2 Chit. Rep. 215.

³ *R. v. Surrey*, 8 Mod. 119.

⁴ *R. v. Merionethshire*, 6 Q. B. 348.

⁵ S. C.

⁶ See also sect. 111.

⁷ Subject to the exception of county bridges, see sect. 5.

⁸ And see further as to costs, 5 & 6 Will. 4, c. 50, s. 97. *R. v. New Windsor*, 1 Smith, 168.

⁹ *Ante*.

are not under this obligation, for nothing is part of the manor but the demesnes and services, and not the lands of the tenants.¹ The contribution attaches upon persons holding lands at any time during the continuance of the charge in proportion to the value of the lands. It was held in a late case where an action of assumpsit was brought to recover this contribution.²

Obstructions to bridges.] It is an indictable offence to obstruct the passage of public bridges in like manner as it is an offence to interrupt a highway. And any one may abate, or if the matter be brought into court, the judgment will be that the nuisance shall be destroyed.³ And there may, moreover, be a fine upon such an occasion.

Ferry.] The same doctrines may likewise be applied to the obstruction of a public ferry.

CHAPTER VI.

NUISANCES—NAVIGATION.

Obstructions to docks and to navigation in general.] Again, an obstruction to navigation is an indictable nuisance. So, likewise if a dock or harbour be invaded, the defendant is liable to be punished for the intrusion. As where a person brought a large ship of 300 tons burthen into Billingsgate dock. It was objected that if this were a common dock, it would not be a nuisance for a great ship to come there, a common dock in its nature being free for all ships. But the court thought there might be a common dock for small ships, as there may be a common pack and horseway, and they refused, according to the usual rule, to quash the indictment, being for a nuisance.⁴ With regard to obstructing a navigation, it is not easy to find an excuse or defence for such an act, the case being very strict in preserving the public right, and very reluctant to admit any allegation in answer to a charge for interrupting the public passage. For a navigable river is a common highway for all the king's subjects, so that unless the change be by the authority of parliament, or from some natural cause, it would be very difficult to conceive an occasion where the right would be deemed capable of extinguishment. And it must be a matter of rare occurrence⁵ to discover a ground for abridging or modifying these rights, even although the public convenience might be

¹ *Rich v. Barker and others*, Hard. 131.

² *Dimes v. Arden*, 6 Nev. & M. 494.

³ See Vaugh. 340.

⁴ *R. v. Leech*, 6 Mod. 145.

⁵ As a casualty, or a successful appeal to the writ *ad quod damnum*.

enhanced by the alteration in some other respect. So that it is not surprising to find several occasions where prosecutions have been successfully instituted for this nuisance of obstructing navigation.

There are various acts which disturb the course of navigation. Diverting the accustomed stream; throwing improper lumber into it; neglect to place buoys; erecting wharves so as to narrow the river; mooring barges, so as to obstruct the channel, &c. And it has been said that the improper diversion of a watercourse is a transgression which the king cannot dispense with.¹ A defendant was charged with building locks on the Thames, and by Holt, C. J., to hinder the course of a navigable river is against *Magna Charta*.² That statute, indeed, forbade the erection of wears throughout England, excepting on the sea coast. And the 25 Edw. 3, c. 4, s. 4, prohibited the enlargement of mills, wears, and other such annoyances, which obstructed the common passage of boats and ships in great rivers. These provisions were followed by other Acts of parliament.³ All banks, again, which were not defences in the reign of Hen. 2, were declared illegal by *Magna Charta*.⁴ And in construing the statutes above mentioned concerning wears and mills, the court came to the conclusion that such mills only as had been made in the reign of Edw. 1, or since, were within the prohibition. Unless, indeed, the mills built before that reign had been increased, and in that case they also might be corrected and amended. And it was likewise held, that *Magna Charta* extended only to *kidels*, or open wears for taking fish, and, moreover, that the statute of sewers, 23 Hen. 8, had not repealed these Acts of Edw. 3 and Hen. 4.⁵ Wears, locks, and banks, are, therefore, in general, obstructions to navigation. However, where a lock is made by the king's licence, and for the public benefit without any modification or abridgment of the general right, but, on the contrary, with a result beneficial to navigation, it is not a nuisance, although toll may be demanded for passing along the river in consequence of it.⁶ The distinction seems to be where the erection causes an obstruction, and where it advances the public interest without abridging the highway. For no grant from the crown, however legal in itself, can make a nuisance legitimate.⁷

There are several other nuisances. As the erection of a wharf. Where the corporation of London had let a space of ground between high and low water mark for the purpose of wharfage, by which certain public conveniences in the river Thames were considerably interfered with, Abbott, C. J., directed the jury that the

¹ Vaugh. 340.

² *R. v. Clark*, 12 Mod. 615. See Cro. Car. 132, *post*.

³ See 4 Hen. 4, c. 11; 1 Hen. 5, c. 2; 12 Edw. 4, c. 7.

⁴ 9 Hen. 3, c. 16.

⁵ *R. v. Chester Mill*, 10 Rep. 138; 13 Rep. 36; see 2 Inst 38.

⁶ *Juxon v. Thornhill*, Cro. Car.

⁷ See *Williams v. Wilcox*, 3 Nev. & P. 606.

public could not be deprived of the benefits they had always enjoyed for the sake of mere private convenience, and a verdict was returned against all the defendants, excepting Lord Grosvenor.¹ So again, a staith, or collection of piles, built for the purpose of lowering and raising coal waggon, became the subject of an indictment for a nuisance; and although the verdict passed in this case for the defendants, in consequence of the direction of Bayley, J., with reference to a point of law, yet, as Lord Tenterden decidedly dissented from this opinion, and one judge gave no opinion, the point may not be considered as finally decided. The case was, that by reason of this staith, an abridgment of the right of passage in the river Tyne occurred, but, on the other hand, the public reaped an advantage by the facility of dropping the coal waggon into the ship and rearing them again. And the direction of Bayley, J., was, that if the erection in question produced a public benefit, and were in a reasonable situation, so as to leave sufficient room for navigation, the jury should acquit the defendants. And the learned judge pointed out as the results of the staith, with respect to the coals, their better condition and cheaper value. Lord Tenterden, without denying the public advantage which might have accrued, on concluding that a verdict ought to be entered for the crown, said, he could not think that the point of public benefit could be taken into consideration upon the indictment under discussion. The chief justice held the question to be whether the navigation and passage of vessels on the river had been injured. And if the attention of the jury had been simply drawn to the necessary obstruction occasioned by the transfer of coals from the river to the sea, and the erection of the staith left in that light, the verdict for the defendants might well stand. But the matter of public benefit having been also presented to the jury, it was the opinion of Lord Tenterden that there should be a new trial. Holroyd, J., however agreeing with Mr. Justice Bayley, the rule for the new trial was discharged.² So the building of a bridge has been held to be lawful although the navigation was obstructed.³ A floating dock, though used for the purpose of repairing ships, has been deemed a public nuisance.⁴ And private stairs from houses standing by the Thames are said to come under the same denomination.⁵ So the mooring of barges in a

¹ *R. v. Lord Grosvenor and others*, 2 Stark. 511. See also, *R. v. The Sutton Pool*, 6 B. & C. 572, cited there. *Att. Gen. v. Owners of Wharves in Portsmouth Harbour*, Id. 573. *Att. Gen. v. Britain*, Id. 579.

² *R. v. Russell and others*, 6 B. & C. 566; 9 D. & Ry. 566. It was agreed in this case, when the judge began to sum up, that if a verdict should pass for the defen-

dants, the prosecutor might move for a new trial on the ground of misdirection.

³ *R. v. Betts and others*, 4 Cox, 211; 16 Q. B. 1022.

⁴ Anon. 1 Russ. C. M. 379.

⁵ Id. citing 5 Bac. Abr. Nuisance, A. But cuts made in the banks for timber are not nuisances if they be no annoyances to the river. Id.

public dock is an obstruction.¹ And in a recent case, the opinion of Lord Tenterden, above expressed in *R. v. Russell*, seems to have been adopted. The defendant was indicted for erecting an embankment in the water-way of a harbour, and the jury found that the embankment was a nuisance, but that the inconvenience was counterbalanced by the public benefit. It appeared, on the one hand, that the navigation was less free, but, on the other, that the landing of passengers and goods was facilitated, that boats could be better launched in foul weather, and that protection could be more easily afforded to small boats at certain periods. It was held, that this finding amounted to a verdict of guilty.²

It follows, *à fortiori*, that if the erection of buildings which in some measure tend to the public advantage are nuisances, actual interruptions and positive injuries without such benefit must of necessity be deemed such. As if one should cut down the banks of a public river;³ or put several loads of bricks upon the soil of a navigable stream;⁴ or place logs of timber there;⁵ or throw ballast into havens, roads, and channels, or elsewhere, if the navigation be thereby obstructed.⁶ For an offence may not be the less a misdemeanor at common law, as in this case of throwing ballast, because statutes inflict pecuniary penalties in respect of it. Again, dividing the course of a river is a nuisance;⁷ and so is a neglect to cleanse it on the part of those who are liable, for in this respect it may be likened to a highway out of repair. Those who have ease and passage along the stream are said to be liable in the first instance, and in default of such an easement, those who have the piscary are answerable.⁸ And it is not merely an obstruction to navigation which may happen through a want of cleansing, for the lands of the neighbouring vill may be overflowed through the accumulation of mud or other nuisance, and the public health might, moreover, be endangered in consequence of a similar omission.⁹ Neglect to repair a bank or wall, *ratione tenuræ*, is indictable in like manner.¹⁰

Neither, again, can a public canal navigation be obstructed, although the act done may be extensively beneficial elsewhere. So that an embankment made by the defendants which, in times of flood, caused the land water to damage the canal banks and obstruct the navigation, was deemed to be a nuisance, although in

¹ 4 M. & S. 101; see also 1 Esp. 252.

² *R. v. Ward*, 4 Ad. & El. 384; 6 Nev. & M. 38.

³ *R. v. Stanton*, 2 Show. 30.

⁴ *R. v. Haddock*, Andr. 137.

⁵ 1 Russ. C. M. 379; citing 5 Bac. Abr. Nuisance, A.

⁶ See 2 Burr. 656.

⁷ Noy. Rep. 103; 1 Hawk. c. 75, s. 11.

⁸ 37 Ass. pl. 10; 1 Hawk. c. 75, s. 13.

⁹ *R. v. Wharton and others*, 12 Mod. 510. See also 13 Rep. 33; 8 B. & C. 795.

¹⁰ *R. v. Earl Cadogan*, 5 B. & Ald. 902. But the court would not allow the prosecutor to inspect the court rolls of the manor of which the defendant was lord, in order to make out a case for the prosecution.

the event of removing the fenders complained of, several hundreds of acres would be again exposed to inundation.¹ And a distinction was taken between an act of this kind and the right of embanking against the encroachments of the sea as a common enemy.² To say the least, the defence in the one case would be to keep out the water from coming where it had never before come; in the other, the land water is restrained from passing in the way in which, when the occasion happened, it had always been accustomed to pass.³ But a *venire de novo* was subsequently awarded upon error brought in the exchequer chamber, the judges thinking that the jury ought to have found—whether the raising of these fenders were an ancient and rightful usage—or whether they had had their beginning since the construction of the canal—whether the course of the flood water were not the ancient course—and whether the raising of the fenders had not been occasioned by the construction of an aqueduct.⁴

We have said, that but few defences are available to answer an indictment for obstructing the course of a navigable channel, and that the extinguishment of such a right is far more difficult than a partial abridgment of it. An Act of parliament, however, may accomplish both these results; and, likewise, a writ of *ad quod damnum*, or a natural cause.

The defendants were indicted for a nuisance in cutting a trench across a highway, under pretence of the way in question being a public navigable stream. It turned out, however, that the road thus interfered with had existed so long as to prevent the state of the channel where the road was made, from being correctly ascertained, and the jury found a verdict of guilty. A new trial being moved for, the learned judges were of opinion that the public right had been destroyed by a natural cause in the present instance, a deposit of silt and mud having blocked up the channel, and they discharged the rule.⁵ And it was agreed that such a public right might likewise be put an end to by an *ad quod damnum*,⁶ or by an Act of parliament, or by commissioners of sewers,⁷ whose authority rests upon the statute law. And Lord Tenterden some time afterwards remarked, that the want of a writ of *ad quod damnum* would not be conclusive against a defendant;⁸ whence it follows, that other circumstances may exist capable of creating a change in the public interest. Where, however, an Act of parliament and the right of the public can co-exist,

¹ *R. v. Trafford*, 1 B. & Adol. 874.

² 1 B. & Adol. 880. *R. v. Com. of Sewers for Pagham*, 8 B. & C. 355.

³ 1 B. & Adol. 888, Lord Tenterden.

⁴ *Trafford v. The King*, 8 Bingh. 204; 2 Cr. & Jer. 265; 1 Moo. & Sc. 401.

⁵ *R. v. Montague and others*, 4 B. & C. 598; 6 D. & Ry. 616.

⁶ See *Att. Gen. v. Brittain*, 6 B. & C. 579, cited.

⁷ 4 B. & C. *ut supra*, note (1), per Bayley, Holroyd, and Little-dale, JJ.

⁸ 6 B. & C. 600.

the former will not operate as an extinguishment of the highway. As where part of the river Wye was vested in private persons, and an action was given them for damages done to their rights, but, nevertheless, it was found by a special verdict that the Wye was navigable. In this case judgment was given for the crown against the defendant for cutting down the banks of the river, and thus diverting the watercourse.¹ So where the public had always enjoyed a towing path on the banks of a navigable river; and, subsequently, an Act of parliament converted the river in that part into a floating harbour, so that the path could be used at all times of the tide, it was held, that the right of the public could not be extinguished because other persons had been furnished with an authority to render its exercise more easy and beneficial, and judgment was given for the crown.² Power likewise is given by the highways and turnpike Acts to get materials from any river or brook, provided that the surveyor do not interrupt nor divert the course of the stream, nor get the same within the distance of 150 feet above or below any bridge, nor within the like distance of any dam or wear.³ But the surveyor must not take the sea-beach, where the removal of it would cause any damage or injury by inundation to the lands adjoining, or increased danger of encroachment by the sea.⁴ All pits or holes made in such rivers or brooks must be filled up by the surveyors, under certain penalties for omission.⁵

Again, there may be an excusable abridgment of this right through a casualty. As where a vessel was sunk by an accident, so that the passage along the Thames became obstructed, Lord Kenyon at once took the distinction between misconduct and casualty, and held that the indictment could not be sustained. Perhaps, said his lordship, the expense of removing the vessel might have amounted to more than the whole value of the property. An acquittal was directed.⁶

In a late case, upon an indictment for placing planks in a harbour, where the jury found that through the defendant's works the harbour was in some extreme cases rendered less secure, the court were of opinion, that the consequences were too slight to create a nuisance.⁷ And, of course, temporary repairs cannot be said to be an obstruction.⁸ But the exercise of a right of fishery will not be a defence. The right of a fishery is subservient to the purposes of navigation.⁹ And it will be remembered as a general principle, that no length of time can legitimate a nuisance.¹⁰

¹ *R. v. Stanton*, 2 Show. 30.

² *R. v. Tippet*, 3 B. & Ald. 193. See also *R. v. Smith and others*, Dougl. 441.

³ 3 Geo. 4, c. 126, s. 97; 5 & 6 Will. 4, c. 50, s. 51.

⁴ 5 & 6 Will. 4, c. 50, s. 52.

⁵ 3 Geo. 4, c. 126, s. 99; 5 & 6 Will. 4, c. 50, s. 55.

⁶ *R. v. Watts*, 2 Esp. 675. The

owner of the sunken vessel, however, ought to place a buoy there. 1 Campb. 515.

⁷ *R. v. Tindal*, 1 Nev. & P. 719; 6 Ad. & El. 143.

⁸ See 1 Ld. Raym. 386.

⁹ See 1 Camp. 517, *n.*; 3 Burr. 1768.

¹⁰ See 2 B. & Ald. 662; 2 Br. & Bing. 403.

Proceedings.] The proceedings for these obstructions may be said to consist of indictments, informations at law and in equity,¹ and presentments. They may also be abated, and an injunction is sometimes applied for to a court of equity.² But the court will not grant an information where much time has been allowed to pass without objection to the encroachment, unless a grand jury has refused to find a bill of indictment. Therefore, when fourteen years had elapsed without an application, the court refused the rule.³ An indictment of this nature cannot be referred to arbitration. The court, under such circumstances, refused to make an order for costs in pursuance of an award.⁴

Indictment.] The count for obstructing a navigable river states, that the *locus in quo* is an ancient river for the king's subjects to navigate, sail, row, &c. at their will and pleasure, without impediment. The indictment then sets forth the obstruction, describing it accurately, and avers its continuance, and then concludes by stating that the river is straitened by the obstruction complained of, to the common nuisance of the king's subjects.⁵ It must not be said, to the common nuisance of the inhabitants.⁶

The termini need not be set out,⁷ for highways have no bounds,⁸ and the court will take notice of the river Thames.⁹

Judgment.] The judgment is fine, together with abatement of the nuisance complained of, and the measure of the fine will be enhanced or mitigated according to the condition of the place where the obstruction has happened. So, that if a defendant exhibit a willingness to repair the evil he has occasioned, his conduct will weigh with the court when they come to apportion the penalty. And although a nuisance is a matter of fact, and so is commonly left to the consideration of a jury, yet if the crown should exhibit an information for a purpresture, and should prove a right to the soil, the court will give judgment to abate a nuisance without the intervention of a jury.¹⁰

Obstructions to public fisheries.] Lastly, there may be an obstruction to a public fishery, although it must be borne in mind that the fishery must yield to the superior claim of navigation, if there should be a collision between the two rights. However,

¹ *Att. Gen. v. Richards*, 2 Anst. 603, 607. *Parmeter, appt. Att. Gen., respt.* 1 Dow. 316. *Att. Gen. v. Philpot*, Id. 608.

² *Att. Gen. v. Johnson*, 2 Wils. Cha. C. 87, for choking up the bed of the Thames at Millbank.

³ *R. v. Green*, 1 Lord Keny. 739.

⁴ *R. v. Blakemore*, 14 Q. B. 544;

⁴ Cox, 332. See *R. v. Hardey*, ante.

⁵ See also 6 Went, Ind. putting putts in the river Severn.

⁶ *R. v. Thorowgood*, 1 Mod. 107.

⁷ *R. v. Haddock*, Andr. 137.

⁸ Id. 145, per Lee, C. J.

⁹ Id. 150, by Chapple, J. See likewise *R. v. Sorill*, 2 Bulst. 119.

¹⁰ *Att. Gen. v. Richards*, 2 Austr. 615.

setting this point aside, it is not competent for a person to invade a public right of piscary; and, therefore, where Lord Lonsdale and the corporation of Carlisle erected stells in the Eden, whereby all the fish were stopped in their passage up the river, the court held, that these stells were illegal, and a public nuisance.¹ These obstructions must be abated, as well as those which concern navigation, and some statutes give power to justices to exercise a very summary jurisdiction in cases of obstruction by banks, dams, stanks, nets, &c.

It would not appear to be necessary to state the number of fish lost or injured by an obstruction. It was held in case of stealing carp, that such an enumeration need not take place.²

CHAPTER VII.

NUISANCES—PUBLIC HEALTH.

There may be enumerated under the head of nuisance, acts which are injurious to the health of the community, which are, for the most part, common law misdemeanors, and the legislature has not been wanting to lend assistance in cases of novelty or emergency.

Amongst such offences, those which threaten mischief to the largest number of persons are regarded with the most jealousy. And thus it is that the supposed infection of the plague, the spread of an epidemic disorder, as the cholera, have been viewed with much apprehension, and made the subjects of the strongest enactments. For many years, indeed, the breach of quarantine, or the forty days' probation, was a capital crime, and it was not until the first year of the reign of the present Queen that the statute of James I., prescribing the punishment of death against such infected persons as should go abroad contrary to orders, was repealed.³ But, far from a continuance of such severities, the legislature has reduced the punishment accompanying the violation of quarantine to imprisonment and forfeiture.

Quarantine.] Thus by 6 Geo. 4, c. 78, s. 17, every commander, master, or other person having charge of any vessel, liable to perform quarantine, and on board of which the plague or other infectious disease shall not then have appeared, who shall quit, or allow any person to quit the vessel without licence during quaran-

¹ 7 East, 199, cited by Lord Ellenborough.

² *R. v. Wetwang*, 1 Lev. 203.

³ It was, however, a clergyable

felony, whereas the breach of quarantine was not clergyable. See 26 Geo. 2, c. 6, repealed.

tine, or shall neglect to convey such vessel into the place appointed for quarantine, shall forfeit 400*l.* And pilots, or other persons coming in such vessels and leaving them before the end of quarantine, shall suffer imprisonment for six months, and forfeit 300*l.*¹

This offence, however, is also a misdemeanor at common law. An order in council was made, forbidding persons subject to quarantine from leaving ships coming from infected places, until their time of probation should be at an end. This order was disobeyed by the defendant, and the court was quite clear that as the stat. 26 Geo. 2, c. 6, s. 1,² had not annexed any punishment for neglecting this order, the defendant had been guilty of a common law misdemeanor, and judgment of one year's imprisonment was pronounced.³

And, moreover, Lord Hale is of opinion, that it would be a great misdemeanor at common law if one were to go wilfully abroad in an infected state, and so produce the disease in another person through his conversation.⁴

Cholera.] So, when the cholera broke out in England, the legislature was not backward in providing against the supposed evils of infection.

By 2 Will. 4, c. 10, it was made competent for the privy council to make such orders as might tend to arrest the spread of that disease. And by sect. 3, any person wilfully violating an order so made, or neglecting to obey it, or offering resistance to it, was declared guilty of misdemeanor, and liable to a penalty not exceeding 5*l.* nor less than 1*l.*⁵ Provided, that if any person should have paid the penalty, or should have suffered imprisonment for nonpayment, it should not then be lawful to proceed against him as for the misdemeanor.

This Act was renewed by 3 & 4 Will. 4, c. 75, until the end of the then next session of parliament, but that time having now expired without a further renewal, the provisions mentioned may be considered as at an end.

Upon the same principle, persons who have exposed their children before the infection of the small pox has abated, have been deemed fully liable to punishment. As where a woman carried her infant along the highway near to certain dwellings whilst the child was labouring under that disease. It was moved to arrest the judgment, but the court was clearly against the defendant, and Le

¹ By sect. 21, any officer or person embezzling goods during quarantine, or being guilty of other neglect or breach of duty, shall lose his office and forfeit 200*l.* And if such person shall wilfully damage any such goods he shall pay 100*l.* damages, together with full costs of suit to the owner.

² Repealed by 45 Geo. 3, c. 10, s. 9, which is itself repealed.

³ *R. v. Harris*, 4 T. R. 202; S. C. Leach, 549.

⁴ 1 Hale, P. C. 432.

⁵ To be recovered before two justices, by any person who should sue for the same.

Blanc, J., in passing sentence, said, that this Act was a common nuisance, and indictable as such.¹

A precedent is also mentioned of an indictment against an apothecary for keeping a common inoculating house near the church in a town.² And where it was proposed to quash an indictment for keeping a house for inoculation, the court observed that they would not quash as of course indictments for nuisances: the defendant must demur.³ After these decisions it is not surprising to find that an apothecary, who suffered children to be carried along a public street whilst they had the small pox, was declared to be guilty of a misdemeanor. The plea in arrest of judgment, that the defendant was by profession a person qualified to inoculate, had no weight with the court. Lord Ellenborough referred to the terms "unlawfully and injuriously," distinguishing a course of inoculation when practised lawfully and innocently from the public evil created by the exposure. And the defendant was sentenced to be imprisoned for six months.⁴

Mala praxis.] The offence which is called *Mala praxis* is also a misdemeanor at common law.⁵ And, although Dr. Groenvelt, who was fined and imprisoned by the college of physicians for administering unwholesome pills and medicines, was discharged by the Court of King's Bench under a general pardon, yet they said, that this evil practice was not the less an offence at common law, for there is a violation of the trust which the party has placed in the physician, and it tends directly to the patient's destruction.⁶ But the mere fact of failing to cure the prosecutor of an ulcerated sore throat, according to an undertaking made by the defendant, was held not indictable. It was not a public offence.⁷

Bad food.] We have seen, likewise, in a former page, that the sale of unwholesome provisions is a punishable act,⁸ and although the matter was there treated as a cheat, yet Lord Ellenborough said, that he who deals in a perilous article, must be wary how he deals, otherwise, if he observe not proper caution, he will be responsible.⁹ Victuallers, brewers, and other dealers in victuals are liable, probably, whether cognizant or not of the badness of the provisions. They are also civilly liable without fraud or warrant

¹ *R. v. Vantandillo*, 4 M. & S. 72. So again, 4 M. & S. 274. By Le Blanc, J. See also *R. v. Bunce*, Andr. 163.

² 1 Russ. C. M. 114, note (a), citing 2 Chit. C. L. 656.

³ *R. v. Sutton*, 4 Burr. 2116. This case was recognized by Lord Ellenborough in *R. v. Vantandillo*, supra.

⁴ *R. v. Burnet*, 4 M. & S. 272. See also 3 & 4 Vict. c. 29, s. 8.

⁵ 2 Ld. Raym. 214, *per cur.*

⁶ The patient died in this case of Dr. Groenvelt. *R. v. Groenvelt*, 1 Ld. Raym. 213; 12 Mod. 119.

³ Salk. 265. See also *Groenvelt v. Burwell and others*, Com. Rep. 76.

⁷ *R. v. Bradford*, 1 Salk. 189; Ld. Raym. 366.

⁸ *Ante.*

⁹ 3 M. & S. 14.

on their part. But the law does not apply to a private person, who happens to sell unwholesome victuals, knowingly or otherwise.¹

Judgment.] It may just be remarked, that the sentence in all the respective cases above mentioned, is fine and imprisonment.

Noisome smells.] In discussing the subject of nuisance hereafter, it will be found that many of these misdemeanors against the public health are also punishable under that head.

So again, a hurtful stink is a nuisance, and likewise the subject of an indictment. As where the defendants were concerned in making acid of sulphur, which corrupted the air. The court entertained no doubt of the validity of the charge, and Dennison, J., mentioned the terms insalubrity and offensiveness as applying to the particular annoyance which had been created.²

Judgment.] The judgment is that the nuisance be removed,³ if that has not been already done, but the defendant may also be fined and imprisoned, if the court see fit, and, indeed, it is usual to impose a nominal fine although the nuisance has been abated.⁴

¹ *Bumby v. Rollitt*, 16 Mees. & W. 645; 16 Jur. 827. See now, however, 23 & 24 Vict. c. 84.

² *R. v. White and another*, 1 Burr. 333. See Cro. Car. 510.

³ *R. v. Topayle*, Cro. Car. 510.

⁴ *R. v. White and another*, 1 Burr. 333.

PART XVI.

Of other Indictable Offences.

By 52 Hen. 3, c. 23, any farmer making waste or exile of house wood and men during his term, or of anything belonging to his farm, without special licence by writing of covenant, shall yield full damage, and be grievously amerced.

Births, marriages, &c.] Matters connected with births, marriages, and burials, have been considered deserving the attention of the legislature. It is the policy of the law, that births should be not only without concealment, but that a careful registry should be made of all which occur. And thus the parent, or occupier of each house where a birth happens, must, upon request, give information to the registrar respecting the particulars of such birth, within forty-two days after the application made for that purpose.¹ And disobedience to this ordinance is a misdemeanor,² the statute being imperative. Penalties are also awarded, by the statute just referred to, against such as are guilty of neglect or omission in the prosecution of the registry.

An indictment against a clergyman for refusing to marry certain persons, cannot be sustained in the absence of proof that the parties tendered themselves to be married at a time when the ceremony could take place. A demand at 9 P. M. is insufficient.³ And, perhaps, there should have been an averment that the parties were such as could be lawfully married.⁴ Still a refusal to marry under 6 & 7 Will. 4, c. 85, (the Act in question,) was held to be a misdemeanor.⁵

Marriages.] The registration of marriages has been provided for by parliament, and certain offences upon this subject are punishable, as we have seen, as felonies or perjuries. The residue are made subject to penalties.⁶

¹ 6 & 7 Will. 4, c. 86, s. 20.

² *R. v. Price*, 3 P. & Dav. 421.

³ *R. v. M. James*, Clk. 19 L. J. M. C. 179.

⁴ *Id.* 182. Alderson, B.

⁵ S. C. Whether a refusal on the

ground of want of confirmation, or of a desire to be confirmed, would be sufficient, qu. ?

⁶ See 6 & 7 Will. 4, c. 86, ss. 42, 43.

Burials.] Omissions to register burials are likewise subjects for a penalty,¹ but they are not misdemeanors, nor does there seem to be any misdemeanor expressly created by the late Act upon that subject. But there is a clause which requires any person present at a death or in attendance during the last illness of the deceased, or the occupier of the house where the death has happened, in case of the death, illness, inability, or default of any such persons as aforesaid, or any inmate in case of the death of the occupier, to give information to the registrar concerning the death, within eight days after a request made for that purpose. And as disobedience to the commands of a statute is a misdemeanor at common law, a default in the particulars above mentioned will subject the offender to the common law punishment.² Omitting to send for the coroner in the case of a violent death, is a misdemeanor. And whoever, after an order in council directing the discontinuance of burying, shall bury any body, or assist therein, shall be guilty of a misdemeanor.³ And no body shall be buried in any other parish, under the Metropolis Act, while the ground has been ordered to be closed as aforesaid, (except where a body belonging to a family has been there interred, and the relations desire the interment,) upon pain of misdemeanor.⁴ However, under a later Act, (18 & 19 Vict. c. 128, s. 2,) the offence is punishable by a penalty of 10*l*.

Obstructing burials.] It is a misdemeanor to obstruct the performance of a burial service in an illegal manner. But the nature of the obstruction must be specified. Where the defendant was indicted for such an offence, and for unlawfully preventing a burial by threats and menaces, it was held, that the particular threats should have been set out, and the judgment was arrested. In this case there were two counts. One of them described the minister interrupted as W. C., clerk, and the second designated him as the said W. C. The defendant was convicted on the second count only, and for want of saying more than the said W. C., and showing that W. C. was a clerk, and engaged in the lawful performance of the rites of sepulture, the indictment was held faulty on that ground also, for the court will not make an indictment good by inducement.⁵

Innkeeper and guest.] It is an offence for an innkeeper to refuse admission to a guest. But there may be circumstances which will tend to discharge the defendant from the indictment preferred against him. As, for example, the drunkenness, or indecent, or improper behaviour of the applicant.⁶ Or that there was no room.⁷ Or that the guest refused to tender a reasonable price for his en-

¹ See 6 & 7 Will. 4, c. 86.

² Fine and imprisonment.

³ 15 & 16 Vict. c. 85, s. 4, within the metropolis. 16 & 17 Vict. c. 134, s. 3, beyond the metropolis.

⁴ 15 & 16 Vict. c. 85, s. 5. The

statute 14 & 15 Vict. c. 89, s. 3, seems to be repealed.

⁵ *R. v. Cheere*, 4 B. & C. 902; 7 Dowl. & Ry. 461.

⁶ *R. v. Ivers*, 7 C. & P. 213.

⁷ See *R. v. White*, Dy. 158.

tainment.¹ But it is not an answer to show that no sign was visible, if the party in reality kept an inn,² or that the price of the victuals or lodging was not tendered, if no demand was made by the landlord,³ or that the traveller came on a Sunday, or after the family were gone to bed, or that he refused to disclose the particulars of his name and abode.⁴

The indictment must state, however, that the prosecutor was a traveller; for want of such an allegation the court quashed a count for not receiving one taken ill with the small pox.⁵

Judgment.] The judgment for this misdemeanor is fine and imprisonment.

Negligent burning by servants and others.] It should seem, that wilful neglect by which a fire is occasioned is a great misdemeanor at common law; and by 6 Ann. c. 31, s. 3, and 14 Geo. 3, c. 78, s. 84, a servant who sets fire to a house or outhouses negligently, shall, on conviction before two justices, forfeit 100*l.* to the churchwardens for the benefit of the sufferers, and on refusal to pay, after demand, shall be committed to some workhouse or house of correction for eighteen months, with hard labour.

Misconduct on railroads.] Further, by 3 & 4 Vict. c. 97, s. 14, it is made competent for a justice to commit a person charged with the offences mentioned in the prior section⁶ to the sessions, and such person, upon conviction, shall be imprisoned, with or without hard labour, for any term not exceeding two years. But the justice may take bail for the appearance of the offender at the sessions.

Refusal of office.] Questions concerning the refusal of office have frequently arisen in the cases of constables,⁷ overseers, and sheriffs, but the rule is general, and applies to all public functionaries, whose duty has a tendency to promote the interests of

¹ 1 Hawk. c. 78, s. 2; 9 Rep. 87.

² Palm. 374; 2 Ro. Rep. 345; Godb. 346; 1 Hawk. c. 78, s. 2.

³ *R. v. Ivers*, 7 C. & P. 213.

⁴ *Id.*

⁵ *R. v. Luellin*, 12 Mod. 445. An action to recover damages for such a refusal will also lie. 1 Hawk. c. 78, s. 2; Palm. 374.

⁶ Sect. 13.—The offences are these:—Any engine driver, guard, porter, or servant, being drunk when employed on the railway. Committing any offence against the byelaws, rules, or regulations of the company. Wilfully or negli-

gently doing or omitting to do any act whereby the life or limb of any person passing along or being upon the railway or the works of the company, shall be or might be injured or endangered, or whereby the passage of any of the engines, carriages, or trains, shall be or might be obstructed or impeded. Offenders may be apprehended at once by any officer or agent of the company, or by any special constable, and persons whom they may call to their assistance.

⁷ Fort. 129.

society.¹ And it is no ground of defence that the office is one which has been created by statute, because an indictment will lie at common law for disobedience to an Act of parliament. Thus a special constable may be indicted.² Hence it follows, that *prima facie*, a party is always subject to be proceeded against for a refusal of this nature, and it consequently lies upon him to urge reasons why he should not be convicted. The most ordinary pleas are those of exemption by virtue of a licence or other privilege, or by a legal incapacity to perform the required duties. Thus, the defendant claimed to be discharged from serving the office of constable because he was a member of the barbers' company, but Lord Ellenborough held that the exemption sought for was limited to such persons as had been examined by the Bishop of London or Dean of St. Paul's, and licensed to practise surgery according to the provisions of certain statutes of Hen. 8, and the defendant was found guilty upon an indictment.³ So a younger brother of the Trinity House was held liable to serve the office of headborough,⁴ a borsholder⁵—and a watchman⁶—an inspector of lottery offices.⁷ So a captain in the guards was considered bound to serve as constable, for although he might plead personal attendance on the king, yet the more ancient employment of constable must prevail against a later institution.⁸ So likewise a practising physician was held liable upon one occasion;⁹ but the authority of this decision has been doubted,¹⁰ and, at all events, if there be sufficient persons besides to execute the office, and no special custom concerning it, the party may, perhaps, be relieved by the King's Bench,¹¹ and upon this ground, a gentleman of quality will be excused.¹² So, notwithstanding an exemption a person becomes compellable to serve if he be elected for a larger jurisdiction than that comprised in his privilege. As where the defendant had a certificate in respect of all parish offices within the parish of Birmingham, but was subsequently indicted for refusing to take upon himself the duty of constable for the manor of Birmingham, which comprehended the parish of Birmingham and the hamlet of Deritend; the court were of opinion that as the parish and manor in this case were not co-extensive, the defendant must submit to have judgment entered for the crown.¹³ So again, privilege as to a town was deemed to be no discharge in respect of a superior leet.¹⁴ Upon the same principle, tenant in ancient demesne, although discharged from toll, pontage, and

¹ See, as to constables, *R. v. Dansey*, *R. v. Lone*, Str. 920; Ca. Sett. 212.

² 9 C. & P. 105, by Alderson, B.

³ *R. v. Chapple*, 3 Campb. 91.

⁴ *R. v. Clarke*, 1 T. R. 679.

⁵ At the same time, *R. v. Beale*, Ca. Sett. 100.

⁶ *R. v. Clerke*, 1 Keb. 933.

⁷ *R. v. Wood*, 1 Esp. 359.

⁸ *R. v. Vane*, 1 Sid. 355; 2 Hawk. c. 10, s. 41.

⁹ *R. v. Dr. Pordage*, 1 Sid. 431, where the privilege is said to have been allowed. 2 Hawk. c. 10, s. 41.

¹⁰ Comb. 31, by Wythens, J.

¹¹ 2 Hawk. c. 10, s. 41.

¹² *R. v. Wright*, 1 Keb. 439.

¹³ *R. v. Darbishire*, 2 Burr. 1182.

¹⁴ *R. v. King*, 3 Keb. 230.

murage, was held eligible to be high constable, notwithstanding an objection that he would be drawn out of the ancient demesne, for the office of a constable is for the preservation of the peace and government.¹ So, again, it was adjudged upon a special verdict that an inhabitant of a particular leet was liable to serve the office of high constable,² and many years afterwards the same doctrine was adhered to, and the custom to elect a constable in that manner which appeared for the special verdict was held good.³

It was made a question upon one occasion whether a college barber residing at Oxford, in the city, out of college, could be indicted for not taking upon him this office in the city. It was contended, that though he might be a privileged person, yet that as his residence was not within the walls of the college he must still be considered as liable. The verdict being against the defendant the court granted him a new trial upon other grounds, but the case does not appear to have gone before a second jury.⁴ In 2 Jac. 2, it was agreed by the court that a person might be appointed constable although he did not reside within any leet.⁵ It has likewise been held that a naturalized foreigner is not liable to serve the office of constable.⁶ The charge, however, must set forth the authority which elected the constable, and likewise that he had notice of the appointment. For want of these allegations a motion to quash an indictment was allowed.⁷ And the place also where he ought to be sworn has been deemed a material part of the notice.⁸ He must also be said to have been an inhabitant when chosen.⁹ So where a corporation neglected to prescribe for their right to appoint a constable, an indictment was quashed, since a corporation cannot, of common right, elect such an officer.¹⁰

Again, if a person be elected overseer, he is liable to an indictment for refusing to execute that office,¹¹ and although residence is a necessary ingredient in the qualification required for this employment,¹² the payment of rent and taxes, and occupation of premises for the purposes of business, have, nevertheless,

¹ *R. v. Bettsworth*, 2 Show. 75; 1 Ventr. 344.

² *R. v. Jennings*, 11 Mod. 215. But the indictment was quashed for want of stating that the court was held at the time prescribed by magna charta. Id. 227.—See also *R. v. Boycot*, 1 Ld. Keny. 318.

³ *R. v. Genge*, Cowp. Rep. 13, and it is no defence to urge that the refusal is punishable in the leet. *R. v. Lowe*, cited, 7 Mod. 411.

⁴ *R. v. Routledge*, Doug. 531.

⁵ Ca. Sett. 211.

⁶ *R. v. De Mierre*, 5 Burr. 2788.

⁷ *R. v. Harpur*, 5 Mod. 96.

R. v. Halford, Comb. 328. S. C. *R. v. Prigg*, Al. 78.

⁸ *R. v. Chute*, 1 Keb. 418.

⁹ *R. v. Boycot*, 1 Lord Keny. 318.

¹⁰ *R. v. Bernard*, 1 Lord Raym. 94. As to special constables, see 1 Geo. 4, c. 37, repealed. *R. v. Vincent*, 9 C. & P. 91. *R. v. Thomas*, 1 Russ. C. M. 145.

¹¹ *R. v. Jones and another*, 7 Mod. 410; 2 Str. 1146. As, on the other hand, a person is equally liable to punishment who endeavours, by illicit means, to procure the appointment. *R. v. Joliffe*, 1 East, 154, n.

¹² *R. v. Moor*, Carth. 161.

been esteemed sufficient evidence of being a resident householder for this purpose.¹ The court, moreover, in the case referred to, remarked, that the defendant had enjoyed one of the privileges of a resident householder, inasmuch as he had voted for a lecturer, a privilege belonging to resident householders only.² An acting justice of the peace and lieutenant of marines was held to be exempt from serving this office, there being others sufficient within the parish.³ An indictment which stated that the defendant was appointed overseer of the parish for the year then next ensuing was held sufficient, without saying "of the poor of the parish," especially as the word "poor" appeared in a former part of the indictment, and the words "year ensuing" were held to mean the overseer's year.⁴

Sheriff.] Again, an indictment will lie for not serving the place of sheriff. And where sentences of excommunication and disabilities for not taking the sacrament were connected with a refusal to serve this office, it was the opinion of the courts at one time that the person so refusing was, nevertheless, answerable under an indictment, because it was his duty to remove the incapacity.⁵ But a different construction subsequently prevailed in the case of conscientious dissenters,⁶ and religious tests are now, for the most part, withdrawn by late Acts of the legislature. In these cases the indictment must show the liability, and how the defendant refused to serve.⁷

A refusal to take office is shown by the defendant's unwillingness to take the proper oaths of office, or otherwise to qualify himself for his appointment,⁸ and, *à fortiori*, by his express refusal.⁹

There are, notwithstanding, many instances in which the requisition to serve these offices had been successfully resisted on the ground of privileged exemption, non-residence, or otherwise. Thus, with reference to the want of inhabitancy, although an overseer may not be discharged on that ground, a constable can well avail himself of such a defence, being taken to be "conversant where his bed is,"¹⁰ and the distinction is, that the constable's duty consists in personal attendance, and a principal qualification on his part is the circumstance of his being known to the inhabitants of the district. Therefore, where the defendant was not resident in the parish where he was appointed constable, he had judgment

¹ *R. v. Poynder, sen.*, 1 B. & C. 29; Skin. 574. See also *R. v. Grosvenor*, 2 Str. 1193. *Harrison v. Evans*, 6 Bro. P. C. 181. See

² S. C.

³ *R. v. Gayer*, 1 Burr. 245. And so is a constable. *R. v. Price*, Tho. Jones, 46. *Id.* note 1.

⁴ *R. v. Burder*, 4 T. R. 778.

⁵ *Attorney-General v. Sir J. Read*, 2 Mod. 299.

⁶ *R. v. Larewood*, 1 Ld. Raym.

⁷ *R. v. Sellars*, 3 Mod. 167.

⁸ See *R. v. Harpur*, 5 Mod.

⁹ *R. v. Brain*, 3 B. & Adol. 614.

¹⁰ See 2 Inst. 122.

upon an indictment after argument, although he occupied a house within the parish, and paid all rates in respect of it. And it was held to be no answer that he could appoint a deputy, for supposing that he could do this without the assent of some other authority, he would not be compellable in consequence to take upon himself an office requiring personal services, especially in the absence of any proof that there was a necessity for his appointment.¹

A licence or privilege is likewise an exemption. As in the case of a surgeon who is discharged by the custom of the realm as well as by the equity of some statutes and the positive enactments of others.² So an attorney or barrister enjoys a privilege of exemption, because of attendance in public courts,³ and these persons are entitled to be free whether there be a special custom to choose constables or not;⁴ and the servants of a member of parliament have been mentioned as equally privileged.⁵ So, again, an alderman of London has been held entitled to his writ of discharge.⁶ And there is a power inherent in the crown to exempt from the office of constable or headborough,⁷ subject only to this modification at common law, that there be a sufficient number of persons left to serve.⁸ So persons of quality are not liable, if this common law doctrine of a want of other sufficient officers do not apply to their cases.

And it is no ground for objecting to the exercise of a privilege that the party has not sued out his writ of privilege. It is enough if he be in a condition to have his writ at the time of the appointment. The court, therefore, in the case of an officer of customs, who had been elected overseer, made the rule absolute for a new trial, where a conviction had taken place under such circumstances, and they would not saddle the defendant with the costs of the trial which had taken place.⁹

The common course of proceeding is by indictment or information, but the court will not always grant the latter remedy, especially where there is a doubt as to the general liability of the individual. Nor, again, where the party is not usually resident within the corporation, nor where there is no ground for imputing obstinacy to him.¹⁰ If the attorney-general should be satisfied that the defendant is exempted, as in the case of a surgeon, he will, if he thinks fit, enter into a *noli prosequi*. But the Court of Queen's Bench will not interfere by granting a writ of privilege, because a person is appointed who is manifestly disqualified by reason of his holding another employment. Thus Mr. Delamotte, who was a justice of peace, living at Blackheath and in London, was referred

¹ *R. v. Adlard*, 4 B. & C. 772; S. C. 7 D. & Ry. 340.

² *R. v. Pond*, Com. Rep. 312.

³ 1 Mod. 22.

⁴ 2 Hawk. c. 10, s. 39.

⁵ 1 Mod. 13; 2 Hawk. c. 10, s. 39.

⁶ *R. v. Abdy*, Cro. Car. 585.

⁷ 1 T. R. 686, by Buller, J., 1 Sid. 272.

⁸ 1 T. R. *ut supra*.

⁹ *R. v. Warner*, 8 T. R. 375.

¹⁰ *R. v. Denison*, 2 Ld. Keny. 259.

to the sessions upon his appointment as a constable in London, and the writ of privilege was denied.¹

But the sessions cannot commit. They can only direct an indictment to be preferred against the party refusing, and thus a defendant was discharged upon a *habeas corpus* sued out by him in consequence of a commitment by the justices at sessions.² The court, however, granted an information against a person for refusing the office of sheriff, because it would be nearly a year before the indictment could be tried, and there would, in the meantime, be a hindrance to public justice.³

Breach of duty.] Secondly, as the person appointed to be overseer, constable, or other officer is indictable if he refuse to take office, so if he accept it and do not discharge his employment properly, he is punishable for his misbehaviour. As if he neglect to provide properly for the poor,⁴ or omit to shield them from the weather,⁵ or exact labour from those who cannot work,⁶ or withhold proper medical assistance, and it needs not to be shown that the pauper was in the workhouse, or that he stood previously in want of medical aid,⁷ or refuse to render his accounts,⁸ or neglect to make a proper rate.⁹

An information was filed against one of the members of council at Madras for malversations in office.¹⁰

So an indictment was framed against the defendant as bailiff of the borough of Ilchester, for absenting himself from a corporate meeting, for the election of a new bailiff; but, in this latter case, the prosecution did not succeed for want of proof that the presence of the bailiff was necessary at such an election.¹¹ So an indictment lies for not collecting the poor's rate.¹² So where collectors of taxes made an unequal rate, and applied monies to their own purposes, which they had managed to levy from some whose names they had omitted in their books, they were found guilty

¹ *R. v. De la Motte*, 2 Str. 698.

² *R. v. Crawley*, Cro. Car. 567.

³ *R. v. Woodrow*, 2 T. R. 731.

⁴ *R. v. Tawney*, 16 Vin. Ab. 415.

⁵ *R. v. Wetherill and another*, Cald. 432.

⁶ *R. v. Winship*, Id. 76.

⁷ *R. v. Warren*, 1 Russ. C. M. 139.

⁸ *R. v. Commings and another*, 5 Mod. 179.

⁹ *R. v. Barlow*, 2 Salk. 609.

¹⁰ *R. v. Hollond*, 5 T. R. 607. In this case, it was held, that the indictment need not show the appointment, if there be a general statement that the defendant is an officer; that each individual of a

body is liable in his own person for a breach of duty, although the duty be thrown on the whole body; that it is sufficient to state a wilful breach without calling it corrupt; that it is not necessary to aver a revocation of orders, or that they are in force; nor to allege notice of certain acts which the officer must be presumed to know. It was held, however, that a charge for not prosecuting a war with vigour and decision was too uncertain, though the charge were made in the very words of the order given to the defendant.

¹¹ *R. v. Corry*, 5 East, 372.

¹² *R. v. Brown*, 3 Keb. 49.

upon an indictment for misdemeanor.¹ And it has been held, that in an indictment against a person for misconduct to the poor, the names of the poor persons need not be specified.² Every person holding a patent office under the crown, or derivatively from such authority, is liable to be indicted for not discharging his duty.³

So an information against overseers for removing a sick person illegally, was granted with approbation by the court.⁴ So there may be an indictment against a surveyor for a breach of duty.⁵

Judgment.] The judgment for these respective offences of refusals to take office, and breaches of duty, is fine and imprisonment.

Refusing apprentice.] It does not appear to be settled, whether a refusal to receive a parish apprentice is an indictable offence.⁶ A penalty was attached to such a refusal by 8 & 9 Will. 3, c. 30, s. 5; and there has been a decision upon appeal to the effect, that a party occupying lands in a parish, is compellable to receive such an apprentice, although he do not reside in the parish.⁷ The court, however, upon considering the validity of an indictment for this act of omission, declined to enter upon the general question, being of opinion that the binding brought before their notice was not one within 43 Eliz. c. 2.⁸

Usury.—Illegal brokerage, &c.] By 17 & 18 Vict. c. 90, s. 1, certain Acts against usury are repealed. But by sect. 2, transactions prior to the Act are not to be affected, and by sect. 3, interest payable upon any contract before the passing of the Act, is recoverable as if it had not passed. It is observable that the indictment at common law survives, rare as its use may be. The Act of Victoria only repeals the statutes of usury. It seems that usury, unless to the amount of 40 per cent. (which was called Jewish usury), is not an offence at common law.⁹ But Mr. Serjeant Russell cites an eminent legal opinion in favour of an indictment at common law, where the usury is clear and palpable.¹⁰ But the loan, or the taking of excessive interest, must appear in evidence. The reservation of rent, so as to produce an illegal interest, will not be a defence against usury.¹¹ It is not enough to show a corrupt agreement, without any measures founded upon the illegal contract. Judgment was arrested upon an indictment, by reason of this

¹ *R. v. Buck and another*, 6 Mod. 306.

² *R. v. Wetherill*, Cald. 432.

³ *R. v. Bembridge*, 1 Salk. 380, note (a).

⁴ *R. v. Edwards*, 8 Mod. 326. *R. v. Busbey and others*, 2 Barnard. 89.

⁵ *R. v. Anderson*, 3 Ch. Burn, 104.

⁶ See Str. 1268.

⁷ *R. v. Clapp*, 3 T. R. 107. See also *R. v. Barwick*, 7 T. R. 33.

⁸ *R. v. Trevilian*, Str. 1268.

⁹ Hardr. 420, per Hale, C. B.

¹⁰ 1 Russ. C. M. 458.

¹¹ Cro. Jac. 440. The value of the house in respect of which the corrupt contract was made, need not be stated. Id.

fault, after a verdict for the crown.¹ The corrupt bargain may be stated generally in the indictment.² The indictment must contain all the requisites of a declaration *qui tam* for usury.³

By 1 Vict. c. 80, no bill or note made payable at or within twelve months after date, or not having more than twelve months to run, shall, by reason of any interest taken or secured thereon, or any agreement to pay, receive, or allow interest in discounting, negotiating, or transferring the same, be void; neither shall the liability of any party to any bill or note be affected by reason of any statute or law in force for the prevention of usury; nor shall any person or body corporate, drawing, accepting, indorsing, or signing any bill or note, or lending or advancing any money, or taking more than the present rate of legal interest for the loan of money on such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture.

Illegal brokerage.] Then, as to illegal brokerage: Under the 7th section of the repealed statute, 12 Geo. 3, c. 26, s. 7, one Gillham was indicted for taking more than 10s. in the 100*l.* for brokerage. In this case it was held, that the exact sum taken was not necessary to be proved, the *quantum* of excess being immaterial; and Lord Kenyon mentioned *R. v. Burdett*⁴ as decisive, where the indictment for taking 20s. extorsively was deemed sufficiently satisfied by proof of taking 1s. in that manner. And with regard to any sum claimed for drawing deeds or writings, it was rightly left to the jury to say, whether the whole transaction were not in fact for the purpose of gaining usurious interest, though a sum might ostensibly be received for another object.⁵

By 17 & 18 Vict. c. 90, s. 4, No statute relating to pawnbrokers shall be affected or repealed by that Act.

It is likewise a matter of public convenience that licences, or certificates required by statute, upon many occasions should be punctually obtained. The neglect to procure such instruments is punishable at common law by indictment where there is a prohibitory clause independently of that which prescribes a penalty. But where the Act embraces both the forfeiture and the mode of procedure in one clause, an indictment cannot be maintained. An example of this may be found in a decision upon the 8 & 9 Will. 3, c. 25, concerning hawkers and pedlars.⁶

Aliens.] Disobedience to any Act of parliament is likewise punishable as a breach of public duty: as under the Aliens' Registration Act.⁷ All certificates are required to be given with-

¹ *R. v. Upton*, 2 Str. 816.

² Cro. Jac. 440.

³ 2 Ch. Cr. L. 549. See also *R. v. Sewel*, 7 Mod. 118.

⁴ 1 Ld. R. 149.

⁵ *R. v. Gillham*, 6 T. R. 265.

⁶ *R. v. Savage and others*, 1 Ld. Raym. 347. A single act of selling does not constitute a hawker. *R. v. Little*, Burr. 610.

⁷ 6 & 7 Will. 4, c. 11, s. 8.

out fee or reward whatsoever; and every person, who shall take any fee or reward of any alien, or other person, for any certificate, &c., shall forfeit 20*l*. Here, as the sentences are not united, strictly speaking, an indictment may be presumed to lie, although it is probable that the question may never be raised, by reason of the more easy course of recurring to the penalty; and, of late, the legislature has often expressly denounced acts in opposition to its ordinances as misdemeanors.

Russian stocks.] The stat. 17 & 18 Vict. c. 123, prohibited dealings in Russian securities created since March 29, 1854, upon pain of a misdemeanor. Several exceptions were added. By sect. 2, the general venue was Middlesex. Sect. 3 saved the offence of treason, but ordained that no person should claim to be acquitted on the ground of his offence amounting to treason; and, by sect. 4, the costs were regulated under 7 Geo. 4, c. 64, and 14 & 15 Vict. c. 55.

Anatomy Act.] Under the Anatomy Act,¹ any person offending against its provisions is declared to be guilty of that offence, and punishable by imprisonment not exceeding three months, or by a fine not exceeding 50*l*.

Insane persons.] By 8 & 9 Vict. c. 100, s. 23, no disqualified person, as a commissioner, visitor, &c., can act in lunacy without being guilty of a misdemeanor. Persons giving untrue statements are declared guilty of a misdemeanor.² So it is if any one should keep a house for the reception of two or more lunatics without a licence.³ So if a person (other than a pauper) be received without an order and medical certificate, the person receiving and the physician, &c. are guilty of misdemeanor,⁴ except under special circumstances.⁵ The statute 16 & 17 Vict. c. 96, s. 5, allows three days in certain cases before a medical certificate, signed by two persons, need be produced; but after these three days there must be two signatures on pain of a misdemeanor. The 7th section protects paupers. There must be an order and certificate, else the party receiving will be guilty of a misdemeanor. No medical practitioner who is interested in a licensed place can act as a commissioner, visitor, &c. upon pain of a misdemeanor.⁶ And an entry must be according to a set form by the party receiving, upon a similar pain.⁷ It is a misdemeanor to neglect sending a notice of admission to the commissioners or the clerk of the visitors.⁸ So it is in the case of the death, discharge, or removal of the patient, if no notice be given and entry made.⁹ The abuse or ill-treatment of a

¹ 2 & 3 Will. 4, c. 75, s. 18.

² 8 & 9 Vict. c. 100, s. 27.

³ Sect. 44.

⁴ 16 & 17 Vict. c. 96, s. 4;
16 & 17 Vict. c. 97, ss. 73, 74.

⁵ Which are set out in s. 5.

⁶ 8 & 9 Vict. c. 100, s. 23.

⁷ Id. s. 50.

⁸ Id. s. 52.

⁹ Id. s. 54. 16 & 17 Vict. c. 97,
s. 93.

patient is a misdemeanor.¹ By 8 & 9 Vict. c. 100, s. 59, and 16 & 17 Vict. c. 96, s. 14, there is to be a medical visitation book, and every physician, &c. making an untrue entry is guilty of a misdemeanor. The house and every part must be open to the commissioners and visitors under the like penalty.² So it is if full and true answers be not given to those officers.³ By 8 & 9 Vict. c. 100, s. 78, the commissioners are to make an entry in the patients' book, where they meet with a confined person of doubtful mind, and the same is to be sent to the clerk of the visitors, in order that they may visit the patient. A neglect to send a copy of the commissioners' minute to the clerk, or a neglect of the clerk to communicate the same to two of the visitors, is a misdemeanor. By 8 & 9 Vict. c. 100, s. 90, any person receiving a single lunatic without an order or medical certificate, except one who claims no profit, or a committee, shall be guilty of a misdemeanor. By 8 & 9 Vict. c. 100, s. 93, any person detaining a lunatic for three days after an order from the lord chancellor directing the removal of such lunatic, shall be guilty of a misdemeanor.

To give a false certificate, or to give one, not being a medical person, is a misdemeanor.⁴

The words of the statute 16 & 17 Vict. c. 96, s. 9, "Having the care and charge of a lunatic," do not apply to a husband who ill-uses his wife being a lunatic. The domestic custody of a lunatic is not within the Act. But the conviction for a common assault was sustained.⁵

By 17 & 18 Vict. c. 114, s. 2, graduates of the University of London are not to be subject to any charge under sect. 13 of the Act just mentioned, *i.e.* the 16 & 17 Vict. c. 96.

Election of mayor.] By 11 Geo. 1, c. 4, s. 6, any attempt by a mayor, bailiff, or other chief officer of a borough or town corporate to hinder the election of a mayor, by absence upon the proper day, or by preventing the election in any other manner, is made punishable by imprisonment for six months, and disability to hold office in the corporation.⁶

Poor Law Act.] By 4 & 5 Will. 4, c. 76, s. 13, if any person shall wilfully refuse to attend in obedience to any summons of any commissioner, or assistant commissioner, or to give evidence, or shall wilfully alter, suppress, conceal, destroy, or refuse to produce

¹ 8 & 9 Vict. c. 100, s. 56.
16 & 17 Vict. c. 96, s. 9. 16 & 17
Vict. c. 97, s. 123.

² 8 & 9 Vict. c. 100, s. 63.

³ 8 & 9 Vict. c. 100, s. 64.

⁴ 16 & 17 Vict. c. 96, s. 13.
16 & 17 Vict. c. 97, s. 122.

⁵ Dears. 483; 24 L. J. M. C.
129. *R. v. Rundle*, 6 Cox, C. C.
549.

⁶ See *R. v. Nicholletts*, 6 Nev.
& M. 827. Criminal informations
against the town clerk of Bridport,
for misconduct relating to the elec-
tion of borough councillors. *R. v.*
Marsh, 1 Nev. & P. 187. Indict-
ment for soliciting Joseph M. to
personate John M. at an election
for ward councillors.

any books, contracts, agreements, accounts, and writings, or copies of the same which may be required to be produced before such commissioner, or assistant commissioner, he shall be deemed guilty of a misdemeanor.¹

Tithes.] So under the Tithes Commutation Act,² if any person shall wilfully refuse to attend in obedience to any lawful summons of any commissioner, or assistant commissioner, or to give evidence, or shall wilfully alter, withhold, destroy, or refuse to produce any book, &c., which may be lawfully required from him, he shall be guilty of a misdemeanor.³

Copyholds Enfranchisement Act.] So, wilfully to refuse attendance in obedience to a summons under the Copyholds Enfranchisement Act is a misdemeanor, and to withhold evidence is a similar offence.⁴

Ship's registry.] Using or attempting to use a certificate of registry not legally granted is a misdemeanor in the master and owner, and the ship is forfeited. By 17 & 18 Vict. c. 104, s. 103, the concealment of a British or assumption of a foreign character is a misdemeanor, and likewise a false declaration of qualification as to ownership. By sect. 140, making false representations, forging or uttering certificates of competency or service, or making use of such, or lending a true certificate, is a misdemeanor. So, by sect. 164, uttering any entry, or making a false copy of any agreement. So making a false certificate of character, or forging or fraudulently using the same.⁵ By sect. 176, masters making false reports as to the discharge of persons under the Act, or committing frauds in respect of certificates under that section, are guilty of a misdemeanor. The prisoner was in the habit of altering such documents on payment of a reward. He erased letter M. from the character, which signified "middling," and inserted G., which meant "good." This act was held to be a misdemeanor within the section.⁶ So, by sect. 200, forcing a seaman or apprentice on shore, and leaving him there, is a misdemeanor. So, by sect. 207, discharging a seaman illegally, leaving him behind without certain sanctions. Another misdemeanor is a false representation or forgery in support of any application by an owner for extra expenses. So is any misconduct by a master or seaman tending to endanger the ship, or life, or limb.⁷ So, by sect. 284, to destroy, mutilate, or render illegible any entry in any official log book, or make, &c., any fraudulent entry or omission in any such log book, is a misdemeanor. So, by sect. 320, to forge a certificate respecting any passenger steamer.⁸

¹ And punishable with fine and imprisonment.

² 6 & 7 Will. 4, c. 71, s. 93.

³ And punishable accordingly, with fine and imprisonment.

⁴ 4 & 5 Vict. c. 35, s. 94.

⁵ Sect. 176.

⁶ *R. v. Wilson*, Dears. & B. 558, whether forgery at common law, qy.?

⁷ 4 & 5 Vict. c. 55, s. 239.

⁸ Sect. 220.

By sect. 366, any pilot in charge of a ship endangering the ship, or life, or limb, by a breach of duty, or drunkenness, or omitting necessary duty, is declared to be guilty of a misdemeanor, and liable to suspension and dismissal, if qualified. By sect. 518, every misdemeanor under the Act is punishable with fine and imprisonment, with or without hard labour. The costs are given under 7 Geo. 4, c. 64. Upon summary conviction the fine is not to exceed 100*l.*, nor the imprisonment six calendar months, with or without hard labour, and before two justices.¹ By sect. 496, the punishment for forging a false representation in cases of salvage, is imprisonment not exceeding two years, with or without hard labour, or, upon summary conviction, not exceeding six months.

Newspaper stamps.] By 6 & 7 Will. 4, c. 76, s. 6, if any person shall knowingly and wilfully sign and make a declaration, with the name, addition, or place of abode of the proprietor, publisher, printer, or conductor of the actual printing of any newspaper to which such declaration shall relate, who shall not be a proprietor, printer, or publisher thereof, or from which shall be omitted the name, addition, or place of abode of any proprietor, publisher, printer, or conductor of the actual printing of such newspaper, or shall make any other untrue statement in his declaration, or omit anything required by the Act, he shall be guilty of a misdemeanor.²

Election writs.] If any person concerned in the transmitting or delivery of any election writ, shall wilfully neglect or delay to deliver such writ, or shall take any fee, or otherwise violate the Act, he shall be guilty of a misdemeanor.³

Elections.] The stat. 3 Edw. 1, c. 5, threatens with "great forfeitures" such as shall by force of arms, malice, or menace, disturb any from making his free election.

Identity of voter at elections.] By 2 Will. 4, c. 45, s. 58, if any person shall wilfully make a false answer to the questions as to the identity of the voter, the fact of his having voted, or as to the qualification for which his name was originally inserted in the register, he shall be deemed guilty of an indictable misdemeanor, and shall be punished accordingly. The *same* qualification means the identical, and not a similar qualification in respect of other

¹ See as to the procedure, ss. 518, 519, *et seq.*

² And punishable with fine and imprisonment.

³ 53 Geo. 3, c. 89, s. 6. And be proceeded against either by indictment or information, and punished by fine and imprisonment, at the discretion of the court.

See also 5 Ric. 2, st. 2, c. 4, as

to sheriff omitting cities or boroughs which ought to send members, or being negligent as to his writs. The punishment was amercement. By the same Act, any person, whether archbishop, peer, or other person, absenting himself from a summons to parliament, was to be amerced.

premises of a like description. Nevertheless, if the voter be shown to have possessed property of an equal value, and it appear that he acted *bonâ fide*, although under a mistaken impression, he ought to be acquitted.¹

So, in order to procure a conviction, it should be shown that the proper officer read over his specific qualification to the voter. It was so held where the voter had changed his residence, but swore that he had the same qualification as before.² By the 14 & 15 Vict. c. 99, s. 14, a certified copy is sufficient upon proof of the office of the person signing. The return need not be produced. To prove that a person obstructed was a voter, a book entirely in writing, and signed, was put in. It should have been printed, but although irregular, it was deemed valid.³ It was also held that the decision of the revising barrister was conclusive, even if the list was not signed, and if the barrister had contravened the statute.⁴

But it is not a defence that the voter acted under the advice of an electioneering committee.⁵ A copy of the original register may be given in evidence to prove the charge, and if it resemble the original in respect of the name and description of the defendant, it will be sufficient.⁶

The indictment should state the writ and contain the precept, and that the defendant's name was on the register. Merely to allege, that the defendant appeared as a voter, and swore to his qualification, is insufficient,⁷ and the defect is hardly cured after verdict.⁸ The words of the answer should be proved as alleged.⁹ The father, William Goodman, was on the burgess roll, but had been for a long time absent. The question put was, "Are you the person whose name appears on the burgess roll now in force." Answer, "Yes." The defendant, William Goodman, junior, was acquitted. There was no case.¹⁰ The word "wilfully" cannot be dispensed with in such an indictment. "Falsely and fraudulently" will not suffice.¹¹ And "wilfully" is to be construed in the same way as in an indictment for perjury, and to be supported in the same manner.¹²

A count for falsely, fraudulently, deceitfully, and contrary to

¹ *R. v. Dodsworth*, 8 C. & P. 218.

² *R. v. Lucy*, Car. & M. 511.

³ *R. v. Clarke*, 1 Fost. & F. 654. Byles, J.

⁴ *R. v. Colebourne*, Id. 655, n. Byles, J.

⁵ *R. v. Dodsworth*, 8 C. & P. 218.

⁶ S. C.

⁷ *R. v. Bowler*, 6 Jur. 287; 1 Car. & M. 559.

⁸ S. C.

⁹ S. C.

¹⁰ *R. v. Goodman*, 1 Fost. & F. 502.

¹¹ *R. v. Bent*, 2 Car. & K. 179.

¹² *R. v. Ellis*, Car. & M. 564, 565; 6 Jur. 287. The register stood thus:—"Penkhill, &c., No. ——. Samuel Ellis. A house in Eldon Place." Eldon Place was the only place of that name in the borough. The question—"Have you the same qualification, viz., a house, in Eldon Place?" This was held to be a sufficient specification of particulars.

and in fraud of the said statute, personating, &c., was held bad. It disclosed no offence, neither at common law, nor by statute.¹

Personation of voters.] By 6 & 7 Vict. c. 18, s. 83, knowingly to personate or assume the character of a voter, whether living or dead, although the name assumed be fictitious, is punishable by imprisonment not exceeding two years, with hard labour. By sect. 84, aiders and abettors are to be punished as principals. The writ to the sheriff must be produced, for that is the foundation of the election.²

Personation of corporate officers.] Upon an indictment under 5 & 6 Will. 4, c. 76, s. 34, it is sufficient to show that the offence took place at what purported to be a ward election. Nor needs the due division of the borough into wards be shown, nor that the privy council approved of the division.³

Voters.—11 & 12 Vict. c. 63.] By 11 & 12 Vict. c. 63, (The Public Health Act,) s. 25, certain forms were required for voting at the election of the local board. The defendants filled up the names and marks of the voters, *but with their consent*, and then placed their own names as attesting witnesses. This was held not to be a forgery at common law.⁴

Voting papers.—University elections.] By 24 & 25 Vict. c. 53, s. 5, any person falsely or fraudulently signing any voting paper in the name of another, either as voter or witness, whether the other person be living or dead, and any person knowingly so signing, subscribing, &c. any false voting paper, or making any false declaration, or fraudulently altering, defacing, withholding, or abstracting any voting paper, or wilfully making a false answer to questions, is guilty of a misdemeanor, and punishable by fine, or imprisonment not exceeding one year.

Vestries.] By 1 & 2 Will. 4, c. 60, s. 11, if any churchwarden, rate collector, overseer, or other parish officer, shall refuse to call meetings under the provisions of the Act, or to take and give the declarations and notices as directed by it, or receive the vote of any ratepayer, or in any manner alter, falsify, conceal, or suppress any vote, the person so offending shall be guilty of a misdemeanor.

Under the Local Management Act, 18 & 19 Vict. c. 120, s. 27, churchwardens, &c. refusing to call meetings, or otherwise evading the Act, are guilty of a misdemeanor.

¹ *R. v. Bent*, Den. 157; 1 Cox, 356.

² *R. v. Vaile*, 6 Cox, 470.

³ *R. v. Thompson*, 2 Moo. & Rob. 335.

⁴ *R. v. Hartshorn*, 6 Cox, 395.

PART XVII.

Of Offences punishable by Courts Martial.

These offences, although not indictable, may, nevertheless, be mentioned in this place, being intimately connected, as to their suppression, with the public safety. By the Mutiny Act,¹ if any person who is or shall be commissioned or in pay as an officer, or who is or shall be listed or in pay as a non-commissioned officer or soldier, shall at any time during the continuance of the Act, begin, excite, cause, or join in any mutiny or sedition in the marines or land forces, or shall not use his utmost endeavours to suppress the same; or coming to the knowledge of any mutiny or intended mutiny, shall not, without delay, give information thereof to his commanding officer, or shall misbehave himself before the enemy; or shall shamefully abandon or deliver up any garrison, fortress, post, or guard committed to his charge, or which he shall be commanded to defend, or shall compel the governor or commanding officer of any garrison, fortress, or post, to deliver up to the enemy, or to abandon the same; or shall speak words or use any other means to induce such governor or commanding officer or others, to misbehave before the enemy, or shamefully to abandon or deliver up any garrison, &c. committed to their respective charge, or which he or they shall be commanded to defend; or shall leave his post before relieved, or shall be found sleeping on his post—or shall hold correspondence with, or give advice or intelligence to any rebel or enemy of Her Majesty, either by letters, messages, signs or tokens, in any manner or way whatsoever; or shall treat or enter into any terms with such rebel or enemy without Her Majesty's licence, or licence of the general or chief commander; or shall strike or shall use or offer any violence against his superior officer, or who being confined in a military prison, shall offer any violence against a visitor or other his superior military officer, being in the execution of his office; or shall desert Her Majesty's service,—all such offenders, whether within the realm or in any other of Her Majesty's dominions, or in foreign parts, upon land or upon the sea, shall suffer

¹ 24 Vict. c. 7, s. 15.

death, or such other punishment as by a court martial shall be awarded.¹

From this enactment it appears, that as far as the officer and soldier are concerned, the offence of seducing men in service is capital by the Mutiny Act, for such an offence is certainly the beginning, causing, or exciting of sedition and mutiny. By sect. 39, no person subject to the Act and acquitted or convicted by the civil magistrate, or by verdict of a jury, shall be punished by a court martial for the same offence, otherwise than by cashiering; and by sect. 16, the sentence of death may be commuted by Her Majesty, or by the commander-in-chief of the forces, if the offence happen in the East Indies, to penal servitude for not less than four years, or to imprisonment, with or without hard labour, and solitary confinement at discretion, provided the latter do not exceed 28 days at one time, nor 85 days in one year. Provisions similar to the above occur in the Marine Mutiny Bill.²

By the articles of war, (22 Geo. 2, c. 33, art. 26,) if any ship belonging to His Majesty be stranded or run upon any rock or sands, or split, or hazarded through wilfulness, negligence, or other defaults in the conduct or steering of it, the person offending shall be punished with death or otherwise, as the court martial shall adjudge.

By 24 Vict. c. 7, s. 17, the embezzlement, fraudulent misapplication, damaging, stealing and receiving of public stores, is made punishable by penal servitude for not less than four years, or fine and imprisonment at discretion, or dismissal from the service, or in the case of a warrant or non-commissioned officer, reduction to the ranks. By sect. 20, a sentence of penal servitude may be commuted for imprisonment, with or without hard labour, and solitary confinement, at discretion.

By sect. 21, if a forfeiture shall be added to penal servitude, it may be enforced, mitigated, or remitted. By sect. 51, every person acting wilfully contrary to the Act in respect of recruiting, shall be liable to a general, district, or camp court martial, and punishable in any other manner than by death and penal servitude.

Unlawful recruiting.—Punishments similar to those above mentioned are ordained by the Marine Mutiny Act.³

By sect. 81, to procure or attempt to procure any soldier to desert, or shall in any way aid in such deserting, is a misdemeanor, and punishable by fine or imprisonment, or both.

The Act for the government of the navy.] By 24 & 25 Vict. c. 115, s. 2, every flag officer, captain, commander, or officer commanding subject to this Act, who upon signal of battle, or on sight

¹ As to penal servitude, see ss. 21, 22. the United Kingdom, sect. 18, and in the colonies, sect. 19.

² See as to the mode of carrying out the sentence of penalservitude in ³ 24 & 25 Vict. c. 8, ss. 20, 21, 22, 23, 24, 25, 26, 27, 69.

of a ship of an enemy which it may be his duty to engage, shall not

- (1.) Use his utmost exertion to bring his ship into action;
- (2.) Or shall not during such action, in his own person and according to his rank, encourage his inferior officers and men to fight courageously;
- (3.) Or who shall surrender his ship to the enemy when capable of making a successful defence, or who in time of action shall improperly withdraw from the fight,

shall, if he has acted traitorously, suffer death; if he has acted from cowardice shall suffer death, or be imprisoned, and be also dismissed with disgrace from Her Majesty's service; and if he has acted from negligence, or through other default, he shall be dismissed from Her Majesty's service, with or without disgrace, or shall suffer such other punishment as is hereinafter mentioned.

By sect. 3, every officer subject to this Act who shall forbear to pursue the chase of any enemy, pirate, or rebel, beaten or flying, or shall not relieve and assist a known friend in view to the utmost of his power, or who shall improperly forsake his station, shall, if he has therein acted traitorously, suffer death; if he has acted from cowardice, suffer death, or such other punishment as is hereinafter mentioned; if he has acted from negligence, or through other default, shall be dismissed from Her Majesty's service with disgrace, or shall suffer such other punishment as is hereinafter mentioned.

By sect. 4, when any action or any service is commanded, every person subject to this Act who shall presume to delay or discourage the said action or service upon any pretence whatsoever, or in the presence or vicinity of the enemy shall desert his post or sleep upon his watch, shall suffer death, or such other punishment as is hereinafter mentioned.

By sect. 5, every person subject to this Act, and not being a commanding officer, who shall not use his utmost exertions to carry the orders of his superior officers into execution when ordered to prepare for action, or during the action, shall, if he has acted traitorously, suffer death; if he has acted from cowardice shall suffer death, or such other punishment as is hereinafter mentioned; and if he has acted from negligence, or through other default, be dismissed from Her Majesty's service, with disgrace, or suffer such other punishment as is hereinafter mentioned.

By sect. 6, all spies for the enemy shall be deemed to be persons subject to this Act, and shall suffer death, or such other punishment as is hereinafter mentioned.

By sect. 7, every person subject to this Act who shall traitorously hold—

- (1.) Correspondence with or shall give intelligence to the enemy;
 - (2.) Or fail to make known to the proper authorities any information he may have received from the enemy;
 - (3.) Or who shall relieve the enemy with any supplies,
- shall suffer death, or such other punishment as is hereinafter mentioned.

By sect. 8, every person subject to this Act who shall, without any treacherous intention, hold any improper communication with the enemy, shall be dismissed from Her Majesty's service, or shall suffer such other punishment as is hereinafter mentioned.

By sect. 9, every person subject to this Act who shall desert his post or sleep upon his watch, or negligently perform the duty imposed on him, shall be dismissed from Her Majesty's service with disgrace, or shall suffer such other punishment as is hereinafter mentioned.

By sect. 10, where mutiny is accompanied by violence, every person subject to this Act who shall join therein shall suffer death, or such other punishment as is hereinafter mentioned; and every person subject to this Act who shall not use his utmost exertions to suppress such mutiny shall, if he has acted traitorously, suffer death, or such other punishment as is hereinafter mentioned; if he has acted from cowardice, shall suffer penal servitude or such other punishment as is hereinafter mentioned; if he has acted from negligence he shall be dismissed from Her Majesty's service, with disgrace, or suffer such other punishment as is hereinafter mentioned.

By sect. 11, where a mutiny is not accompanied by violence, the ringleader or ringleaders of such mutiny shall suffer death, or such other punishment as is hereinafter mentioned; and all other persons who shall join in such mutiny, or shall not use their utmost exertions to suppress the same, shall suffer imprisonment or such other punishment as is hereinafter mentioned.

By sect. 12, every person subject to this Act who shall endeavour to seduce any other person subject to this Act from his duty or allegiance to Her Majesty, or endeavour to incite him to commit any Act of mutiny, shall suffer death or such other punishment as is hereinafter mentioned.

By sect. 13, every person, not otherwise subject to this Act, who, being on board any ship of Her Majesty, shall endeavour to seduce from his duty or allegiance to Her Majesty any person subject to this Act, shall so far as respects such offence be deemed to be a person subject to this Act, and shall suffer death or such other punishment as is hereinafter mentioned.

By sect. 14, every person subject to this Act who shall make or endeavour to make any mutinous assembly, or shall lead or incite any other person to join in any mutinous assembly, or shall utter any words of sedition or mutiny, shall suffer penal servitude or such other punishment as is hereinafter mentioned.

By sect. 15, every person subject to this Act who shall wilfully conceal any traitorous or mutinous practice or design, or any traitorous or mutinous words spoken against Her Majesty, or any words, practice, or design tending to the hindrance of the service, shall suffer penal servitude or such other punishment as is hereinafter mentioned.

By sect. 16, every person subject to this Act who shall strike or offer to strike or use any violence against his superior officer, being in the execution of his office, shall be punished with death,

or such other punishment as is hereinafter mentioned; and every person subject to this Act who shall strike or offer to strike or use any violence against his superior officer, not being in the execution of his office, shall be punished with penal servitude or such other punishment as is hereinafter mentioned.

By sect. 17, every person who shall wilfully disobey any lawful command of his superior officer, or shall use threatening or insulting language or behave with contempt to his superior officer, shall be punished with dismissal from Her Majesty's service, with disgrace, or suffer such other punishment as is hereinafter mentioned.

By sect. 18, every person subject to this Act who shall quarrel or fight with any other person, whether such other person be or be not subject to this Act, or shall use reproachful or provoking speeches or gestures, tending to make any quarrel or disturbance, shall suffer imprisonment or such other punishment as is hereinafter mentioned.

By sect. 19, every person subject to this Act who shall absent himself from his ship or from the place where his duty requires him to be, without any intention of returning to such ship or place, or who shall at any time, and under any circumstances when absent from his ship, do any act which shows that he has not any intention of returning to such ship or place, shall be deemed to have deserted, and shall be punished accordingly; that is to say,

(1.) If he has deserted to the enemy he shall be punished with death, or such other punishment as is hereinafter mentioned;

(2.) If he has deserted under any other circumstances he shall be punished with penal servitude, or such other punishment as is hereinafter mentioned;

and in every such case he shall forfeit all pay, head money, bounty, salvage, prize money, and allowances that have been earned by him, and all annuities, pensions, gratuities, medals, and decorations that may have been granted to him, and also all clothes and effects which he may have left on board the ship or at the place from which he has deserted, unless the tribunal by which he is tried shall otherwise direct.

By sect. 20, every person subject to this Act who shall endeavour to seduce any other person subject to this Act to desert, shall suffer imprisonment, or such other punishment as is hereinafter mentioned.

By 37 Geo. 3, c. 70, which was made perpetual by 57 Geo. 3, c. 7, any person who shall maliciously and wilfully endeavour to seduce any person or persons serving in His Majesty's forces by sea or land from his or their due allegiance to His Majesty, or to incite or stir up any person or persons to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall be adjudged guilty of felony.

By 37 Geo. 3, c. 70, s. 2, if the offence be committed on the high seas, it may be prosecuted and tried as if the said offence had

been committed in any county in England before any court of oyer and terminer, or gaol delivery; and if the crime take place in any county, the trial may be had in any other county. The case against John Tierney for endeavouring to seduce James Brown, was made out satisfactorily, provided James Brown could be considered as being at the time of such attempted seduction, a person serving in His Majesty's forces, by sea. Brown was in the sick hospital, and was not entitled to pay, and as he could not be tried by a court martial for any other offence than was contained in the 5th, 34th, and 35th articles of war, (22 Geo. 2, c. 33), it was questioned whether, being liable only to a limited extent, he could be called a person serving within the 37 Geo. 3, c. 70. The conviction, however, was held right.¹ Fuller was convicted of an endeavour to seduce a soldier named Lowe from his allegiance; three objections were taken to the indictment,—first, that the charge being in the 1st count to seduce from duty and allegiance, and in the 2nd to incite to an act of mutiny, and to traitorous and mutinous practices; it was, nevertheless, omitted to aver the means which the prisoner had adopted to accomplish these offences; secondly, that there was no allegation that Fuller knew the person he had attempted to seduce to be a soldier; thirdly, that an endeavour to excite to an act of mutiny, and also to mutinous practices, were two penal offences, and ought not to have been comprised within one count; but after argument, the judges affirmed the conviction. As to the first point, they said that the word “endeavour” was sufficient without any statement of “means;” in the second place, they held that the word “advisedly” was equivalent to “knowingly,” but that, in point of fact, knowledge was necessarily involved in the charge that the prisoner endeavoured to seduce; and thirdly, that the second count could not be objected to, for it contained the parts of one fact of endeavour.²

Judgment.] The judgment for this offence, which was punishable capitally under 37 Geo. 3, c. 70, is by 1 Vict. c. 91, s. 1, declared to be transportation for life, or not less than fifteen years, or imprisonment not exceeding three years, with or without hard labour, &c.

There are other offences,—as profane swearing. (Sect. 23.) Cruelty and scandalous or fraudulent conduct. (Sect. 24.) Hazarding and losing ships. (Sect. 25.) Not taking care of convoy, which may be punished by death or otherwise. (Sect. 26.)³ Taking other goods on board than those for the use of the vessel. (Sect. 28.) Embezzlement of public stores. (Sect. 29.) Burning any dockyard, &c., which may be punished with death or otherwise. (Sect. 30.) Making false musters. (Sect. 31.) Misconduct in hospitals. (Sect. 32.)⁴

¹ *R. v. Tierney*, Russ. & Ry. 74.

³ See sect. 27.

² *R. v. Fuller*, Leach, 790; 1 Bos. & P. 180.

⁴ See also sects. 33—36.

Stripping, pillaging, beating, &c., persons taken on board of a prize. (Sect. 37.)

Offences punishable by ordinary law.] By 24 & 25 Vict. c. 115, s. 38, every person subject to this Act who shall be guilty of murder shall suffer death:

If he shall be guilty of manslaughter he shall suffer penal servitude, or such other punishment as is hereinafter mentioned:

If he shall be guilty of sodomy with man or beast he shall suffer penal servitude:

If he shall be guilty of indecent assaults he shall suffer penal servitude, or such other punishment as is hereinafter mentioned:

If he shall be guilty of robbery or theft he shall suffer penal servitude, or such other punishment as is hereinafter mentioned:

If he shall be guilty of any other criminal offence which if committed in England would be punishable by the law of England, he shall, whether the offence be or be not committed in England, be punished either in pursuance of the first part of this Act as an act to the prejudice of good order and naval discipline not otherwise specified, or the offender shall be subject to the same punishment as might be awarded by any ordinary criminal tribunal competent to try the offender, if the offence had been committed in England.

By sect. 39, for all offences specified or referred to in this Act, if committed by any person subject thereto in any harbour, haven, or creek, or on any lake or river, whether in or out of the United Kingdom or anywhere within the jurisdiction of the admiralty, or at any place on shore out of the United Kingdom of Great Britain and Ireland, or in any of Her Majesty's dockyards, victualling yards, steam factory yards, or on any gun wharf, or in any arsenal, barrack, or hospital belonging to Her Majesty, whether in or out of the said United Kingdom, the offender may be tried and punished under this Act, and for all offences hereinbefore specified under the headings "Misconduct in the presence of the enemy," "Communications with the enemy," "Neglect of duty," "Mutiny," "Insubordination," "Desertion and absence without leave," or "Miscellaneous offences," if committed by any person subject to this Act at any place on shore, whether in or out of the said United Kingdom, the offender may be tried and punished under this Act.¹

By sect. 45, the following punishments may be inflicted in Her Majesty's navy:—

- (1.) Death:
- (2.) Penal servitude:
- (3.) Dismissal with disgrace from Her Majesty's service:
- (4.) Imprisonment or corporal punishment:
- (5.) Dismissal from Her Majesty's service:

¹ See "General provisions," sects. 40—41.

- (6.) Forfeiture of seniority as an officer for a specified time, or otherwise :
- (7.) Dismissal from the ship to which the offender belongs :
- (8.) Severe reprimand, or reprimand :
- (9.) Disrating a subordinate or petty officer :
- (10.) Forfeiture of pay, head money, bounty, salvage, prize money, and allowances earned by, and of all annuities, pensions, gratuities, medals, and decorations granted to the offender, or of any one or more of the above particulars ; also, in the case of desertion, of all clothes and effects left by the deserter on board the ship to which he belongs :
- (11.) Such minor punishments as are now inflicted according to the custom of the navy, or may from time to time be allowed by the admiralty :

and each of the above punishments shall be deemed to be inferior in degree to every punishment preceding it in the above scale.

And by sect. 46, the following regulations are hereby made with respect to the infliction of punishments in Her Majesty's navy :

- (1.) The admiralty may, except in case of sentence of death, which shall only be remitted by Her Majesty, suspend, annul, or modify any sentence passed on any person subject to this Act.
- (2.) Judgment of death shall not be passed on any prisoner unless four at least of the officers present at the court martial, where the number does not exceed five, and in other cases a majority of not less than two-thirds of the officers present, concur in the sentence.
- (3.) The punishment of death shall not be inflicted on any prisoner until the sentence has been confirmed by the admiralty or by the commander-in-chief on a foreign station.
- (4.) The punishment of penal servitude may be inflicted for the term of life, or for any other term of not less than three years :
- (5.) The punishment of penal servitude shall in all cases involve dismissal with disgrace from Her Majesty's service :
- (6.) Dismissal with disgrace shall involve in all cases a forfeiture of all pay, head money, bounty, salvage, prize money, and allowances that have been earned by, and of all annuities, pensions, gratuities, medals, and decorations that may have been granted to the offender, and an incapacity to serve Her Majesty again in any military, naval, or civil service ; and may also in all cases be accompanied by a sentence of imprisonment, with or without solitary confinement, not exceeding the periods hereinafter mentioned, and with or without hard labour, for all or any part of the term of imprisonment, and with or without corporal punishment :
- (7.) The punishment of imprisonment may be inflicted for any term not exceeding two years ; it may be accompanied with a direction that the prisoner shall be kept in solitary confinement for any period of such term not exceeding fourteen days at any one time, and not exceeding eighty-four days in any

one year, with intervals between the periods of solitary confinement of not less duration than the periods of solitary confinement, and when the imprisonment awarded exceeds eighty-four days, the solitary confinement shall not exceed seven days in any twenty-eight days of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods, and the punishment of imprisonment may also be accompanied with a direction that the prisoner shall be kept to hard labour for all or any part of the term of imprisonment, or any such direction may apply either to solitary confinement or hard labour only, and corporal punishment may be awarded in addition to any sentence of imprisonment, whether such imprisonment is or is not to be accompanied with solitary confinement and hard labour, or either of them.

The 50th sect. provides for the constitution of courts martial.

The 51st and following sections regulate their proceedings.¹

The 60th section deals with the sentence of penal servitude.²

¹ Limitation of time for proceedings: 24 & 25 Vict. c. 115, s. 47, and see ss. 48, 49.

² See also sects. 61—63.

INDEX.

A.

- ABATEMENT**, plea in, 126; not amendable, 67. Amendment of, 67.
- Abduction**, 830, 844; of a woman on account of her fortune, 842; indictment, 844; the woman may be a witness, 843. Of a woman under twenty-one years of age, 844; of a girl under sixteen years of age, statute, 845. Of children under ten years, 838.
- Abettors**, 79, 603.
- Abominable crime**, sending letters threatening to accuse of, 443.
- Abortion**, attempts to procure, 762, 867; administering poison to procure miscarriage, 762, 867; using instruments to procure miscarriage, 867; procuring poison for the purpose of its being used to cause miscarriage, 867.
- Absence of witnesses from court**, 231.
- Accessories**, 76; how, when more than one principal, 84; evidence, 251.
- Accessories in rape**, 837.
- Accessories, punishment of**, 875.
- Accessory and principal in forgery**, 701.
- Accessory before the fact**, 787, 82; punishment of, 602, 875.
- Accessory after the fact**, 77, 83; punishment of, 602, 875.
- Accomplices in treason**, 327.
- Accomplices, evidence of**, 181, 182.
- Accountant-general**, forging the name of the, 695; certificates, &c. of, 695.
- Accusing or threatening to accuse a man of an infamous crime with intent to extort money from him**, 443.
- Acknowledgment of false recognizance**, 933.
- Acquittal**, 276.
- Acquittal of one defendant, to enable him to give evidence for a co-defendant**, 181.
- Acquittal on the ground of insanity**, 118, 250.
- Action on account of death caused by wrongful act or default**, 883.
- Action for imputing subornation of perjury**, 972.
- Acts of parliament**, printing same purporting to be printed by Queen's printers, and uttering the same, 699.
- Addressing jury**, 169, 246.
- Adhering to the Queen's enemies, what**, 315.
- Adjournment of trial**, 151, 258.
- Administering poison, &c., to procure miscarriage**, 762, 867.
- Administering poison, with intent to murder**, 788; so as to endanger life, 805; with intent to injure or annoy, 806.

Index.

- Administering unlawful oaths, 933.
Administration of justice, libels on, 1091 ; frauds on, 934.
Admiralty, trial of indictable offences under Larceny Act, committed within jurisdiction, 398. Slave dealing, 1192.
Admiralty, court of, forgery of signatures of judge or officers of, or seals, 700.
Adulterated food, &c., selling, 609.
Adulterer, killing of, by husband, 765.
Adulterer, larceny by, 388.
Advertising for stolen property, taking rewards for, 406.
Affidavit to ground an application for an information, 141.
Affidavit, how proved, and in what cases evidence, 220.
Affidavit, perjury by, 980.
Affidavits in aggravation, 285 ; in mitigation, 286.
Affirmation of jurors, 86.
Affirmation, when admissible in criminal cases, 179 ; form of, 179. If false, it is punishable as perjury, 179, 995.
Affray, what, 1100 ; indictment for, 1102 ; punishment, 1102.
"Against the form of the statute," use of in indictments, 94.
Agent applying to his own use money or securities intrusted to him for a specific purpose, statute, 509 ; indictment, 510. Converting to his own use any chattel, security, or power of attorney intrusted to him for safe custody, or for any special purpose, 509. Selling, negotiating, &c., property intrusted to him for safe custody, 509.
Agent or factor, pledging goods of his principal intrusted to him for sale, 511 ; indictment, 513.
Agistment of cattle, 392.
Aggravated assaults, 828.
Aggravated robberies, 439.
Aggravation, affidavits in, 285.
"Against the peace," use of in indictments, 94.
Agricultural machinery, destroying, &c., 575.
Aiders and abettors, who are, 79.
Aiding foreign powers, 356 ; prisoners of war to escape, 359.
Aiding prisoners to escape, 958.
Alarming the Queen, 346.
Alibi, defence of, 251.
Aliens, right to a *jury de medietate*, 160.
Aliens Registration Act, 1314.
Allegations in indictment, what sufficient, 603.
Allegiance, who bound to, 308.
Alpaca, stealing, 479.
Alteration of judgment, 289.
Ambassadors, libels on, 1091.
Amending coroner's inquisition, 890.
Amendment of an indictment, or information, 65 ; of record, 284 ; coroner's inquest, 890.
Amendments, in the discretion of the judge, whether they may be made, 65 ; not a plea in abatement, 67.
Anatomy Act, 1315.
Anglers, when punishable, 416 ; their tackle, 416.
Animals, in what cases larceny may be committed of them, 367.
Animals, killing or maiming, &c., 590.
Animals, *feræ naturæ*, 414.
Annoyances, what are, 1240.

Index.

- Answer, to criminal information, 143.
Answering witnesses called for defence, 252.
Appearance, how enforced, 1.
Appearance, how compelled, 503.
Apples, stealing, 389.
Application of forfeitures, 604.
Appointment, how proved, 219.
Apothecaries' certificates, when evidence, 219.
Apprehension of offenders, rewards for, 265; law if the person be killed, 265.
Apprehension of offenders without warrant, 603.
Apprehension of loiterers on highways, &c., 602, 875.
Apprentices, neglecting to provide with necessary food, &c., 806.
Aqueducts, pulling down or otherwise destroying, 586.
Arbitrators, evidence of, 187.
Arbitrators, perjury before, 977.
Army prize money, forgery as to, 710.
Arraignment, 117.
Array, challenge of, 152.
Arrest of judgment, 267.
Arrest, under a warrant, 602; without warrant, 603.
Arrest, refusing to aid constable, 950.
Arrest, upon warrant, 2; on suspicion, 3; on a Sunday, 5; where, 6; breaking doors to effect, 6; to be without unnecessary force, 16; in foreign countries, 8; without warrant, 13, 16; by private persons, 16; under Poaching Act, 16; colonies, 16; on the high seas, 16.
Arrest, under a warrant, 4; time of, 5; place, 5; how, 6; in foreign countries, 8; without a warrant, 8, 13; by private persons, 9, 12; for assault, 11; of poachers, 14; in the colonies, 16; high seas, 16.
Arrest of judgment, 267; pardon may be pleaded, 268.
Arresting, obstructing, &c. clergymen in discharge of their duties, 1165.
Arson, what is, 555, 564; at common law, 566. Setting fire to a church or chapel, 556; indictment, 558. Setting fire to a house, some person being therein, 556. Setting fire to a house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, 556. Setting fire to station, engine-house, &c., dock or harbour, 556. Setting fire to county, poor law, or college buildings, 556; nature of the building, 559. Setting fire to a coal mine, statute, 582. Setting fire to a ship, with intent to destroy it, 594. Setting fire to a ship, 594. Setting fire to stacks of corn, grain, pulse, tares, straw, haulm, stubble, furze, heath, fern, hay, turf, peat, coals, charcoal, or wood, or any steer of wood, statutes, 578. Setting fire to crops of corn, grain, or pulse, or any part of a wood, coppice, or plantation of trees, or heath, gorse, furze, or fern, 577. Setting fire to ships of war, dockyard, &c., 597.
Art, works of, &c., destroying or damaging, 589.
Articles of war, 1324; when evidence, 218.
Asportation, in larceny, 362; in robbery, 432.
Assault, with intent to rob, 436; aggravated assaults, 828.
Assault, common, and battery, 817, 821; defence to, 821; certificate of dismissal of complaint, 829; occasioning bodily harm, 830.

Index.

Assault, with intent to rob, 431, 436; being armed, 439.
Assault, arrest for, 11.
Assaults, on clergymen, 811; magistrates, 812; peace officers, 812; to obstruct sale of grain, 816; on seamen, &c., 816.
Assaults upon the Queen, 346.
Assemblies, when unlawful, 349.
Asses, within the meaning of the statute against killing cattle, 591.
Assignment of counsel, 172.
Assignment of perjury, 1018.
Assignment, fraudulent, 612.
Assisting the Queen's enemies, 355.
Assize, commission of, when to be opened, 41.
Attachment against a witness for disobedience to a subpoena, 257.
Attainder, 299.
Attempt to commit felony or misdemeanor may be found on indictment for commission thereof, 1194.
Attempting to set fire to buildings, 557.
Attempts to commit crimes, 1194.
Attempts to murder, 787.
Attendance of witnesses, how compelled, 254.
Attorney, privileged from giving evidence against his client, in what cases, 233, 234.
Attorney applying to his own use money or securities intrusted to him for a specific purpose, 509; indictment for, 510. Converting to his own use any chattel, security, or power of attorney intrusted to him for safe custody, or for any special purpose, 509. Selling, negotiating, &c. property intrusted to him for safe custody, 509.
Attorney, not to act unless admitted and enrolled, 942.
Attorney, power of, frauds by persons intrusted with, 511.
Autrefois acquit, plea of, 128, 276.
Autrefois convict, plea as to, 132.
Averments, 96.

B.

Backing warrant, 5.
Bail by the judges, 27.
Bail, when demandable, 20; upon postponement of trial, 21; excessive bail, 21; estreating, 23; on remand, 24.
Bail on indictment, 20; fresh bail, 21; sureties, 21; after conviction of misdemeanor, 287.
Bailee, larceny by, 381, 402.
Bank, entry in the books of, when evidence, 268.
Bank of England or Ireland, embezzlement by officers and servants of, 504.
Bank of the sea, or of a river, canal, or marsh, cutting or breaking down, whereby lands are overflowed or damaged, 585. Cutting off, drawing up, or removing piles, chalk, or materials, &c., from, 585.
Bank note paper, searching for, 646.
Bank note, plates for, searching for, 646.
Bank notes, forgery of. Forging and uttering a bank note, 645; indictment, 650; having a forged bank note in possession, 654. Foreign bills or notes, 653.
Bank notes, forgery of, 645.

Index.

- Banker, frauds by, 509 ; applying to his own use money or securities intrusted to him for a specific purpose, 509 ; indictment, 510 ; converting to his own use any chattel, security, or power of attorney, intrusted to him for safe custody, or for any special purpose, 509 ; indictment, 510. Selling, negotiating, &c., any property intrusted to him for safe custody, statute, 509.
- Bankrupt, frauds by, 624 ; perjury by, 978.
- Bankrupt laws, offences against, 623 ; for not surrendering, 623 ; not discovering property, 623 ; trial, 631.
- Bankruptcy, perjury before commissioners of, 978.
- Bankruptcy court, forging signatures of officers or seals of court, 699.
- Bankrupts taking false oath, 990.
- Bankrupts destroying, mutilating, falsifying, &c., their books, &c., 624.
- Baptism, forging entry of, 696.
- Barge, stealing from, in port, or in a river or canal, statute, 480 ; indictment, 480.
- Barn, setting fire to, 556 ; riotously demolishing, pulling down, or destroying, or beginning to do so, 570 ; indictment, 573.
- Baron and feme, 72 ; larceny by, 388.
- Barratry, 924.
- Barrister, privileged from giving evidence against his client, in what cases, 233, 234.
- Bastardy, disobedience of order in, 941 ; perjury in cases of, 981.
- Bathing in public, 1187.
- Battery, 817.
- Bawdy-house, keeping, 1182 ; punishment, 283.
- Beast (not the subject of larceny at common law), stealing, 415 ; having possession of, or of the skin thereof, 415.
- Bench warrant, 3.
- Benefit of clergy abolished, 97.
- Bestiality, 872 ; attempt to commit, 872.
- Bigamy, 848 ; evidence on the part of the prosecution, 861 ; evidence for the defendant, 859.
- Bill of exceptions, in criminal cases, 258.
- Bill of exchange, stealing, 389, 419 ; forging and uttering a bill of exchange, 659. Fraudulently inducing persons to accept, &c., 517.
- Bill for money or the payment of money, stealing, 419.
- Bird (not the subject of larceny at common law), stealing, punishment, 415. Having possession of, or of the plumage thereof, punishment, 415. Injuries to, 590.
- Birth, forgeries connected with, 696 ; falsity of registers, 1169 ; must be registered, 1305.
- Birth, concealment of, 868.
- Births, marriages, and deaths, forging registers of, 696 ; offences in relation thereto, 1169, 1305.
- Blank warrant, 2.
- Blasphemy, 1171.
- Boat, stealing from, in port, or in a river or canal, statutes, 480 ; indictment, 480.
- Bond . forging and uttering a bond, 654 ; stealing a bond, 419 ; indictment, 421.
- Bonds, stealing, 389.
- Books, fraudulently destroying or mutilating, by officers of public companies or bodies corporate, 589.
- Borough, hindering election of mayor of, 1316.

Index.

- Borough, refusing freedom in, 1212.
Boundaries of counties, offences committed on, where tried, 56.
Boundaries as connected with venue, 56.
Breach of prison, 956; Millbank Penitentiary, 961.
Breaking, what, in burglary, 450; actual, 450; constructive, 450.
Breaking and entering a church or chapel, and stealing therein, 450; indictment, 451. Breaking out of a church or chapel, 450; house, &c., 450.
Breaking and entering a building within the curtilage, and stealing therein, 468; indictment, 469. Curtilage, what is, 468.
Breaking doors to arrest without a warrant, 12.
Bribery, 1201.
Bribery at parliamentary elections, 1201; in other cases, 1202.
Bridge. Indictment for not repairing a bridge, 1273.
Bridge, pulling down or destroying, 586; plea to indictment, 132. Injury with intent to render dangerous or impassable, 586.
British ambassador, forging seal, &c. of, 716.
British colonies, judgments of the courts in, how proved, 220.
Broker, applying to his own use money or securities intrusted to him for a specific purpose, 509; indictment, 510. Converting to his own use any chattel, security, or power of attorney, intrusted to him for safe custody, or for a special purpose, 509. Selling, negotiating, &c., property intrusted to him for safe custody, 509.
Brokerage, when illegal, 1314.
Brothels, keeping, 1182.
Bubble companies, restraint of, 1207.
Buildings, injuries to, by tenants, 574.
Bull, stealing, 407.
Buoy-rope, cutting away, casting adrift, removing, altering, defacing, sinking, &c., or injuring or concealing, 595.
Burglary, 450. Indictment, 451, 464. Indictment for burglary by breaking out of a house, 453. Entry, 456; plea, 457; indictment, 464; trial, 467.
Burglary in a church, 450.
Burglary, place where it may be committed, 457.
Burial ground, stealing fixtures in, 425.
Burials, offences in relation to, 1306.
Burials, forging registers of, 696; destroying or injuring, 697.
Burning ships, 593; with intent to prejudice the underwriters, 593; attempting to set fire, 594; by gunpowder, 594; damaging otherwise, 594.
Burning, by negligence of servants, 1307.
Buying and selling coin at a lower value, 733.
Byelaws, forging, 699.

C.

- Calf, stealing, 407.
Calling back witnesses to be re-examined, 257.
Canal, lock, sluice, floodgate, or other work on, throwing down, levelling, or destroying, 585; opening floodgates, or doing other injury to canals, with intent and so as to obstruct the navigation, 585; obstructing navigation, 1296.
Canal bank or wall, cutting and breaking down, whereby lands are overflowed or damaged, or are in danger of being so, 585. Cutting off, drawing up, or removing piles, chalk, or materials, &c., fixed in the ground, or used to secure any canal, bank, or wall, 585.

Index.

- Canal, vessel, barge, or boat on, stealing from, 480.
Cannel coal, injuries to mines of, 582.
Canons, clergy making, without consent of the crown, 1168.
Capital offences, reference to under former law as to forgery, 702.
Caption of depositions, 211.
Cards, frauds by playing, 530, 618, 1187; forgery of wrappers of, 714.
Carelessness, when it will amount to murder, 759.
Carnal knowledge defined, 830.
Carnally knowing a girl under ten years, 838. Carnally knowing a girl between the ages of ten and twelve, 841.
Carriage, furiously driving, 811.
Carrier, larceny by, 381.
Case reserved, 271.
Cats, stealing, 389.
Cattle—horse, mare, gelding, colt, or filly, bull, cow, ox, heifer, or calf, ram, ewe, sheep, or lamb, stealing, 407; indictment, 408. Killing with intent to steal the carcase or skin, or any part of the cattle so killed, 590. Killing, maiming, or wounding any cattle, 590.
Caution to prisoners, how given, 18.
Cellar, whether included under word "house" in arson, 560.
Central Criminal Court, jurisdiction of, 63.
Central Criminal Court, trial at, of offences committed beyond its jurisdiction, 113; offences within the jurisdiction of the Admiralty, triable at the, 783.
Certificate for special jury does not apply to criminal cases, 66.
Certificate of dismissal of complaint for an assault, 829.
Certificates as to orphan girls, making false, 618.
Certificates in cases of assault, 829.
Certificates of baptism, of burial, or of marriage, forgery of, 696.
Certifying false documents, 622.
Certiorari, 99; to what courts, 99; for what causes, 100; when refused, 102.
Certiorari, must be accurate, 103; how carried out, 103; recognizance, 103, 113; how, when one defendant only applies for writ, 104; bodies corporate, 105; in felony absolute in first instance, 106; *nisi* in misdemeanors, 106; limitation, as to time, 106; quashing writ, 107; costs, 108; recovery of them, 111; supersedeas, 112; time for applying for writ, 112; Central Criminal Court, 112; carrying down the record, 115; traverse, 115.
Certiorari, when it will not lie, 876.
Certiorari, in indictment for perjury, 1001.
Challenge of jurors, 152; when, 152; by whom, 156; trial of it, 157.
Challenge of grand juror, 42.
Challenge to fight, 1102; proceedings, 1103.
Challenges in trials for treason, 334.
Champerty, 918.
Chance medley, 774.
Chancery, answers, &c. in, when evidence, 218.
Chancery, forging signatures of officers of court of, or seals, 700.
Chancery, perjury before court of, 976, 982, 985, 1000, 1021, 1032.
Changing venue, 64.
Chapel, breaking, entering, and stealing, &c. in, 450, 470; setting fire to, 556; destroying, 570.

Index.

- Character, evidence as to, 229. Evidence as to the character of a witness, 251 ; of prisoner, 236.
- Character, witness called to, 170. Character, giving false to servants, 619.
- Chattels, which are the subject of larceny, 388.
- Cheating, 375, 607 ; obtaining goods by false pretences, 516 ; indictment, 530 ; punishment, 283 ; what false pretences are within the statute, 518 ; at cards or dice, 1187.
- Cheats, 607 ; at common law, 608.
- Chelsea Hospital, obtaining pensions by means of false certificates, 620.
- Cheque upon a banker, forging a, statute, 670 ; altering, &c., crossings on, 659.
- Child, capability of, to commit murder, 760.
- Children, aggravated assaults on, 828.
- Children, concealing the birth of, 868.
- Children, cruelty to, 1195.
- Children, exposing, whereby life is endangered, 807 ; to inclemency of weather, when an assault, 818.
- Children, evidence of, 177.
- Children, negligence towards, causing death, 766.
- Child-stealing : stealing, decoying, or enticing away a child, 847 ; indictment, 847 ; punishment, 847.
- Chimney-sweepers, employing children as, a misdemeanor, 818.
- China passenger ships, searching, 1212.
- Chinese, how sworn as a witness, 179.
- Choke, attempting to, with intent to commit any indictable offence, 805.
- Cholera, 1301.
- Chloroform, using, for the purpose of committing any indictable offence, 805.
- Christian names, how stated in indictments, 90.
- Church or chapel, breaking and entering, and stealing in, 450 ; indictment, 464 ; breaking and entering with intent to commit felony, 470. Setting fire to, 556. Riotously demolishing, pulling down, or destroying, or beginning to do so, 570 ; indictment, 573.
- Church rate, jurisdiction of justices as to, 943.
- Churchwardens, when they may be indicted, 947.
- Cinque ports, commission, how directed, 54.
- Clergy, benefit of, abolished, 97 ; restrained from making canons, 1168.
- Clergymen, obstructing, &c., in discharge of their duties, 811 ; indictment, 812.
- Clergymen, taking false oath on admission to a living, 975.
- Clerks, embezzlement by, 485 ; larceny by, 482 ; of assize, guilty of extortion, 1077.
- Clipping coin, 723.
- Clubs, when unlawful, 350.
- Coach-house, setting fire to, 556. Riotously demolishing, pulling down, or destroying, or beginning to do so, 570 ; indictment for, 573.
- Coal, stealing, 430 ; injuries to mines of, 582.
- Cock-fighting, 1190.
- Codicil, stealing, 422.
- Co-heiress abduction of, 841.
- Coin of the realm, offences relating to the, 719 ; current coin, counterfeit coin, definition of, 719. Counterfeiting gold and silver coin, 720 ; indictment, 721. Colouring coin, statute, 720. Indictment for colouring metal, 721 ; filing and altering coin, 723 ; punishment, 723. Impairing gold and silver coin,

Index.

- statute, 723 ; indictment, 723 ; punishment, 723. Defacing coin, statute, 723. Copper coin, 723. Buying or selling coin at a lower rate than by its denomination it imports, 732 ; indictment, 734. Importing counterfeit coin, 733 ; exporting counterfeit coin, 733 ; indictment, 734. Uttering counterfeit coin, 725, 731 ; indictment, 728 ; uttering accompanied by possession of other counterfeit coin, or followed by a second uttering, 725 ; uttering after former conviction, 725. Having in possession three or more pieces of counterfeit coin, statute, 726. Coining tools, for making a puncheon, &c., for coining, 734. Conveying coining tools and coin out of the mint, 735. Cutting, when false, 739.
- Coin : making or counterfeiting foreign coin, 724 ; uttering false foreign or English, 731 ; being in possession of filings or clippings of, 732 ; counterfeiting, &c. copper coin, 723 ; procedure in coinage offences, 740.
- Collectors of taxes, assaults on, 815.
- College buildings, setting fire to, 556.
- College of Physicians, libel against, 1182.
- Colonies, arrest in, 16.
- Colonies, British judgments in the courts of, how proved, 220 ; sending false coin into, 733.
- Colonies, importing false coin into, 733 ; trial in of murders and felonies, 783.
- Colt, stealing, 407.
- Combinations, assaults in pursuance of, to raise wages, 817.
- Combinations, when unlawful, 350.
- Commissions of assize, when to be opened, 41.
- Commissioners exceeding their powers, information against, 948.
- Commissioners of bankruptcy, perjury before, 978.
- Committal, for nonpayment of penalties, &c., 604.
- Commitment of accused, 24 ; to what gaol, 25 ; expenses of, 26 ; when not to be void by reason of defects therein, 27 ; of dangerous lunatics, 27.
- Commitment, 24 ; for contempt, 187.
- Commitment for contempt of court, 188.
- Common assault and battery, 817.
- Companies, public, fraudulent appropriation of property by directors or officers of, &c., 514 ; keeping fraudulent accounts, 515 ; destroying or mutilating books, 514.
- Comparison of handwriting, in what cases evidence, § 239 ; when not, 316.
- Compassing the Queen's death, 309, 316.
- Compensation to persons apprehending offenders, 265 ; how if the person apprehended be killed, 265.
- Competency of witness, time for objecting to, 187.
- Compounding action, 151 ; felony, 915. Taking a reward for the recovery of stolen property, indictment, 405.
- Concealing the birth of a child by secret burying, &c., 868.
- Concealing wills, codicils, or other testamentary instruments, 422.
- Confession, kinds of, 188 ; when made in open court, 124 ; upon an examination before magistrates, 197 ; must be taken down in writing, 199 ; or to any other person, 197. Effect of, 202. Papist to Protestant clergyman, 234.
- Congé d' elire*, 1168.
- Confederacies, when unlawful, 350.
- Confirmation of evidence, 182.

Index.

- Congregations assembled for public worship, disturbing, 1165.
Conies, stealing, 389 ; unlawfully killing, &c., 413.
Consent to marriage of minors, 857.
Conspiracies neither *mala in se* nor *mala prohibita*, 1200.
Conspiracy, what, 1047. Public frauds, 1047 ; private frauds, 1053.
 Conspiracy to charge a man with a crime, 808 ; punishment, 283.
 Indictment, 1057. Evidence, 1064 ; trial, 1069.
Conspiracy, assault in pursuance of, to raise the rate of wages, 817.
Constable, when indictable for misconduct in office, 947. Larceny and
 embezzlement by, 502.
Constables refusing office, 1307.
Constructive treason, 310, 344.
Consul, forging seal, &c. of, 716.
Contempt of court, 943.
Contempt of court, commitment for, 688.
Contradicting witness, 170.
Conveyances, making fraudulent, 622.
Conviction, 280 ; for a first offence, 604.
Conviction, effect of discharge from, 604.
Convictions, when evidence, 218.
Copper coin, falsely making or counterfeiting, 723.
Copy of indictment, 277.
Corn, stealing, 389.
Coroner, examinations before, return of to court, 167 ; evidence by,
 200.
Coroner's inquisition, 877 ; jurisdiction, 878 ; duties in cases of violent
 or doubtful death, 880 ; deodands abolished, 883 ; the finding, 884 ;
 the inquisition, 884 ; form of, 887 ; medical witnesses, 885 ; amend-
 ing inquisition, 890 ; quashing it, 891 ; appointment of deputy,
 880 ; removal of coroner from his office, 880.
Corporal punishment, 289.
Corporation books, entries in, when evidence, 218.
Corporations, forging documents of, 699.
Corroboration of evidence, 183.
Corruption of blood, 337.
Corruption, by justices, 944.
Costs upon an information, 142, 146 ; of a prosecution, 275 ; of prose-
 cutions for misdemeanors under Larceny Act, 400 ; for misde-
 meanors under Malicious Injuries Act, 606.
Costs of special jury, 163.
Costs, in prosecutions for misdemeanors, 702.
Costs before trial, 52 ; on *certiorari*, 108, 109 ; of prisoners removed to
 Newgate, 115.
Cotton goods in the loom, &c. or in any stage, &c. of manufacture,
 cutting, breaking, or destroying, or damaging with intent to destroy
 or render useless, 479 ; indictment, 479 ; punishment, 479.
Council of the Marches, perjury before, 978.
Counsel, assignment of, 172.
Counsel, privileged from giving evidence against his client, 187 ; how,
 in collateral matters, 187.
Counsel, for prisoners, 166 ; right to begin, 275 ; right to reply, 168,
 170 ; precedency of, 169 ; practice, 246 ; rules as to, 286.
Counterfeiting coin, 719.
Counting-house, breaking and entering and stealing therein, 470 ;
 indictment, 471.

Index.

- Counts, joinder of several offences in several, 96; addition of to indictments, 97, 173; when superfluous, 98, 122.
- County buildings, setting fire to, 556; riotously destroying, 570.
- County court, perjury before, 977.
- County court, issuing false process of, 932.
- County, goods provided for and at the expense of, how described in an indictment, 91.
- Court baron, perjury before, 976.
- Court of sewers, perjury before, 977.
- Court rolls, forging of, 693.
- Courts, before what, perjury can be committed, 974.
- Courts-martial, 1321.
- Courts-martial, perjury before, 990.
- Cow, stealing, 407.
- Criminal appeal court, 272.
- Criminal informations, generally, 134; for what causes, 134, 136; mode of proceeding, 138; cannot be moved for by a private person, 138; where filed, 140; when to be moved for, 140; affidavit and jurat, 141; filing, 142; answer, 143, 149; pleading, 144; punishment by infliction of costs, 146; venue, 148; other matters, 149; compounding, 151; entry of records, 151; issue, 151; discretion of judge as to trying indictment, 151.
- Crops of corn, grain, or pulse, setting fire to, 577; indictment, 580.
- Cross examination of witnesses, 168, 224, 231; on depositions, 168.
- Crown, challenge of jurors by, 155.
- Crown Office subpœna, 257.
- Crossed cheques, alteration of, 659.
- Cruelty to children and servants, 1195.
- Cultivated roots, destroying, &c., 579.
- Curtilage, what is, 468. Breaking and entering a building within, and stealing therein, 468; indictment, 469.
- Custom-house officers, shooting at, 1214.
- Customs, forgeries relating to, 707.
- Customs, officers of, embezzling or wasting goods, &c., 507.
- Customs, oaths imposed by Acts relating to, 991.
- Cutting false coin, 739.

D.

- Damaging, &c., works of art, 589.
- Dead bodies, stealing, 1195.
- Deaf and dumb person pleading, 117; may be a witness, 177.
- Death, judgment of, 281.
- Deaths, forging registers of, 696; offences in relation to, 1169, 1305.
- Declaration instead of oath or affirmation, 995.
- Deed, forgery of, statutes, 654.
- Deed or other writing, evidence of title to real estate, stealing, 422; indictment, 422; forgery of, 654.
- Deer, coursing, hunting, snaring, or carrying away, killing, wounding, or attempting to kill or wound, in inclosed part of any forest, &c., or in inclosed land where deer are usually kept, 411; indictment, 413; being in possession of, 411; setting snares for, 412.
- Defacing coin, 723; when false, 739.
- Defacing marks on public stores, 1219.
- Defective venue, 63.
- Defects, formal, may be amended, 71; certain defects shall not vitiate an indictment, 71.

Index.

- Defence, evidence for, 245.
Defence in *forma pauperis*, 124.
Defilement of a girl under twenty-one years of age, procuring the, 830.
Demanding money with menaces or by force, with intent to steal, 442 ; indictment, 443 ; upon forged instruments, 698.
Demanding money, &c., on forged instruments, 698.
Demurring to indictment, 116, 123.
Deodands, abolition of, 883.
Depositions, how proved, 17, 211 ; admission of in evidence, 208, 231 ; when not, 208 ; of a person who is dead, 210, 214 ; of a person unable to travel, 209 ; how taken, 17 ; right of prisoners to copies of, 17.
Depositions before coroners, 167 ; when evidence, 211, 213 ; how proved, 211.
Deputy coroner, appointment of, 880.
Detainer, forcible, 1105.
Dice, frauds with, 530, 618, 1187.
Die, possession of, when forged, 704 ; forging wrappers of, 705.
Directors of corporate bodies and public companies, frauds, &c., by, 514.
Discharge of jury, 164, 259.
Discharge of prisoners, 278.
Discharge from conviction, effect of, 604.
Discharge of recognizance, 24.
Discrediting witness, 226.
Discretion of judge as to trying indictment, 151.
Disfigure, wounding with intent to, 803.
Disobeying the orders of a judge, 934 ; of justices, 934, 937, 941.
Dissenting chapel, setting fire to, 556.
Dissenting chapels, marriages in, 854.
Distress, how, when illegal, 948.
Disturbances of public peace, suppression of, 1085.
Disturbing public worship, 1165.
Divine worship, place of, breaking, entering, and stealing, &c. in, 450, 470.
Divorce, pleaded in answer to a charge of bigamy, 860.
Dock, stealing from, 480 ; setting fire to buildings connected with, 556 ; other injuries, 585.
Doctors' Commons, perjury in, 975.
Document of title to lands, interpretation of, 361.
Document of title to goods, interpretation of, 361.
Dogs, stealing, 389, 417 ; taking money to restore stolen, 300 ; knowingly being in possession of stolen, 415, 418 ; or the skin thereof, 418 ; injuries to, 590 ; stealing a dog after a previous conviction, 417.
Domestic beasts, stealing, 390, 415.
Doubtful titles, buying or selling, 925.
Drain, damaging banks of, 585.
Drink, selling adulterated, 609.
Driving, furious, 811 ; indictment, 811 ; punishment, 811.
Drown, attempting to, with intent to murder, 789.
Drunkenness, 1178 ; no excuse for crimes, 247 ; for homicide, 747 ; will not exclude a confession, 195.
Ducks, stealing, 390.
Duel, killing in, murder, 748 ; manslaughter, 764.
Dutch Bay Hall Company, forgery as to, 717.
Duty of counsel, 166.
Dwelling house, breaking and entering, and committing felony in,

Index.

450, 470 ; indictment, 450, 471 ; breaking, &c., a building within the curtilage and stealing therein, 468 ; indictment, 469 ; stealing in, some person therein being put in fear, 474, 477 ; punishment, 474 ; stealing to the value of 5*l.* in, 474 ; indictment, 476.
Dwelling house, setting fire to, 556. Setting fire to, some person being therein, 556.
Dwelling house, injuries to, by tenants, 574.
Dying declarations, when received in evidence, 205.

E.

East India bonds, forging, 642.
Ecclesiastical leases, false recitals in, 620, 1169.
Election, where several offences are charged in, 173.
Election petitions, false evidence, regard to, 993.
Election writs, 1318.
Electric telegraph, injuries to, 587 ; attempts, 588.
Embezzlement by clerks or servants, or persons employed in that capacity, 485 ; indictment, 497.
Embezzlement by officers and servants of the Bank of England or Ireland, 504 ; by persons to whom money, or securities for money, &c. shall be issued for the public service, 502 ; by constables, 502.
Embezzlement by bankers, merchants, brokers, attornies, agents or factors, 509.
Embezzlement under Mutiny Acts, 506.
Embezzlement of first fruits, 506.
Embezzling the Queen's stores, 506.
Embracery, 926.
Enchantments, pretending to exercise, 618.
Engine-house, setting fire to, 556 ; being in possession of, for the purpose of committing offences, 601, 874.
England, Bank of, embezzlement by officers of, 504.
England, forging instruments purporting to be payable out of, 700.
Engrossing, 1205.
Entry, what, in burglary, 456.
Entry, forcible, into a freehold, indictment for, 1106.
Error, writ of, 290.
Escape, 956.
Escape from prison, aiding, 950.
Escape of prisoners of war, aiding, 359.
Estreat of recognizances, 23.
Evidence, 117 ; want of understanding, 117 ; of religious belief, 178 ; infamy and interest, 179 ; accomplices, 181 ; king's evidence, 181, 183 ; of jurymen, 187 ; objecting to witnesses, 187 ; committal for contempt, 188 ; mode of examining witnesses, 188 ; confessions, 188 ; when admissible, 190 ; of arbitrators, 187 ; examinations, 204 ; dying declarations, 205 ; depositions, 208 ; letters, 214 ; papers, 215 ; notice to produce documents, 216 ; public documents, 217 ; private documents, 220 ; number of witnesses necessary, 230 ; nature of, 233 ; hearsay, 233 ; privileged communications, 234 ; onus of proof, 236 ; not necessary *in extenso*, 236 ; character of prisoner, 236 ; of felony, not proof of another, 237 ; variances, 237 ; best evidence, 239 ; handwriting, 239 ; presumptive, 240 ; of medical men, and experts, 242 ; prior conviction, 242 ; where there are two indictments, 244 ; for the defence, 245 ; insanity, 249 ; infamy, 251 ; alibi, 251 ; character, 251 ; principal and accessory, 251 ; in answer, 252.

Index.

- Evidence, in case of treason, 323.
- Evidence before the grand jury, 42, 47.
- Ewe stealing, 407.
- Examination of witnesses in chief, 222 ; cross-examination, 224 ; re-examination, 229 ; right of persons to copies of, 167.
- Examination on the *voir dire*, 152.
- Examinations before justices, 204.
- Exchequer bills, bonds, or debentures, forging or uttering, 643.
- Excise. Affairs of embezzling or wasting goods, &c., 507 ; false accounts, 618, 619 ; false permits, 619 ; forging moulds, forms, &c., with words " Excise Office" on them, 706 ; forging handwriting of receiver-general of, 707 ; permits, 707 ; oaths imposed by Acts relating to, 991.
- Excusable homicide, 773.
- Execution of sentence, 302.
- Execution of a murderer, at what time to take place, 114.
- Execution of warrant to arrest, 5.
- Ex-officio* information, 134, 150.
- Expenses of witnesses, 256.
- Expenses of commitment, 26 ; before trial, 52.
- Experts, opinions of, in evidence, 242.
- Explosive substances ; manufacturing or having in possession explosive substances for the purpose of committing offences, 601.
- Explosive substances, sending with intent to burn, &c., 569 ; indictment, 569.
- Exporting false coin, 733.
- Exposure of children, 807.
- Extortion, 607 ; what is, 1073 ; by gaolers, 1078 ; by justices, 944. Trial, 1080. Judgment, 1080.
- Extreme unction, custom as to, 206.

F.

- Factor, frauds by, 509.
- Factor or agent pledging for his own use the goods of his principal intrusted to him for sale, 509 ; indictment, 510.
- False accusation, whereby a conviction for murder ensues, 759.
- False characters to servants, &c., giving, 619.
- False dice, 610.
- False document, certifying, 622.
- False news, propagating, 610.
- False permits, fraudulent delivery of, 619.
- False pleading, 618.
- False pretences, obtaining goods, &c. by, 516 ; indictment, 530 ; what pretences are within the statute, 518.
- False process of county court, 932.
- False lights to ships at sea, 594.
- False recognizances, acknowledgment of, 933.
- False return to *mandamus*, 946.
- False statements as to collection of public revenues, 618, 619.
- Farm buildings, setting fire to, 556.
- Fees, 305.
- Felonies, where tried, 162.
- Felonies against the Queen, 344.
- Felony, compounding, 915.

Index.

- Females, aggravated assaults on, 828.
Females, punishment of, 284.
Fences, live or dead, post, pale, or rail, or stile, or gate, stealing, cutting, breaking, or throwing down, 425, 427 ; unlawful possession of, 428.
Feræ naturæ, animals that are, 414.
Fern, growing, setting fire to, 577.
Ferry, obstructions to, 1293.
Fetters on prisoner when arraigned, 120.
Fight, challenging to, 1102.
Filing informations, 142.
Filly, stealing, 407.
Finding base coin, procedure in such case, 735.
Finding of an indictment, 97.
Fines, 285.
Fireworks, how, if death ensue from, 771.
First conviction, power of justices in such case, 604.
First fruits, embezzlement of, 506.
Fish, taking or destroying, in water situate in land adjoining or belonging to a dwelling house, 415 ; indictment, 416.
Fish, stealing, 389.
Fishery, obstructing, 1299.
Fishpond, or water which is private property, or in which any person has a private right of fishery, breaking or destroying the dam of, 585.
Fitting out vessels of war for foreign states, 357.
Fixtures—glass or woodwork belonging to any building, lead, iron, copper, brass or other metal, or any utensil or fixture, fixed to any building—stealing or ripping, cutting or breaking with intent to steal, 425 ; indictment, 426.
Fixtures, larceny of, by tenants or lodgers, 508.
Fold, setting fire to, 556.
Food, selling adulterated, 609.
Food, sale of unwholesome, 1302.
Forcible entry, 1105 ; nature of the force, 1109, 1110 ; other entries not forcible, 1111, 1112 ; who may be guilty of the offence, 1112 ; joint tenant, 1112 ; feme covert, 1113 ; infant, 1113 ; by an individual, 1114 ; nature of property and possession, 1114, 1115 ; proceedings, restitution, re-restitution, 1116 ; inquisition, 1125, 1128 ; judgment, 1117, 1119, 1130 ; indictment, 1119 ; pleas, 1124 ; *certiorari*, 1127 ; writ of error, 1130.
Foreign bills or notes, forging, 653.
Foreign coin, making or counterfeiting, 724.
Foreign coin, offences relating to, 724.
Foreign countries, arrest in, 8.
Foreign countries, laws of, when evidence, 218 ; how proved, 220.
Foreign courts, judgments of, when evidence, 218 ; how proved, 220.
Foreign enlistment, 356.
Foreign governments, libels against, 1139.
Foreign princes and ambassadors, libels on, 1091.
Foreigners of distinction, libels against, 1139.
Forestalling, 1205.
Forfeiture, 299.
Forfeitures, application of, 604.
Found property, 364.
Forged die, or counterfeit plate, possession of, 704.
Forged instruments, demanding money on, 698.

Index.

- Forged stamps, what is an uttering of, 705.
- Forgery at common law, 632; indictment, 635; punishment, 636; trial, 636.
- Forgery, as to records, 691; as to the revenue, 703, 708; as to public offices, 699; court rolls, 693; of memorials, &c. in registry office, 693; of name, &c. of accountant-general, 694; registrar of admiralty, 694.
- Forgery, punishment, 698.
- Forgery, relating to customs, 707.
- Forgery, as to stamps for gold or silver plate, 705; certificates for issue of Exchequer bills to carry on public works and fisheries, 709; public pensions and salaries, 709; life annuities, 709; navy pay and prize money, 709; army prize money, 710; certificate of West India relief commissioners, 711; abolition of slavery receipts, 712; officers at Chelsea concerned in paying prize money, 712; half-pay officers' widows' pensions, 712; soldiers' and sailors' pensions, 712; savings banks, 712.
- Forgery, principal and accessory in, 701.
- Forging and uttering bank notes, &c., 645; foreign notes, 653; search for paper and forged instruments, 644; forging a will, 656; forging a bill of exchange, 659; forging an undertaking, warrant, or order for the payment of money, 670.
- Forging and uttering Exchequer bills, &c., 643.
- Forging by bank clerks of warrants for more or less than is due, 640; indictment, 641.
- Forging deeds, bonds, &c., 654. Indictment for forging a bond, 655; forging a receipt, 670; forging a warrant, order, or request, for the delivery of goods, &c., 670.
- Forging false entries of stock, &c., 639; making a transfer of stock in the name of another, not the owner, 639.
- Forging the great seal, &c., 637; indictment, 639; seal of county court, 932.
- Forging registers of births, marriages, deaths, &c., 696.
- Forging East India bonds, 642.
- Forging handwriting of paymaster-general, 707; of receiver-general of excise, 707; permits, 707; land tax, 708.
- Forging instruments purporting to be payable out of England or Ireland, 700.
- Forging instruments relating to the excise, 706.
- Forging legal documents, 699; as to Acts purporting to be printed by the Queen's printers, 699.
- Forging Mediterranean passes, 708; certificates of quarantine, 708.
- Forging orders of justices, 694.
- Forging scrip receipts, 709.
- Forging signatures of officers or seals of bankruptcy court, 699.
- Forging wrappers of dice, 705; playing cards, 705.
- Forging, trial for, 701; offences formerly capital, 702; fine and sureties, 702; hard labour and solitary confinement, 703.
- Forging, national debt, 713; savings bank for seamen, 713; public works, woods, and forests, 713; wrappers of playing cards, 714; ship's registry, 714; Petty Bag Office, 764; post office, 714; oaths and notarial Acts abroad, 716; wills of petty officers and seamen, 716; seal, &c. of British ambassador or consul, 716; insurance companies, 717; Dutch Bay Hall Company, 717.

Index.

- Formâ pauperis*, defence in, 124.
Frauds against administration of justice, 934.
Frauds by agents, bankers, or factors, 509.
Frauds by bankrupts, 623.
Frauds by directors and other officers of corporate bodies and public companies, 514.
Frauds by public officers, 610.
Fraudulent assignment of pensions, 622 ; conveyances, 622.
Fraudulent process of county court, 932.
Freedom in boroughs, refusing to grant, 1212.
Freeholders' oath, 990.
Freemasons' lodges, exemption of from statutes relating to unlawful oaths, 1210.
Friendly societies, property of, justices orders as to, 937.
Fruit or vegetable production growing in a garden, orchard, nursery ground, hot-house, green-house, or conservatory or elsewhere, stealing, destroying, or damaging, with intent to steal, 428 ; second offence, 428 ; destroying or damaging with intent to destroy, 579.
Furious driving, 811 ; indictment, 811 ; punishment, 811.
Furze, growing, setting fire to, 577.

G.

- Gambling houses, 1187.
Game, offences relating to, 903.
Game, taking in the night-time, or entering land armed for that purpose, 903 ; second offence, 903 ; third offence, 903. Three or more entering land in the night to take game, armed, 905. What shall be deemed night, 905.
Gamekeeper, power of, to apprehend poachers, 904.
Gamekeepers, or the owner or occupier, or person having a right, or reputed right, of free warren, &c., or the lord of the manor, or any gamekeeper, &c., assaulting or offering violence towards, 904.
Games and wagers, cheating at, 618.
Gaming, 1187 ; winning money at cards, &c., by fraud, 530 ; punishment, 530.
Gaming-house, punishment for keeping, 283.
Gaol, non-repair of, 927.
Gas, stealing, 390.
Gate, stealing, cutting, breaking, or throwing down, or being in possession of, 425, 427.
Gazette, in what cases evidence, 218.
Gelding, stealing, 407.
General warrants, 3.
Gentoo, how sworn as a witness, 179.
Girl, carnally knowing, 838, 841.
Gleaners, larceny by, 383.
Gold plate, forging stamps for, 705.
Good behaviour, recognizance for, 605.
Good behaviour, surety for, not now in use, 901.
Goods found, larceny of, 364.
Goods in process of manufacture, stealing, 479.
Goods, jury on trial for treason or felony not to inquire as to, 242.
Gorse, setting fire to, 577.
Government, forgeries relating to, 703.

Index.

Government, libels on, 1089.
Grain, assaults to prevent sales of, 816.
Granary, setting fire to, 556.
Grand jurors, who may be, 42; proceedings before, 42, 47; their duties, 43; their finding, 45.
Grand jurors, when verdict in civil action equivalent to finding by, 46; prevention of vexatious indictments before, 46.
Grand jury, libel on, 930.
Grass growing, stealing, 389.
Great seal, counterfeiting, 637.
Great seal, forging, &c., 637.
Guardians and overseers, prosecution by, 876.
Gunpowder, causing bodily injury by, 807; attempting to injure buildings or persons therein by explosion of, or other explosive substance, 569; indictment, 569; attempting to blow up buildings, &c. with, 788; ships, 594.
Gunpowder, keeping in an improper place, 1239.
Gunpowder, making, to commit offences, 601, 874; searching for same, 874.

H.

Habeas corpus, 28; return to writ, 36; when amendable, 38; costs, 38.
Habeas corpus ad respondendum, 38; motion for must be made by counsel, 39; error, 39; waiver, 39; quarter sessions, 39.
Half-pay officers, forging certificates as to, 712.
Handwriting, how proved, 239, 679. Comparison of handwriting, 239, 679.
Hares, stealing, 389; unlawfully killing, &c., 413.
Hay, setting fire to, &c., 577.
Hearing of a complaint, what is, 829.
Hearsay evidence, 233.
Heath, growing, setting fire to, 577.
Heifer, stealing, 407.
Heiress, abduction of, 842.
Hens, stealing, 390.
High seas, arrest for offences committed on, 16.
High seas, what, within the jurisdiction of the admiralty, 1192.
High treason, 307.
Highway, obstructing, 124; plea to indictment for, 132; dedication, 1250. Indictment for not repairing a highway, 1251, 1261; repair *ratione tenuræ*, 1254; fences, 1259.
Highway, loiterers on, apprehension of, 602.
Highways, apprehension of persons loitering on, 875.
Homicide, 743; excusable, 773; justifiable, 775.
Hop-binds, cutting or destroying, 578.
Hop-oast, setting fire to, 556. Riotously demolishing, &c., or beginning so to do, 570; indictment, 573.
Horse-racing, stakes on, 1189.
Horse-stealing, 368, 390, 407.
Hostile witnesses, rule as to, 170.
House, setting fire to, 556.
House of Commons, perjury before, 976; libels on, 1089.
Housebreaking, being found by night armed, with intent to break into any dwelling house or other building, statute, 473; indictment, 473. Second offence, 470. Breaking out of a dwelling house in the night, 450; indictment, 451; punishment, 450; entering dwelling

Index.

- house in the night, with intent to commit felony, 450. Definition of night, 452.
- Houses, injuries to, by tenant, 574.
- Hovel, setting fire to, 556.
- Hue and cry, 15.
- Husband, coercion of, in what case it excuses wife, 72, 76. He cannot be a witness for his wife, 184; in what cases he may be a witness against her, 185.

I.

- Identity of voters at elections, 1318.
- Idiot, what, 13; how when called upon to plead, 117. Cannot be a witness, 177.
- Ignorance, what, an excuse for crime, 247; of a statute, 247.
- Illegal brokerage, 1313.
- Illegal dealings with false coin, 732.
- Illegal distress, 948.
- Illness of juryman during trial, 164.
- Illegal possession of coin, 725.
- Illegal warrant, arrest under, 4.
- Illegal witness, 948.
- Illegitimate children, consent to marriage of, when minors, 857.
- Immaterial averments, 236.
- Imparlance, 116.
- Impeaching judgment, 267.
- Implements for coining, making without lawful authority, 734.
- Importing false coins, 733.
- Impounding documents, 221.
- Impressment, how, when malicious, 948.
- Imprisonment, sentence of, 605.
- India, venue as to, 63.
- Indictment, 53; venue, 53, 64.
- Indictment before grand jury, prevention of when vexatious, 46.
- Indictment, amendment of, 65; defects in, 71. Baron and feme, 72; time, how to be stated in, 84; statement of offence in, 86; of property, 91; addition of count, 97; finding of, 97; how, when there are several felonies charged, 98; superfluous counts in, 98, 122; joinder of parties, 98, 533; traverse of, 116; how in default of pleading to, 116; quashing, 120; demurrer to, 123; reading over indictment, 124; prisoner entitled to copy of, on being acquitted, 277; what it shall be sufficient to allege in, 605.
- Indictment found, warrant in such case, 2.
- Indictment, where there may be two against the same person, for felony, 244.
- Indictments for murder or manslaughter, 778.
- Infamous crime: accusing or threatening to accuse of infamous crime, with the intent to extort money from him, 442; indictment, 443.
- Infamy of witnesses, 179.
- Infant, in what cases incapable of crime, 251; may be a witness, 177.
- Infants, murder of, 757.
- Infectious disease, exposure of person labouring under, 759.
- Inferior courts, proceeding in, how proved, 218.
- In *formâ pauperis*, defence, 124.
- Information upon penal statutes, 146; how, 146; by common informer, 146; limitation of time, 147; venue, 148.

Index.

Information previous to a summons need not be on oath nor in writing, 2; how previous to a warrant, 3.
Informations (criminal) generally, 134; for what offences, 134; mode of proceeding, 138; cannot be moved for by a private person, 138; where filed, 140; when to be moved for, 140; affidavit and jurat, 141; filing, 142; defendant's answer, 143, 149; pleading, 144. Punishment by infliction of costs, 146; venue, 148; other matters, 149; compounding, 151; entry of record, 151; issue, 151; discretion of judge as to trying indictment, 151.
Informer, action by, 146; evidence, 224.
Injuries to houses, buildings, &c., by tenants, 574.
Injuries not specially provided for, 600.
Injuring the Queen, 346.
Innkeeper refusing to admit guest, 1306.
Inn of court, setting fire to buildings belonging to, 556; riotously demolishing, 570.
Inquest of office, perjury before, 978.
Inquisition, 884.
Insane persons, commitment of, 27.
Insanity, acquittal on the ground of, 118, 250.
Instruments, possession of, for purposes of felony, 601, 874.
Instruments, using, to procure miscarriage, 867.
Instruments unstamped, when evidence, 221; when not, 220.
Insurance companies, forgeries as to, 717.
Interested witness, 179.
Interpretation of terms, 96.
Interpreter, counsel acting as, must be sworn, 172.
Invalid marriages, 858.
Ireland, records of courts in, when evidence, 218.
Ireland, embezzlement by officers of bank of, 504.
Ireland, forging instruments purporting to be payable out of, 700.
Issue joined, 151.

J.

Jesuits, penal statutes as to, 1170.
Jew, how sworn as a witness, 179.
Joinder of parties in indictments, 98.
Joinder of several offences in different counts in one indictment, 96.
Joint-stock companies, altering or falsifying books of, 623.
Joint tenants, larceny by, 388.
Judge's warrant, 2.
Judgment, 281; time and place of, 287; alteration of, 289; execution of, 302.
Judgment of death, recording, 303.
Judgment for treason, 336.
Judgment in trial for larceny, 399.
Judgment, when evidence, 218.
Judicial proceedings, perjury in, 984.
Juries in trials for treason, 334.
Jurisdiction for trial, of offences within jurisdiction of the admiralty, 398.
Jurisdiction, plea to, 125; in what cases, 126.
Jurors, assignment of perjury by, 971.
Jurors, how described in indictments, 69; affirmation of, 86.
Jury, coroner's, 881.

Index.

Jury *de medietate linguæ*, 160.
Jury of matrons, in what case, 284.
Jury pannel, prisoner not entitled to copy of, 161.
Jury, petty, 152; challenges, 152; trial of it, 157; their qualification, 159.
Jury process, 160.
Jury, special, 162.
Jury, view by, when permitted, 258.
Juryman, illness of, 164; evidence, 187.
Juryman, personating, 947.
Justice acting without qualification, 946.
Justices, assaults on, 812.
Justices, obstructing in holding court, 928.
Justices, perjury before, 982.
Justices, powers of, with regard to preservation of the peace, 1086.
Justifiable homicide, 775.

K.

Keeping the peace, &c., recognizance for, 605, 893.
Kidnapping grown persons, 847.
Killing cattle maliciously, 590.
Killing cattle, &c., with intent to steal, 407.
Killing the Queen's officers, 317.
King's evidence, 181; execution of, 227; depositions of, 246.
Kirk session book not evidence, 219.

L.

Lace in the loom, &c., or in other process of manufacture. cutting, breaking, or destroying, or damaging with intent to destroy or render useless, 479.
Lamb, stealing, 407.
Land tax, forging certificate for redemption or sale of, 708.
Lands, jury on trial for treason not to inquire as to, 242.
Larceny, 561; definition of, 362; must be against the will of the owner or possessor, 372; in what character, 384. Larceny by clerks or servants, 382, 384, 482, 485. Stealing or embezzling post letters, 1226. Stealing money, &c., out of letters, 1230. Stealing letters sent by the mail, or by a post-office packet, 1230. Stealing votes, newspapers, &c., 1232. Stealing from a building within the curtilage, breaking into the same, 468. Stealing in a shop, warehouse, or counting-house, by breaking into the same, 470. Stealing silk, woollen, or cotton goods in any stage of manufacture, in any building, field, &c., 479. Stealing from a ship or vessel in distress, wrecked, stranded, or cast on shore, statute, 480. Stealing from a vessel, barge, or boat, in any port of entry or discharge, or upon any navigable river, canal, &c., 480.
Larceny by tenants or lodgers, 508.
Larceny by a bailee, 381.
Larceny, property found, 364; pledged, 371; by gleaners, 383; by sheriff's officers, 387; by the owner of the goods, 387; by joint tenant, 388. Baron and feme, 388; of chattels, real and personal, 389; indictment, 390; trial, 396; jurisdiction of admiralty, 398; judgment, 399. Costs in misdemeanors, 400. Restitution, 400; by bailees, 402; of cattle, &c., 407; indictment, 408; sheep, 409; trial, 410; of pigs, 408. Deer, 411. Animals *feræ naturæ*, 414.

Index.

- Dogs, 411. Hares and conies, 413. Fish, 415; oysters, 417. Dogs, 417. Bonds, bills, &c., 419. Deeds relating to real estate, 422; wills, &c., 422; records, &c., 423. Metal, glass, wood, &c., 425. Trees in pleasure grounds, 427. Fences, gates, &c., 427; unlawful possession of, 428. Fruit, vegetables, &c., 428; in mines, 430. "Last mentioned," use of, in indictments, 93.
- Laudanum, administering with intent to commit any indictable offence, 805.
- Lead, stealing from roofs, 389.
- Leases, ecclesiastical, false recitals in, 1169.
- Legal documents, forging of, 699.
- Legal officers, misconduct of, 931.
- Letters sent by the post, stealing, 1226.
- Letters, servants of the post office embezzling, 1230; destroying, 1233.
- Letters, opening or delaying, 1232.
- Letters, threatening, 442, 599, 802.
- Letters, when not evidence, 214; when they are, 215.
- Lewdness, open and notorious, 1184.
- Liability for death caused by wrongful act or default, 883.
- Liability to repair gaol, 927.
- Libel, criminal information for, 135; mode of proceeding, 139; evidence, 248; when treasonable, 339.
- Libel on officers of justice, 928.
- Libel, seditious, 1088; punishment, 1092.
- Libel, what, 1130; against an individual, 1131; public persons, 1132; foreigners of distinction, 1139; mode of publication, 1140; the offence, 1140; defence, 1144; proceedings, 1149; evidence, 1154; trial, 1159; verdict, 1161; cost, 1162; judgment, 1162.
- Libels, obscene, 1185.
- Licence, marriage by, 852; special licence, 853.
- Licence to Queen's counsel to appear on behalf of prisoner, 169.
- Life annuities, forgery as to, 709.
- Light coin, when to be cut or defaced, 739.
- Lights, showing false, to ships at sea, 594.
- Limitation of prosecutions, 147; under game laws, 904.
- Linen goods in any stage of manufacture, stealing, 479; indictment, 479; punishment, 479. Linen goods in the loom, &c., or other process of manufacture, cutting, breaking, or destroying, or damaging with intent to destroy or render useless, 479.
- Lodgers, larceny by, 508.
- Loiterers at night, apprehension of, 602.
- Loom used in weaving silk, woollen, linen, or cotton articles, or framework-knitted piece, stockings, hose, or lace, cutting, breaking, or destroying, or damaging with intent to destroy or render useless, 479.
- Lotteries, 1190.
- Lucri causa*, 382, 383.
- Lunacy, forging signature of registrar in, 699.
- Lunacy Acts, offences under, in regard to the insane, 1315.
- Lunatic, in what cases incompetent as a witness, 177.
- Lunatics, commitment of, 27.

M.

- Machine, being in possession of for the purpose of committing offences, 601, 874.
- Machinery—cutting, breaking, or destroying, or damaging with intent to destroy or render useless, any loom, frame, machine, &c., em-

Index.

- ployed in carding, spinning, &c., silk, woollen, linen, or cotton articles, or framework-knitted piece, stocking, hose, or lace, 574 ; indictment, 576. Cutting, &c., or damaging, &c. any machine or engine, employed in other manufactures, or a threshing machine, 575 ; indictment, 576. Riotously demolishing, pulling down, or destroying, or beginning to do so, 570 ; indictment, 573.
- Magistrate, information against, in what cases granted, 136 ; not obeying the order of, 935 ; assaulting, 812.
- Magistrates, powers of, with regard to the preservation of the peace, 1086.
- Magnetic telegraph, injuries to, 587.
- Mahometan, how sworn, 179.
- Mail, stealing letters sent by, 1226.
- Maiming cattle, 590.
- Maintenance, 920.
- Mala praxis*, 1302.
- Male children, aggravated assaults on, 828.
- Malice prepense : act done wilfully may be presumed to have been done maliciously, 602.
- Malicious impressment, 948.
- Malt-house, setting fire to, 556. Riotously demolishing, pulling down, or destroying, or beginning to do so, 570 ; indictment, 573.
- Mandamus*, false return to, 946.
- Manslaughter, what, 761 ; punishment, 772.
- Man-traps, setting with intent to do grievous bodily harm, 808.
- Manufacture, cutting, breaking, or destroying, or damaging with intent to destroy or render useless, any silk, woollen, or cotton goods, or framework-knitted piece, stocking, hose, or lace, being in the loom or other process of manufacture, 479, 574 ; indictment, 479, 576.
- Map, when not evidence, 221.
- Mare, stealing, 407.
- Marines, obtaining pay by means of false certificates, 620.
- Marriage Acts, false declarations under, 992.
- Marriage by licence, 852 ; special licence, 853 ; registrar's certificate, 853 ; in dissenting chapels, 854 ; of minors, 857 ; when illegitimate, 857.
- Marriage licence, taking false oath to obtain, 975.
- Marriage, indictable offences in relation to, 1179.
- Marriage, how proved, 849 ; how proved in cases of bigamy, 861.
- Marriage register, forging or making any false entry in, 696.
- Marriages : indictment for refusal of clergyman to perform ceremony, 1305.
- Marriages, when invalid, 858.
- Married woman cannot enter into recognizance, 255.
- Marsh, bank or wall of, breaking or cutting down, whereby lands are overflowed or damaged, 585.
- Master in chancery, forging signature or seal of, 700.
- Matrons, jury of, 284.
- Mayor of borough or corporate town, hindering election of, 1316.
- Medical evidence as to insanity of prisoner, 119.
- Medical men, opinions of, in evidence, 242.
- Medical witnesses at coroner's inquisition, 885.
- Mediterranean passes, forgery of, 708.
- Meeting-house, breaking, entering, and stealing in, 450.
- Menaces, demanding money, &c., by, with intent to steal, 442 ; indictment, 443.

Index.

- Merchant, applying to his own use money, or securities for money, intrusted to him for a specific purpose, 509; indictment, 510. Converting to his own use any chattel, money, or valuable security, or power of attorney to sell or transfer shares in public funds intrusted to him for safe keeping, or for a specific purpose, 509.
- Metal, stealing, when attached to buildings, 425.
- Metropolis police district, powers of police constables in, in certain cases, 621.
- Millbank Penitentiary, convicts breaking out, punishment, 961.
- Military exercises, unlawfully training to, 354.
- Milk, stealing, 390.
- Mill, setting fire to, 556. Riotously demolishing or pulling down, or destroying, or beginning to do so, 570; indictment, 570.
- Mine, stealing the ore of any metal, *lapis calaminaris*, manganese, mundick, wad, black cawke, black lead, coal, or cannel coal, or removing it with intent to steal it from mines, beds, or veins thereof, 430; indictment for, 430. Conveying water into a mine with intent to damage it, 582. Setting fire to mines of coal or cannel coal, 582. Pulling down, filling up, or obstructing airways, waterways, drains, pits, levels, or shafts, or engines, &c., belonging to mines, 583. Doing so, or beginning to do so, riotously, 570; indictment, 573.
- Ministers, disturbing, at public worship, 1165.
- Minor, cannot enter into a recognizance, 255.
- Minors, consent to marriage of, 857.
- Mint, illegal removal of coining instruments out of, 735.
- Mint offences, rescue for, 962.
- Misconduct of officers of justice, 931, 943.
- Misconduct on railroads, 1307.
- Misdemeanor, costs of prosecution for, under Larceny Act, 400; compounding, 915.
- Misdemeanors committed against legal officers, 949.
- Misdemeanors, costs of prosecutions for, 702.
- Misdemeanors, where tried, 162.
- Misprision of felony, 82, 916.
- Misprision of treason, 341; trial for, 342; judgment, 342.
- Mistrial, 161, 163.
- Mitigation, affidavits in, 286.
- Mohair, stealing, in process of manufacture, 479.
- Money found on prisoner, application of, 26.
- Monopolies, 1207.
- Moravian, evidence of, 178.
- Murder, attempts to, 787. Administering poison, wounding, &c., with intent to murder, 788. Indictment for wounding with intent to murder, 788; punishment, 797. Attempting to poison, shoot, drown, &c., with intent to murder, 789, 797. Attempting to murder by the explosion of gunpowder, &c., 788. Destroying ships with intent, &c., 788. Other attempts to murder, 789.
- Murder, sending letters threatening to, 802.
- Murder, statutes, 530; what, 743, *et seq.*; judgment, 760. Form of indictment for murder, 534; venue, 778; evidence, 780; evidence for the defendant, 536.
- Murderers, rescue of, going to execution, punishment, 963.
- Museums, &c., destroying or damaging works of art in, 589.
- Mute, standing, of malice, proceeding upon, 117.
- Mutiny Act, 1321.
- Mutiny Acts, embezzlement under, 506.

Index.

N.

- Name of the defendant, how stated, 70; *idem sonans*, 70; how, when unknown, 70.
Name of the prosecutor, how stated, 84, 87.
Name of person injured, how stated in indictment, 87.
National debts, forgeries as to, 713.
Nature of evidence, 233.
Nature of verdict, 260.
Naval stores, embezzlement of, 506, 1218.
Navigable river, lock, sluice, floodgate, or other work, throwing down, levelling, or destroying, 585; breaking or cutting down the bank or wall of, 585. Cutting up, drawing up, removing piles, chalk, &c., for securing the bank or wall of a navigable river, with intent to obstruct the navigation thereof, indictment, 585.
Navigable river, stealing from a ship, barge, or boat on, statutes, 480; indictment, 480.
Navigation of public river, obstructing, 1293.
Navy, government of, 1322.
Navy, pay and prize money, forgeries as to, 709.
Negligence, where death occasioned by, 766.
Newspapers, declaration as to, 1318.
Newspapers, officers of post office embezzling, &c., 507.
New trial, 268; time for moving for, 271.
Night, what, 362, 452, 471. What, in offences relating to game, 905.
Noisome smells, 1303.
Non compos mentis: proceedings upon the trial of persons *non compotes*, 118. Custody of, 118.
Non-repair of gaol, 927.
Note for money or payment of money, stealing, 419; indictment, 421; forging, 659.
Notes of a judge, when not evidence, 220.
Notice to produce documents, 216.
Nuisance, 1240; carrying on an offensive trade, 1238. Procedure, in order to abate, 1243; to public health, 1300. Nuisances to highways, 1246; obstructing a common highway, 1246. Indictment against a parish for not repairing a highway, 1261. Indictment for not repairing a bridge, 1273; what is a public bridge, 1274.
Number of witnesses necessary, 230.

O.

- Oath, before what authority taken in perjury, 973.
Oath of jury, allegation of indispensable, 1007.
Oaths, unlawful administering, 347, 933, 1084, 1200, 1205, 1209.
Objecting to competency of witness, 187.
Obscene libels, 1185.
Obscene prints, &c., punishment for selling, 283.
Obstructing burials, 1306.
Obstructing any engine or carriage using any railway, 809.
Obstructing justices in holding court, 928; officers generally, 949.
Obstructing return of a woman child who has been abducted, 846.
Obstructing navigation of public river, docks, &c., 1293.
Obtaining money, &c., by false pretences, 516.
Offences against the person, procedure, 875.

Index.

Offences, how punishable, 1; statement of in indictment, 86; how offenders are to be prosecuted, 605.
Offensive trades and occupations, 1237.
Office, setting fire to, 556. Riotously demolishing, pulling down, or destroying, or beginning to do so, 570; indictment, 573.
Offices, purchase and sale of, 1197.
Officers of justice and others, killing, 756, 771. Assaulting in the execution of their duties, 813; indictment, 816.
Officers of justice, misconduct of, 931, 943; libel on, 928.
Officers and others lawfully authorized, assaulting, striking, or wounding, on account of the exercise of their duty, in preserving wreck, statute, 812; indictment, 812.
Officers of justices, assignment of perjury by, 971.
Officers of public revenues furnishing false statements as to collectors, 618; of excise, 619.
Officers refusing office, 1307.
Onus of proof, 236.
Opinions of medical men, &c., in evidence, 242.
Order of judges, &c., disobedience of, 934.
Orders, forging, 670.
Orders of justices, forging, 694.
Ore, stealing, 430.
Original instruments, production of, in evidence, 239.
Outhouse, setting fire to, 556; demolishing, 570.
Outlawry, 48; reversing, 292.
Overseer of the poor, prosecutions by, 876.
Overseers refusing to account, 611; fraudulent conduct by, 611.
Overseers refusing office, 1307; breach of duty by, 1312.
Overseers, when they may be indicted, 947.
Owners of goods, larceny by, 387.
Ownership of goods, how laid in indictment, 392.
Ownership of property, how stated in indictments, 91.
Ox, stealing, 407.
Oyster fishery, using dredge, net, instrument, or engine, within the limits of, 417; indictment, 417. Dredging on the ground or soil of the oyster fishery of another, 415.

P.

Papal bulls, purchase of, 343.
Paper books, 298.
Papers, when evidence, 215.
Pardon, plea of, 126; in what cases, 127; where to be pleaded, 127, 149, 267. The effect of pardon in restoring competency as a witness, 224.
Parish officers, prosecutions by, 876.
Parish officers not to induce persons to contract marriage, 1181.
Parkhurst prison, convicts breaking out of or rescue from, 962.
Parliament, entries in the journals of, when evidence, 218; reversing judgment, act of, 292.
Parliament, printing Acts of, purporting to be printed by the Queen's printers, and uttering the same, 699.
Parliament, publication of proceedings of, when libellous, 1138.
Particulars of charge, right of prisoner to, 133.
Patents, making false entries in registers of, 622.
Pawnbroker's duplicate, larceny of, 390.
Paymaster-general, forging handwriting of, 707.

Index.

- Payment of wages in other than current coin, 1211.
Parol evidence of confession of prisoner, 200.
Peers and peeresses, how named in an indictment, 90 ; privilege of, 281.
Peers, trial by, in cases of treason, 335.
Penal servitude, instead of transportation, statutes relating to, 304.
Penal servitude, being at large during a sentence of, 951.
Penal statutes, information upon, 146.
Penalties, application of, 604.
Pensions and salaries, forgeries as to, 709, 712.
Pensions, obtaining by false certificates, 620 ; fraudulent assignments of, 622.
Pentonville prison, convicts breaking out of or rescued from, punishment, 962.
Peremptory challenge of petty jury, 153. None in misdemeanors, 154.
Perjury, 965 ; what is, 965. Prosecution by direction of judge, 1000 ; by bail, 971 ; subornation of perjury, 971. Action for imputing, 972 ; at common law, 973 ; wilful, 973 ; before what authority, 973 ; before what courts, 974 ; Doctors' Commons, 975 ; before House of Commons, 976 ; courts of chancery, 976 ; superior courts of law, 976 ; court baron, 976 ; county court, 977 ; court of sewers, 977 ; sheriff's court, 978 ; Council of the Marches, 978 ; inquest of office, 978 ; commissioners of bankruptcy, 978 ; before arbitrators, 979 ; by affidavit, 980 ; in bastardy, 981 ; legal officers, 981 ; justices, 982 ; in judicial proceedings, 984 ; need not be material to issue, 984 ; the matter sworn must be material to the issue, 1012 ; averments, 1014 ; innuendoes, 1019 ; assignments of perjury, 1018 ; evidence, 1024 ; perjury upon a trial at assizes, 1000 ; perjury upon a complaint before a magistrate, 1000 ; evidence, 994 ; false affirmation of a Quaker, Moravian, or Separatist, 994 ; jurors and officers of justice, 971.
Perjury, by statute, 987 ; by witnesses for prisoners, 990 ; freeholders, 990 ; courts-martial, 990 ; municipal corporations, 990 ; bankrupts, 990 ; excise and customs, 991 ; naval and military departments, 991 ; West Indies, 992 ; privy council, 992 ; slavery, 992 ; poor laws, 992 ; charities, 992 ; sale of bread, 992 ; tithe commutation, 992 ; Marriage Act, 992. Registration of births, 993 ; election petitions, 993 ; affirmations, 994 ; declarations, 995 ; two oaths, 1006.
Perjury, proceedings in, 998 ; information, 999 ; *certiorari*, 1001 ; action, 1002 ; pleadings, 1004 ; joinder of parties, 1005 ; venue, 1006 ; time and place, 1006 ; oath of jury, 1007 ; indictment for subornation of perjury, 1022 ; for perjury before committee of House of Commons, 1023 ; before a magistrate, 1023 ; before commissioners of assessed taxes, 1024 ; trial, 1039 ; verdict, 1039 ; judgment, 1040 ; new trial, 1040 ; costs, 1041 ; arrest of judgment, 1042 ; punishment, 1043 ; pardon, 1045.
Permits, delivering false, 619.
Permits, forgery of, 707.
Personation of voters, 1320 ; of corporate officers, 1320.
Persons in the public service, larceny or embezzlement by, 502.
Petit treason to be deemed murder, 743.
Petty Bag Office, forgery as to, 714.
Petty jury, swearing of, 152 ; challenges, 152 ; trial of, 157.
Petitioning, tumultuously, 352.
Pharmaceutical chemists, false certificates as to, 622.
Pigs, stealing, 408.
Pilots endangering ships, 1220.
Piracy at common law, 548 ; trial, 550 ; punishment, 552.

Index.

- Piracy by statute, 548; trial, 550; punishment, 552.
Place of judgment, 287.
Place of trial, 53; changing, 64; of prisoner in court on trial, 176.
Placing wood on rails with intent, &c., 587.
Plague, exposure of person labouring under, 759.
Plan, when not evidence, 221.
Plant, stealing, &c., 428; destroying, &c., 579.
Playing cards, forging, 705, 714.
Plea in abatement, 67.
Pleader, misconduct of, 946.
Pleading to indictment, 117; to criminal information, 144.
Pleading to indictment, 116; pleading over in felony, 123.
Pleadings, how proved, 220.
Pleas, 125; must not be repugnant, 125; withdrawal, 125; to the jurisdiction, 125; in abatement, 67, 126; pardon, 126; *autrefois acquit*, 128; *autrefois convict*, 132; as to highways and bridges, 132; *puis darrein continuance*, 133.
Pleasure grounds, stealing or destroying trees in, 427.
Pledging goods, 371.
Poachers, apprehension of, 904.
Poison, killing by, 540. Administering, with intent to murder, 788; Administering, with intent to endanger life, or inflict grievous bodily harm, 805. Administering, with intent to injure or annoy, 806.
Police constables in the metropolis, powers of in certain cases, 621.
Poll-books of an election, when evidence, 219.
Polygamy, 848.
Poor law board, &c., giving false evidence before, 992; refusing, &c., 1316.
Poor law union, buildings, setting fire to, 556; riotously demolishing, 570.
Postage stamps, forgery as to, 715.
Post office, forgery as to, 714.
Post office, officers of, embezzling, &c. printed papers, 507.
Post office, servants of, opening or delaying, or stealing or embezzling letters, 1226, 1230, 1232; indictment, 1229; trial, 1229; receivers, 1233; destroying letters, 1233.
Postponement of trial, 50, 117.
Power of attorney, fraud by broker, &c., intrusted with, 511.
Præmunire, 343.
Precedency of council, 169.
Pregnancy of female prisoner, under sentence of death, 284.
Presumptive evidence, 240.
Principal and accessory, 76, 84; evidence, 251; principals in the second degree, punishment of, 602; accessories before the fact, 77, 82; accessories after the fact, 77, 83.
Principal and accessory, 76; who are, 76; principals in the second degree, 79; how, when more than one, 84.
Principals and accessories, punishment of, 875.
Principals and accessories in forgery, 701.
Principals and accessories in rape, 837.
Printed papers, officers of post office embezzling, &c., 507.
Prior conviction, 242.
Prison breach, 956; Millbank Penitentiary, 961.
Prisoner, right of to copy depositions, 17; right of to have professional assistance, 19, 166; remand of, 24; commitment, 24; to what

Index.

- gaol, 25 ; application of money found on, 26 ; proceedings before trial, 50 ; costs and expenses, 52 ; name and description of, 70 ; refusing to disclose name, 70 ; arraignment of, 117 ; reading over indictment to, 124 ; confession, 124 ; right to particulars of charge, 133, 167 ; where to be placed in court when tried, 176 ; how brought up as a witness when under sentence, 183 ; character of, 236 ; evidence for defence, 245 ; may address the court, 247 ; entitled to copy of indictment on acquittal, 277 ; discharge of by proclamation, 278.
- Prisoners of war, aiding escape of, 359.
- Private cheats and frauds, 613.
- Private documents, production of in evidence, 220.
- Private frauds, conspiring to commit, 1053.
- Private persons, arrest by, 12.
- Privilege of peerage, 281.
- Privileged communication, 234.
- Privileged publications, 1136.
- Privy council, warrant of, 2 ; may commit for treason, 25.
- Privy seal, forging, &c., 637.
- Prize money, forgery as to, 709, 710, 712.
- Probate, court of, forging signatures of officers of, 2 ; seals, 700.
- Proceedings in indictments for perjury, 998.
- Procedure in coinage offences, 740.
- Procedure in forgery, 700.
- Procedure relating to offences against the person, 875.
- Process, forging, 691.
- Proclamation, the Queen's, when evidence, 218 ; how proved, 220.
- Proclamation, discharge of prisoners by, 278.
- Procuring abortion, 867.
- Production of documents in evidence, notice as to, 216.
- Proof of depositions given in evidence, 211.
- Property, how stated in indictments, 91 ; defined, 362.
- Property, what is the subject of larceny, 389.
- Prosecution of offence at common law, 147.
- Prosecution of offenders, 605.
- Prosecutions by guardians and overseers, 876.
- Prosecutor, name of, 87.
- Prosecutor, threatening, 927.
- Provisions, sale of unwholesome, 1302.
- Provoking a man to send a challenge, 1102.
- Public bathing, 1187.
- Public buildings, setting fire to, 556.
- Public decency, offences against, 1182.
- Public documents, production of, in evidence, 217 ; how proved, 220.
- Public fishery, obstructing, 1299.
- Public frauds, conspiring to commit, 1047.
- Public health, nuisances to, 1300.
- Public officers, frauds by, 610.
- Public peace, indictable offences against, 1083.
- Public revenues, furnishing false statements as to collection of, 618.
- Public service, larceny or embezzlement by persons employed in, 502.
- Public stores, embezzlement of, 506.
- Public writs and policies, forgeries as to, 709.
- Publication of libels, how, 1140.
- Puis darrein* plea, 133.

Index.

Punishment of abettors, 603.
Punishment of females, in lieu of whipping, 284.
Punishments, power of court to award, 876.
Purchase and sale of offices, 1197.

Q. .

Quaker, cannot be a juryman, 160 ; evidence of, 178.
Qualification of jurors, 159.
Quarantine, 1300.
Quarantine, forging certificates of, 708.
Quashing coroner's inquisition, 891.
Quashing indictments, in what cases, 120.
Queen, assaulting or alarming her, 346.
Queen, discharging or aiming, &c., fire-arms, &c., at the person of, 346.
Queen's counsel, licence to appear on behalf of prisoner, 169.
Queen's evidence, 181, 183.
Queen's printers, printing Acts of parliament purporting to be printed by, or uttering the same, 699.
Questions of law, reservation of, 272.
Quick with child, what is, 758.
Qui tam actions, 147.

R.

Rabbit, unlawfully killing, &c., 413.
Railroads, misconduct on, 1307.
Railway stations, engine-house, warehouse, or other building appertaining to any railway, setting fire to, 556.
Railways, maliciously putting, placing, casting, or throwing upon or across any railway, wood, stone, &c., turning, moving, or diverting any points of machinery, or making, showing, hiding, or removing, any signal or light, with intent to obstruct, or upset, or injure, or destroy, any engine, tender, carriage, or truck, 587 ; with intent to endanger the safety of any person travelling thereon, 587. Throwing, or causing to fall into or upon any engine, carriage, &c., any wood, stone, &c., with intent, &c., 809.
Ram, stealing, 407.
Rape, 830 ; punishment, 830. Procuring the defilement of a woman or girl under twenty-one years of age, 830 ; indictment, 838. Carnally abusing a girl under ten years, 838 ; indictment, 838. Carnally abusing a girl under twelve and above ten years, 841. Abduction of women, 842. Principals and accessories in, 837.
Reading over indictment to prisoner, 124.
Receipts, forging, 670.
Receiver-general of excise, forging handwriting of, 707 ; of customs, 707.
Receiving stolen goods, &c., 537 ; summary conviction, 538 ; who a receiver, 538 ; principals and accessories, 541 ; witness, 545 ; trial, 546 ; verdict, 547.
Receiving goods stolen from the river Thames, 481, 1224, 1225 ; indictment, 481.
Recognizance to appear and give evidence, 22. Estreats, 23 ; discharge of, 24.

Index.

- Recognizance on *certiorari*, 103, 113.
Recognizance for good behaviour, 605.
Recognizances, forging, 694; acknowledgment of false, 933.
Recognizances in felonies and misdemeanor, 255.
Recorder is a justice of the peace, 275; trial of prisoners by, 290.
Recording judgment of death, 282.
Records, forgery of, 691; production of in evidence, 217.
Records, &c., stealing or destroying, 423; indictment, 424.
Records of the Queen's courts, entry of, 151.
Records, stealing, 389.
Re-examination of witnesses, 229, 257.
Refusal of bail, law in such cases, 27.
Regency, treason relating to, 340.
Register of births, marriages, deaths, forging, defacing, &c., 696;
 offences relating to, 1169, 1305.
Register of burials, injuring or destroying, 697.
Register, parish, how proved, and in what cases evidence, 223.
Registers of births, &c., forgery of, and Savings Bank Acts, 712.
Registers of deeds, forgery of, 693.
Registrar of admiralty, forgery as to, 694.
Registrar in lunacy, forging signature or seal of, 699.
Registrar's certificate, marriage by, 853.
Registration of births, &c., false declarations as to, 993.
Regrating, 1206.
Religious belief, want of it in witness, 178.
Remand of prisoner, 24.
Removal of coroner from his office, 880.
Reply, right of counsel for prosecution generally, 168, 170.
Reprieve, 304.
Repugnant, statement in indictment must not be, 84.
Rescue, 955; Millbank Penitentiary, 961; of a traitor, 338.
Rescue for mint offences, 962.
Rescue of prisoners a misdemeanor, 950.
Rescue of smugglers, 1216.
Rescuing murderers going to execution, punishment, 963.
Reserving points for consideration of judges, 271, 272.
Restitution of stolen property, 266, 536.
Restitution of stolen property, to owner prosecuting to conviction, 400.
Return to writ of *habeas corpus*, 36; when amendable, 38.
Returning from transportation, 951; indictment, 953.
Revenue, duty of officers of, as to cutting, &c. counterfeit or light coin
 tendered, 739.
Revenue forgeries, relating to, 703.
Revenue laws, witness in prosecution under, 189.
Reversing judgment, 290; Act of parliament, 292.
Reward, in what cases granted to witnesses, 264.
Reward, taking, under pretence of helping to stolen property, statute,
 405; indictment, 405.
Riot, 1092. Indictment for a riot and assault, 1095; punishment, 283,
 1097. Routs, 1098. Rioters remaining together one hour after
 proclamation, 1098; indictment, 1099. Riotously pulling down or
 destroying any church, chapel, house, stable, coach-house, out-
 house, warehouse, office, shop, mill, malt-house, hop-oast, barn,
 granaries, or manufactory, or machinery, or steam-engines used in
 mines, 570; indictment, 573.
River bank, or wall, breaking or cutting down, whereby lands are over-

Index.

- flowed, &c., 585. Cutting off, drawing up, or removing piles, chalk, &c., fixed for the security of, 585; opening floodgates, &c., 585.
- Robbery, 431; on trial for, jury may convict of assault with intent to rob, 431; indictment for, 435. By a person armed, or by two or more, or accompanied by wounding, 439; indictment, 439; trial, 441; verdict, 441; indictment for stealing from the person, 358; punishment, 358; evidence, 358. Assault with intent to rob, 436; indictment, 438. Demanding property with menaces, or by force, with intent to steal, 442; indictment, 443.
- Roman Catholics, offences by, in the nature of treason, 343.
- Rooting up trees, 427.
- Roots or plants growing in a garden, orchard, nursery ground, hot-house, green-house, or conservatory, or elsewhere, stealing, or destroying, or damaging with intent to steal, 428; second offence, 428. Destroying or damaging, 579.
- Rouge et noir*, 1189.
- Rout, what, 1098.
- Rule as to evidence, 188.
- Russian stocks, 1315.

S.

- Sabbath-breaking, 1176.
- Sacrilege, 451.
- Sailors' pensions, forgeries as to, 712.
- Sale of grain, assaults to prevent, 816.
- Sale of offices, 1197.
- Salaries, forgery as to public, 709.
- Sapling, destroying, &c., 578.
- Savings banks, forgeries as to, 709, 713.
- Schoolhouse, breaking and entering, to commit felony, 470.
- Scrip receipts, forgery of, 708.
- Sea bank or sea wall, breaking or cutting down, whereby lands are overflowed or damaged, 585. Cutting off, drawing up, or removing piles, chalk, &c., fixed for securing, 585.
- Seal of justices to warrant to arrest, 62.
- Seals, forging Her Majesty's, 637.
- Seaman's wages, forgery as to, 714.
- Seamens' savings banks, forgeries as to, 713.
- Searching China passenger ships, 1212.
- Searching for gunpowder, &c., 601, 874.
- Searching for paper, &c., to be used for forged instruments, 646.
- Secretary of state, warrant of, 2; may commit for treason, 25; warrant to bring up convict prisoner as a witness, 183.
- Security, valuable, what, 419.
- Security for money, or payment of money, &c., stealing, 419; indictment, 421; obtaining by false pretences, 516.
- Sedition, 347; seditious libel, 1088; punishment, 1092.
- Seditious meetings, 1085.
- Seduction, what is, 1180.
- Seizure of base coin, 735.
- Seizure of stolen stamps, 704.
- Selling adulterated food, &c., 609.
- Selling false coin, 733.
- Selling goods, &c., stolen from wreck, 480.
- Sentence of death, execution of, 114.

Index.

- Serjeant, misconduct of, 946.
Servants, embezzlement by, 485 ; indictment for, 497. Larceny by, 482.
Servants, or apprentices, not providing with necessary food, clothing, or lodging, 806 ; cruelty to, 1195.
Servants, giving false characters to, 619.
Servants, negligent burning by, 1307.
Setting aside writ of error, 297.
Severance of, verdict in the case of husband and wife, 263.
Several felonies charged in same indictment, 98.
Shed, setting fire to, 556.
Sheep-stealing, 407 ; indictment, 409.
Sheriff, duty of, to execute judgment, 303.
Sheriffs' court, perjury before, 978.
Sheriffs' officers, larceny by, 387.
Sheriffs refusing office, 1310.
Ships, pilots endangering, 1220.
Ships' registry, offences in relation to, 1317.
Ships' registering, forgery as to, 714.
Ships, setting fire to, 593 ; the like with intent to prejudice the owner of the ship or goods, or underwriter, 593. Attempting to set fire to ships, 594. Damaging a ship otherwise than by fire, 594. Attempting to damage ships with gunpowder, 594. Exhibiting false lights or signals to bring a ship into danger, 594. Setting fire to, with intent to commit murder, 788. Destroying any part of a ship in distress or wrecked, 595. Cutting away, &c., buoys, &c., or doing any act with intent to cut away, &c., buoys, &c., for the purpose of navigation, 595 ; stealing from, in port or in a river or canal, 480 ; indictment, 481. Plundering or stealing from a ship in distress, wrecked, stranded, or cast on shore, statute, 480 ; indictment, 481. Impeding a person endeavouring to save his life from a ship in distress, or wrecked, 803 ; indictment, 803.
Ships' stores, receiving from seamen illegally, 481.
Shipwrecked goods, being in possession of, 480.
Shooting, murder by. *See "Murder."* Shooting at a person with intent to murder, 789. Attempting, by drawing a trigger, or in any other manner, to shoot at a person with intent to murder, 789. Shooting at a person with intent to maim, disfigure, disable, to do some grievous bodily harm, or to prevent or resist a lawful apprehension or detainer, 803.
Shop, breaking and entering, and stealing in, 470 ; indictment, 471 ; what is a shop, 472 ; setting fire to, 556 ; riotously demolishing, 570.
Shrub, destroying, &c., 578.
Signal, false, to ships, 594.
Signature of judge, does not require proof of, 215.
Silk goods in any stage of manufacture, stealing, 479 ; indictment, 479 ; punishment, 479.
Silver plate, forging stamps for, 705.
Similiter, 133, 268.
Simple larceny, 361 ; indictment for, 390.
Simple robbery, 431.
Slander, 1088 ; indictment for slanderous words to a magistrate, 930 ; treasonable, 339.
Slander and libel as respects foreign governments, and individuals, 1131.
Slaughtering cattle, &c., in unlicensed place, 1237.
Slave dealing, 1191.

Index.

Slavery, forging receipts as, to abolition of, 712.

Smuggling, 1213. Making signals to smuggling vessels, 1213. Being armed and assembled for the purpose of assisting in running uncustomed goods, &c., 1214. Assisting in running uncustomed goods, 1214. Shooting at a ship belonging to the navy or revenue, 1214. Shooting at officers of the army or navy, &c., or officers of the customs employed for the prevention of smuggling, 1214. Being found in company with more than four others, with goods liable to forfeiture, 1214. Being found armed near a navigable river, 1214. Rescue of smugglers, 1216.

Sodomy, 872; assault with intent to commit, 872.

Soldiers' pensions, forgeries as to, 712.

Soldiers, suppression of riots by, 14.

Solemnization of marriages, 849.

Solicitors not to act unless admitted and enrolled, 942.

Solitary confinement, extent of, 400, 605, 876.

Sorcery, pretending to exercise, 618.

Speaker's warrant, 2.

Special jury, 162; in misdemeanors only, 162; certificate for does not apply in criminal cases, 266.

Special licence, marriage by, 853.

Spring guns, setting, with intent to do grievous bodily harm, 808.

Stables, setting fire to, 556. Riotously demolishing, 570.

Staith, destroying, &c., 570.

Stamp duties, forgeries as to, 703, 708; seizure of, when stolen, 704.

Starving, when murder, or manslaughter, 762.

Statement of accused before magistrates, 199.

Statement of offence in indictment, 86.

Stations, setting fire to, 556.

Stating case, how, 273.

Statute, perjury by, 987.

Stealing dead bodies, 1195.

Stealing from the person, 431, 435; indictment, 436.

Stealing goods in process of manufacture, 479.

Stealing in a dwelling house to the amount of 5*l.*, 474; with menaces and threats, 474, 477.

Stealing from ships, &c., 480.

Stock, forging transfers of, 639.

Stocking frames, receivers of, 1219.

Stolen property, restitution of, 266, 400, 536; receivers of, 537.

Stores: embezzling or stealing the Queen's stores, 506, 1218; ships' stores, &c., 481; setting fire to them, 556.

Stores, public, having in possession, 1219; defacing marks on, 1219.

Strangle, attempting to, 789, 805.

Striking out superfluous counts in indictment, 122.

Subornation of perjury, 965, 971; action for imputing, 972.

Subsequent offence, 282.

Substantive felony, accessories may be indicted for, 9, 821.

Succession to the crown, treason relating to, 340.

Suffocate, attempt to, 789, 805.

Suicide, where two mutually agree to commit, and one only die, the survivor is guilty of murder, 758.

Summons, how usually employed, 1; how served, 1; information need not be on oath, 2; what it should contain, 2; for offence punishable on summary conviction, 603.

Index.

Sunday, exercising trades on, 1176.
Superfluous counts in an indictment, 98, 122.
Sureties in giving bail, 21 ; for keeping the peace, &c., 605, 876.
Surety of the peace, what is, 893 ; in what cases taken, 893 ; for good behaviour, 901.
Surplusage, what may be rejected as, 95, 190.
Swearing, 1178.
Swearing jurymen, form of, 160.

T.

Taking reward for restoring stolen property, 405.
Taking up dead bodies, 1195.
Tales, award of, 145, 158.
Tampering with witnesses, 927.
Telegraph, destroying or injuring, 587 ; attempts, 588.
Telling fortunes, 618.
Tenant, larceny by, 508 ; injuries to buildings by, 574.
Tenements, jury on trial for treason or felony, not to inquire as to, 242.
Testamentary papers, stealing, 422 ; forging, 656.
Thames, receiving stores, &c. of ships on river, 1224.
"The said," use of in indictments, 93.
"Then and there," use of in indictments, 93.
Threatening letter, sending, delivering, or uttering, a letter threatening to burn or destroy houses, &c., 599. Sending a letter threatening to murder, 782 ; indictment, 782 ; containing demands for money, &c., with menaces, 442 ; indictment, 443. Sending a letter threatening to accuse another of a crime, with intent to extort money, &c., 443 ; indictment, 443 ; trial, 449.
Threatening prosecution, 927.
Threshing machine, cutting, breaking, or destroying, or damaging with intent to destroy or render useless, 575 ; indictment, 576.
Time, how stated, 84 ; limitation of, in prosecutions, 147 ; in respect of burglary, 452, 471.
Time of arrest, 5.
Time for moving for new trial, 271 ; of judgment, 287.
Titles, buying or selling doubtful, 925.
Toll bar, destroying, &c., 586.
Tools for coining, making without lawful authority, 734.
Training to arms, when unlawful, 353.
Transfers of stock, forging, 639.
Transportation abolished, 304 ; returning from, 951.
Traverse of an indictment not allowed, 116. Power of courts to order postponement of trial, 116.
Treason, 307 ; statutes, 622 ; punishment, 624. Indictment for compassing the Queen's death, 318 ; evidence, 319. Count for levying war, 318 ; evidence, 323 ; adhering to the Queen's enemies, 315 ; time and place, 319 ; witnesses, 321 ; limitation of time, 323 ; jurisdiction, 323 ; accomplices, 327 ; trial, 328, 329 ; judgment, 336 ; misprision of treason, 341 ; constructive treason, 310, 344.
Treason relating to the succession to the crown and regency, 340.
Treasonable libels and slander, 339.
Treaties, how proved, 220.
Tree, sapling, shrub, or underwood, growing in parks, pleasure grounds, gardens, orchards, or avenues, or grounds adjoining to or belonging

Index.

- to a dwelling house, stealing, &c., or otherwise destroying, &c., with intent to steal, 427; indictment, 429. Stealing or cutting trees after two previous convictions, 429; stealing or cutting, &c., with intent to steal, statute, 427. Setting fire to, 577; cutting, breaking, barking, &c., 578. Destroying wheresoever growing, value 1s., first and second offence, 578.
- Trespassers in search of game, arrest of, 15.
- Trespassers, it is murder to kill, 758; when manslaughter, 762.
- Trial, when, 116, 162; adjournment of, 258.
- Trial for larceny, 306.
- Trial for murder or manslaughter, 778, 782.
- Trial for treason, 328, 339; by peers, 335.
- Trial, proceedings before, 50; postponement of, 50; of challenge of jurors, 157.
- Trial, what it shall be necessary to prove on, 603.
- Truck Act, 1211.
- Trustees defined, 361.
- Trustees, fraudulent appropriation of property, 514.
- Tumultuous petitioning, 352.
- Turnpike gate, wall, chain, rail, post, bar, or other fence belonging to a turnpike gate, or house, building, or weighing engine, throwing down, levelling, or destroying, 586.
- Turnpike road, property belonging to, how described, 92.

U.

- Under sheriff, practising as an attorney, 946.
- Undertakings, forgery of, 670.
- Underwood, destroying, &c., 578.
- Underwriter, forging name, &c. of, 717.
- Undue solemnization of marriage, 1179.
- University buildings, setting fire to, 556; riotously demolishing, 570.
- Unlawful assemblies, 1083.
- Unlawful assembly, 349.
- Unlawful oaths, 347, 933, 1084, 1200, 1205, 1209.
- Unlawful societies, 1209.
- Unlawful training to arms, 353.
- Unnatural crimes, 872.
- Unstamped instruments, when evidence, 220; when not, 220.
- Unwholesome provisions, sale of, 1302.
- Usury, 1313.
- Uttering forged instruments, 679.
- Uttering forged stamps, what is, 705; counterfeit gold or silver coin, 725, 731.

V.

- Valuable security, what, 361, 419; indictment for stealing, 421. Obtaining signature to, by false pretences, 517.
- Variance between the pleading and proof, 237.
- Vegetables in fields, stealing, 428; destroying, &c., 579.
- Venue, 53; boundary, 56; in county of a city or town corporate, 57; how, in the case of a journey, &c., 59; in regard to parishes, 61; India, 63; defective venue, 63; changing, 64; in criminal informations, 148; for forgery, 701; for offences against the stamp duties, 21; for coining, 740; for offences committed out of the

Index.

- realm, 783; for offences within the jurisdiction of the admiralty, 702; for murder or manslaughter, 778, 782; for offences committed during a journey or voyage, 783; attempts to murder, 799.
- Verdict, 259; nature of it, 260; improper or repugnant verdict, 262; special verdict, 259; discharge of jury, where the jurors do not agree, 259.
- Verdict of coroner's jury, 884.
- Vessels of war fitting out for foreign states, 357.
- Vestry books, when evidence, 218.
- Vestry meeting, refusing to call, 1320.
- Vexatious indictments before grand jury, prevention of, 46.
- Viaducts, pulling down or otherwise destroying, 586.
- "*Videlicet*," use of in indictments, 96.
- View by jury, when permitted, 258.
- Voluntary confessions, 193, 200.
- Votes of House of Commons, officers of post office embezzling, &c., 507.
- Voters, identity of at elections, 1318; personation of, 1320.

W.

- Wagers, cheating at, 618.
- Wages, assaults in connection with combination to raise rate of, 817.
- Wales, venue in indictment for offences committed in, 782.
- Want of religious belief in witness, 178.
- Warehouse, breaking and entering, and stealing in, 470; indictment, 471; setting fire to, 556; riotously demolishing, 570.
- Warehoused goods of customs or excise, officers of, embezzling or wasting, 507.
- Warrant for the payment of money, forging and uttering, 670.
- Warrant for the delivery of goods, stealing, 423; forging and uttering, 670.
- Warrant, how in the case of felony, 1; arrest under, 2; blank warrant, 2; of secretary of state, 2; general warrants, 3; what it must contain, 3; how executed, 4, 6; how directed, 4; when to be executed, 5; where, 5; backing warrant, 5.
- Warrant to apprehend, when not necessary, 603.
- Weak intellect, how, when witnesses are of, 178.
- Weighing engine, injuring or destroying, 586.
- West India relief commissioners, forgeries as to, 711.
- Whipping, limitation of sentence of, 605, 876; sentence to specify number of strokes, 605, 876.
- Wife, in what cases excused by the coercion of her husband, 72, 76; cannot be a witness for her husband, 184. In what cases she may be a witness against him, 185, 186. She cannot be guilty of larceny by taking the goods of her husband, 388; cannot enter into recognizance, 255.
- Wilful perjury, 973.
- Will, forging, 656.
- Will, codicil, or other testamentary instrument, stealing, destroying, or concealing, 422; indictment, 423.
- Will, how proved, 218; copy of a probate of a will, when evidence, 218.
- Wills of petty officers and seamen, forgery of, 716.
- Witchcraft, pretending to exercise, 618.
- Withdrawal of plea, 125.

Index.

Witness, attendance of, 254; expenses of, 254; cross-examination of, 224; discrediting, 224; when not compellable to answer, 224; number required, 230; absence of from court, 231.
Witness to character, 229.
Witnesses before grand jury, 44.
Witnesses for defence, answering, 252.
Witnesses, rule as to hostile, 170.
Witnesses present in court, 257.
Witnesses, rewards to, 264.
Witnesses, tampering with, 927.
Witnesses, procuring them to commit perjury, 988.
Witnesses for prisoners, how sworn, and perjury by them, 990.
Woods and forests, certificates as to documents in office of, 622.
Wool, stealing from sheep's back, 390.
Woollen goods in the loom, &c., or other process of manufacture, cutting, breaking, or destroying, or damaging with intent to destroy or render useless, 479; indictment, 479; punishment, 479.
Works of art in museums, &c., destroying or damaging, 589.
Wounding with intent to murder, 789.
Wounding with intent to maim, &c., 803; unlawfully wounding, 804.
Wrappers of playing cards, forging of, 714.
Wreck, stealing from, 480; destroying, 595.
Writ of *certiorari*, 99.
Writ of error, 272, 275, 290.
Written instruments, larceny of, 423.

Y.

Yarn, stealing woollen, linen, hempen, or cotton, in process of manufacture, 479.
Youth of offenders in cases of murder, 760.

THE END.

Woolrych, Humphry Will.

The criminal law, as amended by the statutes of 1861, with pleading,
evidence, forms of indictment, cases, and index

London 1862

Crim. 280 I

urn:nbn:de:bvb:12-bsb10395892-7